



WORKING GROUP ON A COURTS COMMISSION

CONFERENCE ON CASE MANAGEMENT

*Presentations made to the Conference on Case
Management organized by the Working Group on a
Courts Commission*

May, 1997

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The Working Group on a Courts Commission was established by the Minister for Justice, Nora Owen, T.D.

1. *To review, (a) the operation of the Courts system, having regard to the level and quality of service provided to the public, staffing, information technology, etc; (b) the financing of the Courts system, including the current relationship between the Courts, the Department of Justice and the Oireachtas in this regard; (c) any other aspect of the operation of the Courts system which the Group considers appropriate.*
2. *In the light of the foregoing review, to consider the matter of the establishment of a Commission on the Management of the Courts as an independent and permanent body with financial and management autonomy (as envisaged in the December 1994 document entitled "A Government of Renewal").*
3. *To have investigative, advisory and recommendatory functions and to make a report (and any interim reports and recommendations as they see fit) to the Minister for Justice on the foregoing matters.*

The Working Group on a Courts Commission consists of:

Mrs. Justice Susan Denham, Judge of the Supreme Court.
Mr. Justice Robert Barr, Judge of the High Court.
Mrs. Justice Catherine McGuinness, Judge of the High Court.
Judge Kevin O'Higgins, Judge of the Circuit Court.
Judge Peter Smithwick, President of the District Court.
Mr. Justice Anthony J. Hederman, President of The Law Reform Commission.
Mr. Ken Murphy, Director General of The Law Society.
Mr. James Nugent, Senior Counsel, Chairman of The Bar Council.
Mr. Ken Wright, Management Consultant.
Mr. John Rogers, Senior Counsel.
Ms. Roisin McDermott, Chairwoman of Women's Aid.
Mr. Kevin Duffy, Assistant General Secretary, Irish Congress of Trade Unions.

Departmental Representatives

Mr. Caoimhin O hUiginn, Department of Justice.
Mr. Colm Breslin, Department of Finance.
Mr. Richard Barrett, Attorney General's Office.

Secretariat

Mr. Noel Synnott, Department of Justice.
Ms. Niamh O'Donnell, Department of Justice.

Working Group on a Courts Commission
Four Courts,
Dublin 7.

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CHAPTER 1

Introduction

The Working Group on a Courts Commission expresses its gratitude to those who made contributions to the Conference on Case Management held in Dublin on 16th November, 1996. We thank The Right Honourable The Lord Woolf, Master of the Rolls, England and Wales; Professor Michael Zander, The London School of Economics; The Honourable Mr. Nial Fennelly, Advocate General of the Court of Justice of the European Communities; The Honourable Mr. Justice Brian Kerr, The High Court, Northern Ireland; Mr. David C. Steelman, Senior Staff Attorney, National Center for State Courts, United States of America; The Honorable Aaron Ment, Chief Court Administrator, Connecticut Superior Court, United States of America; The Honorable James D. Garbolino, Placer County Superior Court, California, United States of America; The Honourable Mr. Justice Ronald Sackville, Federal Court of Australia; The Honourable Sir Anthony Mason, AC KBE, Chief Justice of Australia 1987-94, currently the Arthur Goodhart Visiting Professor in Legal Science, Faculty of Law, University of Cambridge, England; The Honourable Mr. Justice Liam Hamilton, Chief Justice of Ireland; The Honourable Mr. Justice Declan Costello, President of the High Court of Ireland.

We express our appreciation to the speakers for their presentations to the Conference and for their agreement to have their work published in this publication.

The Conference is part of a wide-ranging study by the Working Group on court systems. While this Conference related to case management, other matters have been the subject of analysis by the Working Group and are reported upon in Four Reports.¹

¹ First Report: Management and Financing of the Courts, April, 1996.
Second Report: Case Management and Court Management, July, 1996.
Third Report: Toward the Courts Service, November, 1996.
Fourth Report: The Chief Executive of the Courts Service, March, 1997.

SECOND REPORT

In the Second Report of the Working Group² the issue of judicial case management was raised. The Group, in continuing the process and facilitating debate on this issue, planned four steps.

- Step One Highlighting the issues
 Facilitating a debate
 Consulting the relevant parties
 Organising a conference on "Court and Case Management"
- Step Two International experts on the topic from other jurisdictions debate the issues at a central conference
 Seminars on related topics
- Step Three Consultation with key groups following the conference
- Step Four Final Report on Court and Case Management.

CONFERENCE

The Conference, the papers of which are published herein, was part of the implementation of Step Two of the plan. Since November, 1996 the Working Group has received further submissions on judicial case management and is continuing to consult with key groups.

SUBMISSIONS

The Working Group invites written submissions on the subject of judicial case management from those who have not done so already. Submissions should be sent to the Working Group³ on or before 30th September, 1997.

REPORT

The Working Group plans to continue receiving and considering submissions and consulting on this subject until the autumn. It is proposed to report, at the end of 1997, on the position of case management in Ireland.

² Case Management and Court Management, July, 1996. See Chapter 3.

³ The Address to which submissions should be sent is:
The Working Group on a Courts Commission,
The Four Courts,
Dublin 7,
Ireland.

QUIET REVOLUTION

The Working Group has found that there is immense interest both in the concept of case management and in the consideration of its place in our courts system. A quiet revolution appears to be taking place. We look forward to reporting on the situation twelve months after the Conference.

CHAPTER 2

Agenda

CONFERENCE ON CASE MANAGEMENT ORGANISED BY THE WORKING GROUP ON A COURTS COMMISSION

*Chairman: The Honourable Mr. Justice Declan Costello,
President of the High Court of Ireland*

9.00 a.m. Registration.

9.30 a.m. Opening of the Conference by The Honourable Mr. Justice Liam Hamilton, Chief Justice of Ireland.

9.40 a.m. "Judicial Case Management: Crucial to the changes necessary in the Civil Justice system in England and Wales."

Presentation by The Right Honourable The Lord Woolf, Master of the Rolls.

The Right Honourable The Lord Woolf was called to the Bar, Inner Temple, 1954; Judge, High Court Queen's Bench Division 1979-86; Presiding Judge, S.E. Circuit 1981-84; Lord Justice of Appeal 1986-92; Lord of Appeal 1992-96; Master of the Rolls 1996; In July 1996 The Lord Woolf presented to the Lord Chancellor "Access to Justice" the final report on the Civil Justice system in England and Wales.

10.10 a.m. Judicial Case Management: Some Questions and Concerns.

Presentation by Professor Michael Zander, Professor of Law at the London School of Economics.

Professor Zander is Professor of Law at the London School of Economics where he has taught for over 30 years. Legal Correspondent of The Guardian for 25 years from 1963 to 1988. Member of the Royal Commission on Criminal Justice 1991-93. Author of

Agenda

many books — including Cases and Materials on the English Legal System; The Law-Making Process; The Police and Criminal Evidence Act 1984; A Bill of Rights? Frequent broadcaster on radio and TV.

- 10.40 a.m. Questions and discussion on the presentations.
- 11.00 a.m. Coffee.
- 11.30 a.m. “Case Management in the European Court of Justice.”
Presentation by The Honourable Mr. Nial Fennelly.
The Honourable Mr. Nial Fennelly is an Advocate General of the Court of Justice of the European Communities. He was called to the Irish Bar in 1966, took Silk in 1978, was Chairman of the General Council of the Bar of Ireland 1990-91 and became the first Irish Advocate General at the Court of Justice of the European Communities in 1995.
- 11.50 a.m. An example of Case Management in Northern Ireland.
Presentation by The Honourable Mr. Justice Brian Kerr.
The Honourable Mr. Justice Kerr was called to the Bar of Northern Ireland in 1970, to the Bar of England and Wales (Gray’s Inns) in 1975, to the Inner Bar 1983, and appointed to the High Court of Northern Ireland in 1993.
- 12.10 p.m. An historical perspective on Case Management in the United States of America.
Presentation by Mr. David C. Steelman, Senior Staff Attorney, National Center for State Courts, United States of America.
Mr. Steelman is Senior Staff Attorney with the National Center for State Courts. In over 22 years with the National Center for State Courts Mr. Steelman has directed over 100 studies for state and local courts in such areas as trial-court delay reduction and caseflow management, court reorganisation, appellate court management and provision of defense services for indigent criminal defendants. He was a contributory author to the book by Barry Mahoney and others,

entitled, *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts* (1988); with James P. Economos he co-authored the American Bar Association book entitled, *Traffic Court Procedure and Administration* (2nd edition, 1983); he supervised data collection in two jurisdictions for the groundbreaking report by Thomas Church and others on delay reduction in American courts entitled, *Justice Delayed: The Pace of Litigation in Urban Trial Courts*.

12.40 p.m. Lunch.

2.00 p.m. Case Management in the Civil Courts in Connecticut, United States of America.

Presentation by Judge Aaron Ment, Chief Court Administrator, Connecticut Superior Court, United States of America.

Judge Aaron Ment became a judge of the Court of Common Pleas in 1976 and joined the Superior Court two years later. During his judicial career he served as Chief Administrative Judge of the criminal division of the Superior Court and as Deputy Chief Court Administrator. Upon his appointment as Chief Court Administrator in 1984 he became responsible for the daily administrative operations of the Connecticut judicial system, a branch of state government which today employs approximately 2,500 people and has an annual operating budget of approximately \$195 million.

Under Judge Ment's direction many innovative programs have been implemented in the Judicial Branch including the first joint state and federal alternative dispute resolution program, an early screening program for criminal cases, regional trial dockets, the one day/one trial jury system, an expanded pre-bench orientation program, a wellness program for judges, a centralised infractions bureau and a statewide alternative incarceration program. Additionally, under his leadership, the Judicial Branch received substantial federal funding for new criminal justice programs.

2.30 p.m. Case Management in the Family Courts of California.

Presentation by Judge James D. Garbolino.

Judge Garbolino has been a Superior Court Judge of Placer County, California, since 1984. He has lectured and spoken extensively on matters relating to family law. At the Center for Judicial Education and Research he was a member of the faculty in 1992 and 1993 and a team leader in 1994, 1995 and 1996 on "Family Law — Continuing Judicial Studies Program". His publications include "California Family Law Bench Manual", Author — Exhibitor, California Family Law Reports; "The Cause of Action for Return under the Hague Convention When a Child is Abducted to the United States; A View from the Bench", North American Symposium on International Child Abduction, U.S. State Department, 1993; "Is the System Broken?", Duryee, Mary T., and Garbolino J., "Family Law News" vol. 19, No. 1. He is Co-Chair of the California Judicial Council, Family and Juvenile Law Advisory Committee.

3.00 p.m. Questions and discussion.

3.15 p.m. Tea and coffee.

3.45 p.m. Case Management: A Consideration of the Australian Experience.

Presentation by The Honourable Mr. Justice Ronald Sackville.

The Honourable Mr. Justice Sackville was appointed a Judge of the Federal Court of Australia in 1994. His career has encompassed Barrister at the New South Wales Bar (1985-1994); Queen's Counsel 1992; Professor (1972-1981) and Dean (1979-1981) of the Faculty of Law, University of New South Wales; Chairman, South Australian Royal Commission into the Non-Medical Use of Drugs; Chairman, New South Wales Law Reform Commission (1981-1984); Chairman, Victorian Accident Compensation Commission (1985-1989); Chairman, Commonwealth Access to Justice Advisory Committee (1994).

4.15 p.m. "Case Management, the Judiciary and change".

Presentation by The Honourable Sir Anthony Mason AC KBE.

Sir Anthony Mason was admitted to the Bar, New South Wales, Australia, in 1951, Queen's Counsel in 1964; Judge, Court of Appeal of the Supreme Court New South Wales 1969-72; Justice of the High Court 1972-87; Chief Justice 1987-94; Currently the Arthur Goodhart Visiting Professor in Legal Science, Faculty of Law, University of Cambridge, England.

CHAPTER 3

Opening Address by The Honourable Mr. Justice Liam Hamilton, Chief Justice of Ireland

Dear guests, colleagues, members of both branches of the legal profession, members of the court staff and others who are here today for this most interesting conference. It is my pleasure to welcome you this morning and, in particular, to welcome our distinguished guests and to thank Mrs. Justice Denham and her Working Group for assembling such an outstanding gathering.

As you no doubt are aware, this Conference has been organised by the Working Group on a Courts Commission established in October, 1995 by the Minister for Justice to carry out a wide-ranging review of the court system as it operates in Ireland at present. The particular topic with which we are concerned today is that of case management, specifically the role which judges should or should not play in this most vital administrative task. This is a subject which has excited a broad spectrum of opinion and we anticipate some lively presentations on the matter from our distinguished guest speakers in the course of the day. We shall also obtain first-hand knowledge of ideas in case management adopted in other jurisdictions and we are given a unique opportunity to learn the lessons of success and failure which others have had in this area.

The problems which we in Ireland face at this time are considerable: delay, inefficiencies, and the increasing burden placed on inadequate support systems must be addressed with all due speed. The ageing machinery of the law in this State cannot be left to atrophy. Welcome as the recent appointments of new judges have been, they cannot be more than a small part of the solution. What is really needed is the vision and courage to undertake a root-and-branch analysis of the courts in Ireland and to consider the problems in a planned fashion including a complete reappraisal of our administrative approach, should that be required. To date the Working Group has exhibited precisely this openness and vision and its members now come, via this Conference, to ask that we do likewise.

What is specifically good about this Conference is that it is not just an isolated event; rather, it is built into the consultative process which has been a feature of the Working Group's modus operandi. In its Second Report, the Working Group recognised the fundamental change in the spirit or philosophy underlying civil litigation which would be caused by the introduction of judicial case management. Accordingly, they proposed a four step process beginning with the general debate on the issues, progressing through further analysis, seminars and group discussions. All this is to lead towards the eventual production of a final report and the making of recommendations to the Minister. This Conference is part of the second step. With this in mind, although the day is primarily concerned with input from our learned visitors, there have been set aside two periods for general discussion. In addition, we would urge you to take advantage of such moments of informal discussion that arise. It is rare that representatives of every aspect of our legal machinery in Ireland are present together in one room. We should seize the opportunity.

We should be grateful to the manner in which our Working Group has facilitated us. With her usual efficiency, Mrs. Justice Denham has assembled a very distinguished panel of speakers to address you this morning. I would like, personally, on behalf of all of you to thank them for coming and giving of their time to us. While I don't say I'm going to welcome them in the order in which they will be making their presentations, it is purely fortuitous that the first two I want to welcome are the Master of the Rolls, The Right Honourable The Lord Woolf and Professor Michael Zander. Our good friend, Nial Fennelly, Advocate General, Court of Justice of the European Communities will also be addressing us on case management in the European Court. We have The Honourable Mr. Justice Brian Kerr of the Royal Courts of Justice in Northern Ireland. Also we have Mr. David Steelman, Senior Staff Attorney from the National Center for State Courts in the USA, Judge Aaron Ment, Chief Court Administrator in Connecticut, Judge James D. Garbolino, Placer County Superior Court, Auburn, California, and our two friends from Australia, Mr. Justice Ronald Sackville, Federal Court of Australia and the Honourable Sir Anthony Mason. They are all extremely welcome, and we thank them with a keen sense of anticipation and interest in what they are going to say. I cannot emphasise enough how grateful we are to them for coming to Ireland and giving us the benefit of their experience. Also, we would like to thank The Honourable Mr. Justice Declan Costello, President of the High Court for agreeing to chair this meeting. It is with great pleasure

The Honourable Mr. Justice Liam Hamilton

that I hand the proceedings over to him and, like the rest of you, prepare to sit back, listen and learn. Thank you very much indeed.

I should really do what I am supposed to do, and formally declare the meeting open.

CHAPTER 4

Judicial Case Management: Crucial to the Changes Necessary in the Civil Justice System in England and Wales

Presentation by *The Right Honourable, The Lord Woolf, Master of the Rolls, England and Wales*

Thank you, Chief Justice, and President, for the very warm welcome given to all your guests.⁴ I was extremely impressed when I heard how many people were going to come on a Saturday morning to talk about case management. I gather that part of the skill of the management team of this Conference was to choose a Saturday when the rival attractions were not great and I also understand that this is the venue of the Dublin Horse Show. Perhaps some people did not realise what they were in for!

I have 303 Recommendations in my Report⁵ to talk about in 30 minutes, which I work out at point one of a minute each. Forgive me if I don't go into detail, but try and give you an overview of what I was trying to do in my Report, which is a similar exercise to that which your Commission has embarked upon in this jurisdiction.

What has been, it seems to me, appreciated all over the common law world is that the way we are doing the exercise of solving civil disputes is not satisfactory. It is not satisfactory, most importantly, from the point of view of the public and it is not satisfactory from the point of view of the Court's system. To a great degree, all those systems are moving towards the idea that there is to be found in case management perhaps the only viable solution. I had a visit from the Deputy President of the Japanese Supreme Court just two days ago and in Japan exactly the same thing is happening, and there are also problems on the Continent, about which they are conscious. The problems are not always the same. I travel very extensively in connection with my work and I was very conscious in the United States of America that their early efforts of case

⁴ Lord Woolf delivered his presentation in extempore form.

⁵ Access to Justice, Final Report by the Right Honourable, the Lord Woolf, Master of the Rolls, July 1996. Final Report to the Lord Chancellor on the Civil Justice system in England and Wales.

management were largely inspired because the demands of the criminal justice system were draining the civil justice system of resources and so, in certain parts of the States (you must never ever generalise about anything in the United States!) the pressures of the criminal courts were driving civil cases out of the system. I need to say that because on the whole, in the jurisdiction from which I come, although delay is a huge problem which has to be tackled, it is largely not a problem which is created because the system cannot cater with the case load that it is receiving. It is because of the way the cases have been handled that they tend to take much longer than they should. It is because lawyers were left to their own devices that this has been happening.

Lawyers were not bringing cases forward with the rapidity they should. When I started out on my exercise, which took two years, I thought I should at the outset decide what I was seeking to achieve and then tailor my recommendations to achieve those objectives. So, I will begin by telling you what my objectives were.

OBJECTIVES

First of all, I thought it was vitally important to reduce the expense of civil litigation. It was out of all proportion. Then I wanted to deal with delays. I wanted to make the system more equal. By more equal I mean achieving a situation in which it is not possible for a party to use greater resources to deprive the party who has less resources of the opportunity of obtaining justice. This is a real problem in our system because the rules could be used in a way which was quite contrary to what I felt should be the position. They could use the rules to drive away those who are less powerful.

It seems to me that anyone who is going to get involved in the litigation process wants to know three things. What would be the result if they were to become involved in litigation? How long would it take? How much would it cost?

So far as the features of our legal system make it impossible for the lawyers to say with confidence what will be the result of embarking on litigation, this is partly due to the fact that we have, unlike the States a cost-shifting rule and the costs for which you are at risk are not only your own costs, which you might be able to control to a very limited degree, but also the costs of the other side over which you can exercise no control. There is also the retrospective system of taxation but this provides little protection or certainty.

I want also to try to use the resources which the Court has in a more effective way than they are used at present. We have a very substantial budget which is devoted to discharging justice, but it is my belief that it is not producing the results it should. The recent Rules which I had the responsibility for drafting, which are to apply to the whole system, not only should be clear and intelligible, but should make it absolutely apparent from the outset what the new system will be seeking to do. One of my new Rules says that cases should be resolved justly, that is rather trite. It goes on to say what is meant by dealing with the cases justly. Each of the matters I referred to is a part of this, including the idea of equality. I do not think most civil systems have paid enough attention to those features.

Secondly, besides the Rules set out, it seemed to me vital we attack the cultural problems, which I believe are largely responsible for the woes in our system. We have become too adversarial. It is too often a battle to the death. I had a meeting with the Judges who do building disputes and the clear message was that such was the effect of the costs Rule that for whoever loses the case the consequence could be that the Company would have to go into liquidation. The effect of our cost shifting rule was to make the loss unsustainable. That being so, it seemed to me what we had to do was to get rid of this excessively adversarial culture. It also appeared to me that if you were going to tackle that, the courts could not start to take responsibility once the proceedings had begun. You had to take responsibility for what happened before proceedings began. I suspect this is a novel approach.

It is perhaps an arrogant approach because Courts hitherto have said that it is enough to have responsibility for what happens once a case starts, without taking responsibility for what happens before. However, I felt that with cooperation we could do something about what happened beforehand. We have got to get parties and their advisors to think of litigation as the last resort, not the first resort. We could initiate a really sensible adversarial system under the umbrella of my inquiry.

We set up a working group which had three components. There would be people on what is called the Plaintiff's side, people on the Defendant's side, regular users of the system and representatives of the Courts. The task we gave them was to find ways of dealing with this pre-litigation stage in a much more sensible and open manner than had hitherto happened. Above all, to get them to produce a protocol of best behaviour before and after the commencement of proceedings. The idea was that these protocols should be published and they should set out how to deal sensibly with particular areas of litigation. Once the

protocols were published, these protocols would be taken into account by the Courts in making orders for costs.

MEDICAL NEGLIGENCE

One area to which we have given particular focus is the area of medical negligence. We sat those involved in the Health Services and the Royal Colleges down with those who were regularly appearing on behalf of claimants. We gave them the job of working out how claims should be handled if rational people were involved. As it happened, at the same time there was an investigation of the internal complaints system proceeding in the Health Service. It is a difficult task. What we have got clear agreement on, which is a big step forward, is what should be disclosed without the need for litigation on both sides. We have also worked out a timetable. As a result of the progress already made trials are taking place in Birmingham County Court which is dealing with the smaller claims. They are testing what I would describe as a sort of modified fast-track. This is revolutionary so far as medical negligence is concerned. It is of critical importance when I tell you that 95% of the cases of medical negligence are actually ones where the claimant has legal aid. People who are injured as a result of medical mishap are not only those who are receiving legal aid. The reason the others are not bringing claims is that it is not open to them to do so. We instituted a cost regime, which both sides may feel comfortable with, and we will know more about it as the Birmingham experiment goes on. That is the first target: to encourage people to try out sensible ways of behaving.

PLAINTIFF'S OFFERS

Another recommendation in my report, which is novel for our jurisdiction, but here other jurisdictions are ahead of us, was to introduce Plaintiffs' offers to settle and to enable them to be issued, indeed encourage them to be issued, before the start of proceedings. Their great virtue is that, if you have an exchange of information in accordance with the protocol and you can get them to make an offer and if the offer proves to be one that should have been accepted, then, if somebody does not reasonably accept the offer, they should compensate the person who has to go through the process of having to become involved in litigation.

SANCTIONS AND CARROTS

So, on a sliding scale, my draft new Rules provide for very heavy sanctions or very significant carrots to encourage the acceptance of

reasonable offers. Included among the sanctions are rates of interest above the normal rate of interest, up to 35%. Top interest rates are normally 10% thus to have to pay 35% is a very real encouragement. Interest is on a sliding scale. You get the top rate on the first £10,000 and it goes down. I believe this will be very influential in changing the culture, for two reasons. If a claimant gets an offer and it is not accepted, they will get the benefit. If the claimant in a case shows that he was not in a position to make an offer because the Defendants had not cooperated in disclosure, as they should have done to enable the claimant to assess whether it was reasonable to bring the proceedings, then the position would be that the high rates of interest would be back-dated to the date when the claimant first could have made an offer, assuming the defendant had complied with the relevant protocol of the particular area of litigation.

These are changes for which I indicate the Court must take responsibility for policing. The Court will have much more influence on the question of costs than it had in the past. The approach that invariably 'costs follow the event' will no longer be appropriate.

MULTI-TRACK APPROACH

There is a selection of tracks. There is the small claims' jurisdiction which has gone to £3,000 and is working very well. Here you have the most informal type of procedure. You then have the fast-track which is meant for cases up to £10,000. That is a radical departure in current practice and controversial. For this track in order to achieve the certainty which I think is of importance, there is a tight description of what the parties on both sides are required to do and (what is more important) fixed timetables with which the parties would be required to comply, unless there are exceptional circumstances. There is a fixed cost. The idea is that the client will know before he embarks on these types of proceedings his possible liability for costs. Litigants will know it will take nine months and their lawyers will know exactly what is expected of them, and both sides will be governed by the same rules. All cases will not have to proceed in the fast-track even though the amount in issue is small. If there are issues which are complex, there are escape routes from the fast-track to cope with those sort of cases. However in general in the fast-track there will be no hands-on management.

We have a system of justice where the proportion of judges to the population is small and so it is absolutely essential to use the judges for management of cases at any level where they can have the maximum

input. I regard the management of cases by judges as being a demanding and time consuming process which can only be used where it is likely to yield real dividends. That is a quick look at the fast-track.

The remaining track, is what I call the 'multi-track'. The multi-track offers a huge variety of alternatives and if appropriate it will be a track where the hands-on-management takes place. It will be within the multi-track that we have Judicial Review cases, which usually require no management. A very simple procedure can be used and the great thing is to get the cases on. There are, on the other hand, going to be cases which are very complicated. The experience of our Commercial Court which has developed a case management system is that having a Judge allocated really early on can have a significant effect on cutting down the issues. He or she is able to suggest that alternative methods of dispute resolutions should be adopted and he or she, especially if it is a procedural judge, can become involved in the question of mediation and discussing settlement with the parties. Here the development will be based on what is happening already as a matter of common sense.

In our jurisdiction we are just recovering from the impact of the Lloyd's litigation. I do not think the system would have coped with the Lloyd's litigation if there had not been positive management by the Court.

Perhaps where my proposals go further than anything that has happened elsewhere is that they anticipate that the parties will be required to disclose budgets of the costs required at different stages for taking the case forward. It will be for the procedural judge to exercise discipline over those budgets so that both sides will have budgets to which they are working and the judge, if he has the budget before him, will be able to say "Look, the amount of money in dispute in this case is X and you are both proposing to spend Y, what about it?". At the management conference I have indicated, unless there are exceptional circumstances, the client who will be present is to be told of the relative expenses. One of the features of which I am very conscious in our system is that the ability of the client to exercise any control is extremely limited. I think that it is time that that changed and that the clients know what is being done on their behalf. We have agreed requests for adjournments at the last moment in the past. In the future such applications should only be granted if the clients are present or at least are aware of what is proposed on their behalf.

EQUALITY

I have made one exception to my proposal of proportionality and that is because some issues may be very important for multinationals. For example, where a licence is in issue there can be vast sums at stake for the corporation but for the little man on the other side it may be just his own modest claim. You have the difficulty in that situation, how do you achieve equality? The multinational may be allowed its expensive form of litigation as long as it pays the difference between the cost of the little man's way of conducting the case and the multinational way of conducting the case. This will enable the little man to take on the big man. It is also very important that the costs' orders are made which are payable forthwith throughout the proceedings.

I do recognise that certain of these proposals are obviously areas for debate. I am conscious I am going to be followed by Professor Michael Zander (who has described himself as a Cassandra as to my proposals, he is also an old friend). I hope he will not regard it as being excessively adversarial on my part if, as I have not the right to reply, I indulge in a little bit in retaliation before ending. I ask you to consider whether Professor Zander has any alternative to offer to the proposals I am making, which will really redress the very difficult situation we are in. The second question I would ask you to have in mind, if he says, as he has in the past, that what we should be doing, is carrying out more research and letting the academics get to work on the whole system and analyse it before deciding on reforms, how long would that process take? Would the results of the research take us very much further?

CHAPTER 5

Judicial Case Management: Some Questions and Concerns

Presentation by *Professor Michael Zander, Professor of Law, The London School of Economics*

It is a great pleasure and privilege to participate in this Conference.⁶ It is a great gathering of expertise in Ireland. I am conscious of my standing here as something of a Cassandra.

The first thing about Professor Woolf's report is that it is bound in a form that disintegrates on first reading. I do not know if there is any significance in that, but it is undoubtedly a fact that this report cannot survive the one reading. More seriously, it is a grand package of reform which has been embraced, endorsed, enthusiastically recommended, not only by politicians, not only by fellow judges, although I think not all, most judges, but much more surprisingly by the legal profession. The media love it. The media think this is the answer to all our problems.

Both branches of the legal profession have endorsed the Woolf Committee ideas. I understand in Ireland that is not necessarily the case. There is a very small number of people who are saying, "Hold on a minute, we are not quite sure". The people who say that are mainly academics. It is not because they are calling for more research, although they are calling for more research. That is not the reason why they are saying, "Hold on a minute". Needless to say, nobody is paying any attention to the academics! Lord Woolf's proposals, I think, are going to be implemented. Or they would be implemented if Lord Mackay's government survived. Most people know that the prospects of that are not good. Therefore, we are probably talking about a Labour Government. But let us assume for the sake of argument that Lord Woolf's proposals are to be implemented. We need to have them tested — though unfortunately, probably no one will do research to find out what happens when they are tested. The way things are done in

⁶ Professor Zander delivered his remarks in extempore form. Anyone interested in a fuller, and properly footnoted statement of his views should refer to "Why Lord Woolf's Proposed Reforms of Civil Litigation Should be Rejected" in *Reform of Civil Procedure*, ed. Zuckerman and Cranston, Clarendon, 1995, pp. 79-95.

England is that we have a grand idea, we move to act on that idea and then X years later we look around and say, "Oh, that did not work, now what?" I feel that is what we are doomed to experience with the Woolf proposals, which are very bold, imaginative and a manifestation of a phenomenon in many common law countries and even beyond the common law systems. This is an idea whose moment has come. Case management actually came a while ago and was accepted in the United States and it is also part of the Australian system but, so far, the fruits have been disappointing. There is little solid evidence from the United States that case management has had very remarkable results. In the jurisdictions where it has been put to the test, not much has yet emerged or has been produced as positive concrete evidence.

I am aware there are papers prepared for this conference, which I have not yet seen, and it may be that in the last few months some result has emerged. I looked at the research in the United States last year and I could not find anything. I think that is understandable. What we are talking about here is a systemic condition which cannot be made to go away. One cannot imagine a situation where people go around saying, "It is an amazing thing, there isn't much delay and costs are just about right." There is not going to be any such day ever anywhere.

SMALL CLAIMS

The small claims jurisdiction in England has recently gone from £1,000 to £3,000. Some say that is an excellent reform. The small claims is designed for the ordinary citizen but is not much used by the ordinary citizen. It is actually used mostly by companies and other businesses. The party who wins in ordinary litigation gets his costs paid by the loser but this rule does not apply in small claims cases. The effect of the increase in jurisdiction is to penalise ordinary citizens. Either they have a lawyer and have to pay for his services out of the proceeds of the litigation or they do not in which case winning the case may become much more difficult. Is this beneficial? I believe it is not.

FAST-TRACK

On the fast-track cases will be rushed through the system so the trial has to take place within nine months. From that point of view, one may have gained something, but there are also costs. What one may lose is the sense of satisfaction of the litigants. Even the winner may be dissatisfied. Certainly the lawyer is likely to be dissatisfied if he feels the

job has not been done properly, not being able to spend the money which in his view needs to be spent in order to secure a just result. One may therefore have lost more than one gains. The case costs less but will the litigant know the difference? What he knows is that he has had to pay for the fast-track, £2,500 basic minimum plus various permitted add ons such as disbursements, but £2,500 may still be more than a citizen can afford to pay. Whether it is £2,500 or £3,500 may not make that much difference from that point of view. But significant damage, in terms of who comes to court and who does not, and what they feel about the whole process could be adversely affected.

COST

In spite of this world-wide concern there is something wrong in regard to cost and delay. Nobody knows, actually knows, what is wrong. There is no relevant proper research. What we know is that the cost of moderate size litigation seems to be out of proportion to the amount in dispute. Where a claim involves a sum say up to £15,000 the total cost seems to be very high. If it is £5,000 to £10,000, the cost of even one side in High Court litigation is often going to be more than the amount in dispute. That seems wrong. But is it if the winner's costs are borne by the loser? The winner at least is unlikely to think so.

DELAY

Similarly, in regard to delays, we have very poor statistics about the extent of delay and nothing to show the reason for the delays. Lord Woolf said the reason for delay is because lawyers are not doing what they should be doing. How does he know that? There is no solid research that examines the process of litigation and what was reasonable and what was unreasonable in the particular case.

We do not actually know anything at all about *excessive* delays or *excessive* costs, unless one takes the crude concept "It is too much because it costs a certain proportion of the amount in dispute". I say that is not good enough. From the litigant's point of view it does not tell one the answer. If the litigant is told the cost of the case is £10,000, when the claim was £5,000, is not that terrible? But the litigant says it was paid by the other side. If you are talking about the costs of litigation, it is very important to ask what does the litigant think. Does he think it unreasonable that a claim costs £12,000, when the claim is £10,000?

FRONT-LOADING OF COSTS

But Lord Woolf's plans will in some ways increase rather than decrease costs — through a huge increase in front-loading of costs. An enormous amount of work will now have to be done which previously would not have to be done in the pre-trial process. In most cases that will be money thrown away because the case will settle.

WITNESSES' STATEMENTS

We saw this in regard to the new rules requiring pre-trial exchange of witnesses' statements, thought to be a grand new gesture in the direction of "Cards on the Table". Both sides should know in advance what the witnesses on each side are going to say. On the face of it, it is a good reform. Unfortunately, it has had a seriously adverse effect on the cost of litigation. The preparation of these pre-trial witnesses' statements has turned into a major industry. Lord Woolf says that it should not be and proposes to get around it by enabling the witnesses at trial to make amendments or to add something to his witness statement so that he is not as locked into his pre-trial statement and there would therefore be less need to spend time and money on drafting these statements. But with respect, that does not meet the point. The industry preparing witnesses' statements will continue. It is a small example of how procedural reform can go wrong. It has side-effects, often unintended, which turned out to be worse than the disease.

REFORM

Unfortunately we do not know what we are talking about when we say there is a huge problem out there. Moreover there are going to be problems whatever we do. The problems of costs and delay are not going to vanish. The judges for instance are going to be called on to do something with which they are totally unfamiliar. They are totally unequipped for it and they will have little skill and appetite for case management. Training will improve matters, but not much. Most judges were previously barristers and I would be surprised if many of them will want to be or will be particularly good at case managing. That is one problem. Another is whether the resources will be supplied by Government. The Lord Chancellor says that all the resources necessary will be found, but I am bound to say that I am sceptical. Whatever the result of an election, Lord Mackay will not be Lord Chancellor for much longer. Even if his successor says the same, it does not mean that will

happen. When it comes to the point, the Lord Chief Justice may say that in order to implement the reforms, he will need very many judges, say 50 more judges. You are not going to get judges in such numbers. There are going to be huge extra costs for the system. Some is required for information technology, which is very costly. The resources question is not trivial. If the resources are not put there, the system will not work.

Another big issue is who pays ultimately? Should it be the user or the taxpayer? The Lord Chancellor says the costs should fall on the user. This idea that they should pay all the costs seems as unacceptable as to propose that the cost of the police or the fire service should be paid by those who use the service.

JUSTICE

But the fundamental question is, “Will Lord Woolf’s reform package ultimately bring more justice?”. I am worried that it will not. It will not if litigants and their advisers feel that litigation has been taken from them and is being handled instead by judges. Obviously a judge ultimately has to decide the case. But I would question very seriously the proposition that the judge necessarily knows enough about the litigation to be in a better position to assess what is necessary in the pre-trial stages than the parties and their advisors.

Lord Woolf says that the lawyers are at fault in dragging cases out. In the majority of cases I do not think that lawyers drag their feet unreasonably. Of course it happens but that is not *the* reason for delay in litigation. The reason is a combination of many factors of which probably no one type of factor predominates. Everybody, I think, does their job more or less according to their lights. Of course, there are some bad cases where there needs to be a sanction and penalties. But I doubt very much whether the litigant will say, in regard to the proposed brave new world, “We can trust the judge to push the lawyers, to chivvy the lawyers”. The judge will always know less about the case than the lawyers and the parties and will not necessarily be in a position to make the correct decision.

I like Lord Woolf’s claimant’s offer concept, so that if the claimant does not accept a reasonable offer, costs will be affected. What I do not like so much is the judge being put in charge of the pre-trial process. One reason is that research both in England and the United States shows that pre-trial process by judges results in the exact opposite of what is intended, namely, longer rather than shorter cases. The Runciman Royal Commission looked at long fraud cases — one cannot

have a more complicated type of case. The result of the research was impressionistic but it was conducted by a real expert. He said he could not find anyone who was prepared to say that the pre-trial process reduced delay. If anything, to the contrary, the pre-trial process allowed huge additional steps. The Maxwell case had three and a half months preparatory hearing. By all accounts, Lord Justice Philips conducted that case extremely well but a preparatory hearing of such length does not sound right. The reason is that when one has lawyers getting together in the presence of a judge, issues emerge. It is like taking a case from the High Court to the Court of Appeal or the House of Lords. At every stage one thinks of new points and the defendant's arguments get longer. So with a preparatory hearing. There are several studies that make this point.

JUDICIAL DISCRETION

I would want to make another important point. The whole thrust of these proposals is hugely to increase judicial discretion. One reads the report and over and over again one reads the judge will decide, the judge will have discretion, the judge should direct. This is essentially uncontrollable judicial discretion, or controllable only in the very rare case where the judge's discretion has been exercised in such a way that the Court of Appeal is satisfied that the judge got it completely wrong. Usually the Court of Appeal will not interfere. This will not be addressed by judicial training. The reason judicial training will not touch it is because the discretion will generally be exercised by the judge according to his or her philosophy of judging. It is nothing to do with training. It is to do with what is in that judge's personality. Every judge, quite rightly, will judge differently. Do we want a huge increase in judicial discretion?

In short I do not welcome these developments. But in a decade or two, when it has become clear that essentially the problems of cost and delay are still with us, it may be quite difficult to go back.

This is therefore a rather crucial moment in the history of civil litigation and I am worried about it because I fear that these proposals will not bring more satisfaction or more justice. I do not think litigants generally will be enthusiastic about it. Lord Woolf called his report "Access to Justice". It sounds right, but I fear that the proof of the pudding will be in the eating and that we may find it not so much to our taste.

CHAPTER 6

Questions and Discussion from the Floor Arising on the Presentations of the Lord Woolf and Professor Zander

Chairman (Mr. Justice Costello): Ladies and gentlemen, we have 20 minutes before coffee, for questions or contributions to the subject.

Mrs. Justice Susan Denham: When you read about case management it is approached in two ways; first, as a philosophy and secondly, from a practical point of view. Have you approached this topic from a philosophical or a practical point of view?

Lord Woolf: I always thought I approached it from a practical point of view. I do not think Professor Michael Zander would say I succeeded in doing that. I do believe we have now, within the English system, very real evidence that in the appropriate cases it does work. I know that is not the sort of research that Michael would like to see and I would wish that we could have the sort of research that Michael would like to see. I would like to investigate the position in the United States. I have had discussions with the Federal Court Center and the State Court Center, who do conduct research. The Federal Court Director said it is extraordinarily difficult to get any satisfactory research which says there is a better way, but the general feeling of those involved is that it is better. May I give an example? I have had letters from litigants and lawyers who say when they heard what the judge was doing for their particular cases, which were long ones, giving timetables for the hearing etc., they were very worried. They were indeed expressing the feelings that Michael thought they would. I have found that what happened in practice was that both sides got together with the judge and tried to work out a sensible timetable. The parties adhered to it and those who were experienced in these areas of litigation would say "Our belief is that we managed to cut the hearing by 25% or 50%". If you can do that with cases, it is obviously a huge benefit to everybody. It is a benefit to the parties. It is a benefit to the Court. It is a benefit to all those involved

in litigation. Long cases are the ones where case management is important.

One of the things which came over loud and clear during the report is the demands litigation places on the parties. It takes over their lives. They do not know when they are going to be free and when they are going to be called and how long it is going to go on. At least when there is a timetable they are able to arrange their affairs. You find that the expert witnesses are helped by being able to arrange when they should be there. I think, with great respect to Michael, the idea that you should go into complex litigation without planning is just nonsense. It is self-evident nonsense. You must have some sort of strategy for dealing with litigation which is getting more and more complex.

The Legal Aid Board has now withdrawn its support for the actions against the tobacco industry, but the actions are going on. They are going to come in to our courts on the basis of a few gallant firms going to take them on a contingency fee basis. How do you deal with that sort of litigation unless you have management? It is not a reality. There is in London a huge litigation support industry of lawyers and other professions who are earning huge sums, by providing backup for the litigation processes. They earn their fees and they produce marvellous products. I had a very general practice at the bar and I was astonished to see the sort of particulars that are now being produced in support of a claim for personal injuries. Every item of expense is particularised and every time there is a case the wheel is reinvented and both sides are producing statistics, slightly different, case after case. The poor judge is trying one case and the judge next door is trying a similar case. If we had a management system, the judge could say "Look, we know what the costs of looking after a paraplegic are going to be". That is not to be run again and again. You are not entitled to relitigate the issues spending days in court.

Question from the floor: I would like to ask Professor Zander if there is any empirical evidence to back up the assertion that exchange of witnesses' statements has driven up costs and is a hindrance to the proper conduct of litigation?

Professor Zander: The answer to the question is "no". There is no study but it is repeated by everybody as something that is generally known.

Mr. Justice Geoghegan: I was interested in another aspect. I wanted to ask Professor Zander whether the introduction of the witness statements system has resulted in more settlements or whether it has had a negative effect.

Professor Zander: The regime was introduced in the hope that more witnesses' statements would produce more settlements. The proportion of settlements is high, well over 90%, only some two to three per cent end up with a trial. There is therefore not much scope for reducing further the number that are going to trial. I am not aware that the proportion of settlements has increased. What has happened is that the costs have increased.

Brian McGovern, S.C.: It is my experience practising in the courts that we do have in Ireland the system of trial by ambush, and Mr. Justice Geoghegan was referring to that. You do not know what the other side is going to say. If there was an exchange of witnesses' statements it would be quite possible that people having the time and having seen what the other party is going to say, might adjust their thinking. I am not talking about an exchange of statements as to fact, but when we come to expert evidence we find ourselves trying to cross-examine engineers where they might be raising theories which are ludicrous. It is only when you get out of court and have a chance to talk to your engineer and have his explanation given to you that you realise the situation. If you had these statements in exchange prior to trial you would be able to take a lot of the dross out of the case.

Professor Zander: There are very few people in England who would want to go back to the pre-existing situation from the point of view you raised. Maybe the witness may tailor his evidence in the light of what he has seen from the other side but seeing the other side's expert testimony beforehand is very helpful from the point of view you raised.

Lord Woolf: I agree with Michael. I do not think that the exchange of witnesses' statements at the top end of litigation has been turned into what he described as an industry. Let me say I have been very conscious of the help I have been given from lawyers throughout my inquiry, I have been working with many groups of lawyers and I certainly do not blame them for what has happened. What I say is that if in our exclusively adversarial system the lawyers feel that by expending large sums of money they can improve their client's position, then it is their

obligation to expend that money and that is what has happened with witnesses' statements. The problem is not because of the "cards on the table". That is not the problem. What is happening is that Counsel are expending large sums of money to produce draft after draft of witnesses' statements. They want to present the case in the most attractive way possible. We have got to recognise they have the best possible motive so far as the client is concerned. What should have been a progressive reform has a down-side. So now steps are being taken. This huge industry has got to be destroyed. This is what happens with reform. It is a continuing process. You take steps, but you find it is not working in the way intended. You return to modify it, so that it does work. That is what is happening with witnesses' statements.

Professor Zander: With great respect to Lord Woolf, I am not of that persuasion.

Judge Smithwick: I wonder if Professor Zander would say why he is dissatisfied with the Small Claims procedure? We introduced it here and we devised it so that major companies could not bring claims. They have to be brought by consumers. The Consumer's Council did a survey of the litigants in the Small Claims Court. There was a very high level of satisfaction. I am surprised that Professor Zander is disillusioned by this, where people are not represented by lawyers. It puts a lot of burdens on the judge. It is free of any costs. I do not quite understand why he does not like it.

Professor Zander: The question enables me to clarify what I said. It is not that I am dissatisfied with the Small Claims jurisdiction. Most people are reasonably satisfied. What I do not want to see is further increases in the jurisdiction from £2,000 to £3,000. I do not think a case of £2,500 is a small claim. It is a medium-sized claim. The reason why it is not desirable to increase the jurisdiction is because in the small claims court people are effectively deprived of the help of lawyers. They are not allowed to have lawyers in Ireland? They are not allowed to sue if they are companies?

Judge Smithwick: They are allowed to have lawyers, but it is not encouraged. The judge has to act as lawyer for both parties. Lawyers do not in the main appear. They are rare.

Professor Zander: The lawyers are not rare in the small claims court in England. They are common, no doubt because the plaintiff in 60% of cases is not a private individual but a company or a small business. Unfortunately we do not have any up-to-date statistics. The other point I want to make is that the judge exercises a very broad kind of discretionary justice which inevitably is exercised in very different ways. There is a piece of research which is about to emerge from John Baldwin in Birmingham. I have just written an article drawing attention to Canadian research. "Consistency — the exercise of discretionary powers", *New Law Journal*, November 1, 1996, p. 1590. They both agree that judges exercise their discretionary powers in very different ways. That may be fine for small claims. I'm not sure it is fine for ordinary run-of-the-mill law.

Chief Justice (Mr. Justice Liam Hamilton): Most of what we discussed here this morning has been concerned with case management in the courts at first instance, trial courts. I would like to ask the Master of the Rolls, based on his experience, has he any suggestion for case management for civil appellate courts?

Lord Woolf: I am very much a new boy.

Chief Justice (Mr. Justice Liam Hamilton): So am I.

Lord Woolf: We are embarking on the review of the Court of Appeal. My own personal belief is that there is room in the long appeals for some form of case management. I would like to go down that road which, to some extent, follows the Continental model, where you have one judge assigned to take on a complex case as a sort of judge rapporteur so that he can really get what are the basic issues identified well before the hearing; then calling in the parties and giving them some guidance as to which way to direct their efforts. I feel that would help. It is difficult in our system because of the very limited assistance which is available to judges.

Chairman (Mr. Justice Costello): Time for two more questions.

Question from the floor: It seems to me in relation to Lord Woolf and witnesses' statements, it creates an industry and I would have thought his report would create a judicial industry of management. There are many cases that were previously managed by lawyers and is it

appropriate in a population of four million to apply what is appropriate in a population of 50 million?

Lord Woolf: Is it appropriate?

Question from the floor: It seems to me in the U.K. you have a far greater number of complex cases, given your population, compared with our population of four million. We may not have the same number of problems in getting cases heard.

Lord Woolf: I think it is very important to use judicial resources to the best effect and in our system this means you have to be selective as to where you use your case management. I tried to indicate in my general comment that you identify cases where the expenditure of judicial time in the management function will mean it will save time for the parties and the court at the hearing, so that it will be constructive. I do not know whether it is true in this jurisdiction, but certainly one of the matters that has plagued our system is the settlement at the door of the court, and it happens time after time. I arranged for an experiment to be held where we created special courts where we had more judges sitting. It was difficult. What happened was the judges turned up and they put aside a week to hear a list of cases, which it was thought was necessary. The cases disappeared at the door of the court. If they can disappear at the door of the court, they can disappear earlier in the system. I accept we have got to try and find ways to bring that about.

Mr. Justice Morris: If I read your report correctly, the system is that the witness statement is prepared by the lawyers. It is furnished to the opposition and the witness is not required to give evidence. His witness statement is taken to be his evidence. If I am right in that, are not you depriving the trial judge of the only real opportunity he has to judge whether the witness's account of what occurred is correct? For myself, I find it far better to see the witness telling his own story. That is often more beneficial than cross-examination.

A second question I want to ask, if I may. I would have thought that it would be virtually impossible before the cross-examination actually begins for the judge to dictate how long each Counsel may have in cross-examination. If the cross-examination gets nowhere, it can be very short but if the cross-examination is satisfactory, surely there is a case to be made for extending the time?

Lord Woolf: Could I deal with the points: turning to the witnesses' statements, here there is a misunderstanding. What I have proposed is that the whole virtue of exchanging witnesses' statements is that each side knows what the other side is going to say beforehand. As a result of seeing the witness's statement they are able to indicate that part of the witness's evidence that is in dispute. Thus the witness is not called if there is no dispute. It is true the judge is deprived of the opportunity of seeing witnesses, but if a witness's evidence is not in issue that is not necessary.

The primary purpose of exchanging the statements is that they are part of the process. The witness when in the witness box has his witness statement put to him and he treats this as his evidence in chief. I accept that in a great many cases this has the effect of depriving the judge of seeing that witness. But if the issue was one of credibility and the witness's evidence is going to be critical then you revert to the old system. You use this process constructively. You use it in the cases where it would help, but going back to the old system where that is necessary.

Mr. Ken Murphy: In case management, the first step is to seek to determine what common ground there may be between adversarial parties. I am sure Lord Woolf would recommend against an 'a la carte' approach. Professor Zander I seemed to detect that there is some element in Lord Woolf's approach to which you agree? I wonder could you identify what elements of common ground exist between you and Lord Woolf.

Professor Zander: I am grateful for the question but feel I cannot respond sufficiently here. Maybe I should write sometime to identify the common ground between Lord Woolf and myself.

Chairman (Mr. Justice Costello): I would like to say what an extraordinary privilege it has been for all of us to be here today and on your behalf to thank Lord Woolf and Professor Zander.

CHAPTER 7

Case Management in the European Court of Justice

Presentation by *The Honourable Mr. Nial Fennelly, Advocate General of the Court of Justice of the European Communities*

The European Court of Justice is, as succinctly expressed in Article 164 of the Treaty establishing the European Community, required to “ensure that in the interpretation and application of this Treaty the law is observed”, which can be seen described in Article 166 as the task of the Court. The mistranslation of the corresponding French word, “mission” into the English mission has provoked much misplaced opprobrium. One distinguished British critic has inferred from this word a danger of “uncontrollable judicial power”!

The European Court can mean either the Court of Justice, which has existed since the coming into force of the three Treaties in the 1950s or the Court of First Instance which, since 1989, has been attached to it and to which progressively more functions have been devolved.

I must make passing reference to two obviously important matters concerning the organisation of the Court. The first is that resources in terms of legal services are not restricted to the judges and advocates general. Highly trained lawyers work in the Research and Documentation Division, which, for example, prepares notes on particular aspects of substantive law or procedure. Each judge and advocate general benefits from the services of three legal secretaries, usually called “referendaires”, specially chosen by that member for their expertise and specialized knowledge and each judge of the Court of First Instance has two. Secondly, any account of the working of the Court of Justice would be incomplete without reference to language. Cases may be taken in any of the twelve official languages of the Community. All written pleadings and supporting documents must be made available to the members of the Court in French, the internal working language of the Court, and, where required, the language of the case. All judgments are drafted in French and are translated into all 11 working languages for the date of their pronouncement. Opinions are

drafted in the language of the Advocate General and are, where that arises, translated into French; judgments are drafted in French.

The European Court is collegiate in character; a single judgment is given. It sits either as a grand plenum (15 judges), a comparatively rare event, or more usually as a small plenum (11 judges) or in Chambers of five or three judges. The Court of First Instance sits in chambers of three or five and only exceptionally in plenary formation. Cases are never heard by a single judge, though a proposal to that effect, put forward by the Court of First Instance with a view to enabling it to cope with its increasingly heavy work load, is under consideration.

Actions heard by the Court are, for convenience, labelled either as direct actions or references for a preliminary ruling. Some types of action, however, such as those between Member States for infringement of the Treaty hardly ever arise. Some special procedures, such as the Opinion of the Court on envisaged international agreements pursuant to Article 228, while very important, are untypical of the work of the Court.

Approximately half of the caseload consists of references for preliminary rulings on points of law from the Courts of Member States, pursuant to Article 177 of the EC Treaty. In spite of their prime importance in the case-law of the Court, these are possibly of less relevance to today's discussion than direct actions for several reasons. The reference procedure is in the nature of a procedure of cooperation between the Court of Justice and the Courts of Member States rather than an *inter partes* proceeding. Furthermore, all questions of fact and of national law as well as the ultimate ruling remain within the jurisdiction of the national judge. Nonetheless, once the written procedure has been completed, these cases are subjected on the whole to the same process of management as direct actions.

A direct action is any form of legal proceeding originating in the European Court. It may be between private parties, i.e. natural or legal persons, on the one hand and Community institutions on the other or between Member States and Community institutions. The Parliament, the Council or the Commission may bring actions against each other; Member States may bring actions against Community Institutions. However, the Court of Justice has no jurisdiction to entertain direct actions between private parties or between private parties and Member States even concerning breaches of Community law or in pursuit of interpretations of Community laws or acts. Private parties may, nonetheless, in certain cases intervene in an existing action in support of the position of either side in a proceeding initiated by another private party against a Community institution. The limited range of parties to

direct actions facilitates use of the system of case management adopted. With very rare exceptions, and other than in references for preliminary ruling, one of the parties is always a Community Institution. Even in references, the Commission makes written observations and invariably appears at any oral hearing.

Although infringement actions pursuant to Article 169 are frequently brought by the Commission against Member States, especially for failure to implement in national law Council directives made under Article 189, they are very often in practice undefended by the Member State or withdrawn by the Commission, when national implementing legislation has been belatedly introduced. The procedure, like its parallel in Article 171 for failure to respect a judgment of the Court, is essentially one of enforcement. It presents no particular problem from the point of view of case management.

The action for annulment pursuant to Articles 173 and 174 of the Treaty is of more direct interest. These Articles confer on the Court of Justice power to review the legality of Acts adopted by the Council whether alone or jointly with the European parliament, in certain circumstances by the Parliament acting alone, or by the Commission. The possible grounds for review are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application or misuse of powers. The jurisdiction of the Court of Justice in actions by private parties has been conferred on the Court of First Instance. Actions by Member States remain with the Court of Justice, subject to a procedure for reconciling conflicts in the event of a dual attack on the same Community act. The Court's jurisdiction pursuant to Article 178 concerning disputes relating to compensation for damage for which the Community attracts either contractual or non-contractual liability under Article 215 has also been devolved on the Court of First Instance.

The procedure and practices of French administrative law, above all those of the supreme French administrative jurisdiction, the Council of State, are generally accepted to have been decisive in forming the jurisdictional provisions of the Treaty. The reasons are not difficult to discern. At the time of negotiation of the Treaty of Paris in 1951, establishing the Coal and Steel Community and the first Court of Justice, it was the French approach to law which prevailed among the original six. After all it was the French Foreign Minister, Robert Schuman, who proposed the Treaty. Admittedly the Article 177 procedure of reference for preliminary ruling was inspired rather by Germany and Italy where questions concerning the constitutionality of laws may be addressed to

separate constitutional courts. Otherwise, the forms of action and their grounds were based essentially on French administrative law. The role of the Advocate General was modelled, in particular, on the differently named “Commissaire du Gouvernement” at the Council of State. The early French Advocates General — all Members of the Council of State — and in particular the first of them, Lagrange, have been credited with putting a distinctive French stamp on the Court.

It is true that the Court has departed to some extent from civil law practice generally by developing a body of case-law and tacitly introducing its own notion of adherence to precedent. Its actual handling of cases has not, however, changed. The unspoken influence of the founding fathers persists. New members of the Court learn quite rapidly to accommodate themselves to unfamiliar procedures and to unshackle themselves from deeply ingrained processes of reasoning. It is difficult to define in exact terms the content of the original French influence and in any case the Court has increasingly adopted its own distinctive approach. I will, before describing the system of case management, make one observation regarding the approach to fact finding. It is true that the Court, in performing its function of judicial review, does not engage in investigation of primary fact. The statement cannot, however, stand unqualified. The continental notion of “manifest error in the appreciation of the facts” appears to me to be significantly more flexible than the common law idea of “irrationality” as the only ground for review of an administrative decision which is otherwise regularly made from the procedural point of view and in application of correct principles of law. The briefest review of the judgments of the Court of First Instance concerning complex economic and commercial matters reveals much highly detailed consideration of issues of fact. Nor can it be said that resolution of issues of fact is outside the competence of the Court. Damages claims pursuant to Article 178 and staff cases under Article 179 can certainly give rise to conflicts of fact. My own impression is that the Court approaches disputed issues of fact in broad terms and usually finds means of avoiding their resolution. It seeks to extract only those elements of fact whose establishment is a precondition to the expression of an opinion on the law and the decision in the case. Whether this unsatisfactorily imprecise situation is the result of French influence I cannot say. Nor will one find the approach of the Court described in principled terms anywhere in its judgments.

The Court may, it is true, either of its own motion, upon application of a party, order that identified facts be proved by witnesses. Any party so applying must state precisely the facts to be proved and the reasons for

which any witness is to be examined. The extremely limited case-law — itself indicative of the reluctance of the Court to hear and evaluate oral evidence — shows that the Court will assess in advance the necessity for the oral evidence in the light of the submissions on law and fact made by that party. It has usually refused to hear oral evidence. An obvious corollary is, of course, that there are no rules of evidence.

The European Court operates under its own governing Statute, which is laid down in a separate protocol to the Treaty and under Rules of Procedure. Though the Rules are adopted by the Court itself, they require unanimous approval of the Council. Any amendment to either the Statute or the Rules requires the like unanimous approval.

The starting point for any explanation of the procedure before the European Court is the statement in the Statute, Article 18, that it shall “consist of two parts: written and oral”. In practice, the written procedure heavily predominates.

The written procedure, as described, must take the form of “applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them”.

Each case starts its life by being lodged with the Registry of the Court. That Registry is no mere administrative office. It is presided over and staffed by qualified lawyers. Each new case is subjected to a preliminary examination by a lawyer in the Research and Documentation division of the Court who will draw up a note classifying the case by type and drawing attention to any cases past or pending in the same area. This may enable the Court, for example, to invite a national judge to consider withdrawing a reference, if the same point has very clearly been decided already, or lead to joinder of similar pending cases in order to ensure consistency in treatment of the same subject-matter and the more efficient handling of cases. However, if this preliminary study throws up a possible problem of manifest inadmissibility, a note will be prepared urgently by the Reporting Judge in consultation with the Advocate General and the matter considered by the General Meeting of the Court.

Shortly after the case arrives at the registry of the Court, responsibility for it is assigned, by the President of the Court, to a reporting judge and, by the First Advocate General for that year, to one of the Advocates General. In the Court of First Instance the case is attributed to a chamber and, within it, to a reporting judge. In respect of any administrative or procedural step — and there are many — the reporting judge and the Advocate General (in the Court of Justice) will consult with each other with a view to agreeing on any appropriate form of order

or preparatory measures to be proposed to the President. In this way, such matters as the joinder of similar cases, requests to be allowed to intervene, legal aid or to deliver late pleadings are dealt with. Such matters never have to be dealt with by the Court in any formation.

Time limits, as adjusted for distance from Luxembourg, are laid down for the delivery of written pleadings and strictly applied. For example, written observations received after the permitted two months period as extended are simply returned. The Court has power to extend times for pleadings in direct actions, though the application must be made within the originally permitted period.

The explanation for this stern discipline is, in part, to be found in the Treaty provision that requires unanimous Council agreement to amendment of either the Statute or the Rules of Procedure and thus implicitly limits the freedom of the Court to alleviate their enforcement. It probably is influenced also by the administrative law nature of most of the proceedings before the Court. The interest in the outcome of annulment proceedings concerning Community Acts, even decisions, is rarely limited to the direct parties to the action. The principle of legal certainty requires that all persons affected should be able to act in confidence in the validity of laws and regulations.

At first sight, the pleadings, as described in the Rules of Procedure, bear a reasonable similarity to those which we expect in the Irish Courts. They provide for an originating application and a defence to be lodged within one month. Subsequently there may be a reply from the applicant and a rejoinder from the defendant.

It occurs to me, however, that the word "pleading", though used in the Rules, is misleading. The entire proceeding, as I have emphasized, includes both the written and the oral part. There is no division of principle between the two. They are merely chronological stages. In particular, there is no separate "trial" in the common law sense. Judge David Edward of the Court of Justice recently noted the tendency, even in England after the abolition of jury trial in most civil matters, to treat the judge as a surrogate jury. He pointed out that the trial in the sense of a once-and-for-all continuous process where all material for decision must be presented at a given time and place is "unique to the countries of the common law". There is no Notice of Trial in the European Court. The oral hearing certainly does not correspond to a trial. In a significant number of cases, there is no hearing. The written proceeding, in other words, is of prime importance. This comes as no surprise to the judges trained in the civil law tradition. In most continental countries, the oral hearing plays little or no part in civil procedure.

The pleadings, therefore, are not merely a series of formalistic assertions of positions which may be pursued, abandoned or modified at will, or, in the last case, with the anticipated consent of the Court. They are, as we have seen, required to contain both the evidence and the arguments in law of the parties advancing them. Any documents relied upon, or certified copies, must be attached. Furthermore, the applicant must include all his pleas of law or arguments in his initial application. He may introduce new ones only with special leave.

This disciplined approach to pleadings prompts me to refer to the position regarding access to documents or documentary evidence. Parties do not have at their disposition anything approaching the order for general discovery with which the Irish Courts are so familiar. They may, of course, attach such documents as they consider relevant to their pleadings and may use copies in the absence of possible direct proof. The Court may, of its own motion, or at the request of a party, ask a party, a Member State or a Community institution to produce specified documents. The consequence of all this is that there is no possibility for parties, in pursuit of discovery of documents, to delay the hearing almost indefinitely, as so frequently can be the case in the Irish Courts. There is a close relationship between the absence of this remedy in the European Court and the practically self-executing effect of the time limits in the Rules of Procedure. Many of the procedures which we have come to know and love — notices for particulars, interrogatories, notice to admit facts — do not exist. There is no question of putting an opposing party to formal proof. While a notice of burden of proof exists, it is in the sense that all parties are bound to assist the Court and to produce any evidence in their possession.

The judges and Advocate General, in their conduct of cases, follow a set of guidelines laid down by the President of the Court in an internal document called the *vade-mecum*. This lays down a set of general rules of guidance and in particular time limits for various stages of the procedure.

The written procedure in direct actions takes about six months. Its exact duration depends to a large extent on whether Member States avail of their right to intervene. Translation into French of the pleadings adds about two months before the time arrives when the pleadings can be said to be genuinely “closed”.

From the moment of the deposit of the last translation into French, the reporting judge and the Advocate General are expected to proceed to work on the case, i.e. to study the file in detail. If the case is in their own language they may start earlier. Here we have the continental

notion of the “dossier”. This study should enable a fairly clear view of the nature of the case to emerge, though not necessarily a decision. It is not limited to the arguments advanced by the parties but involves research into the case-law and the background to any Community acts and, for example, the legislative history, which is admissible as an aid to interpretation. At this stage, knowledge of the case is sufficient to enable a detailed preliminary internal note to be prepared.

Following the end of a period from the last translation into French, designated in the *vade-mecum* as two months, for preliminary references, and four months for direct actions, the Reporting Judge produces an internal document of great importance, called the preliminary report, which, after consultation with the Advocate General, is circulated to all judges and Advocates General for the Tuesday meeting of the entire Court. The preliminary report, while succinct, gives a very good outline of the nature of the case and of the arguments of the parties and of any intervening Government or Community institution. It summarizes any relevant legislation or Community provisions. It concludes with the recommendations of the reporting judge regarding any steps of preparatory inquiry, whether an oral hearing is required, and, crucially, recommends the formation of judges (three or five judge chamber, small plenum or grand plenum) which will decide the case. The preparatory enquiries may consist of some or all of the following steps: the commissioning of an expert report (rarely), request for a research note from the services of the Court regarding the laws of Member States in a particular matter (quite frequent), the addressing of questions or requests for documents to the parties, to a Member State or to any Community institution (very frequent) and even (though exceedingly rarely) the taking of oral evidence. At the same time the Reporting Judge prepares the Report for the Hearing, which is a more or less complete summary of the facts, history of the case, issues and arguments. It is circulated to the parties who may point out any errors in advance of the oral hearing.

The General Meeting of the Court usually but not always accepts the proposals of the Reporting Judge and Advocate General. The parties may be asked, in advance of the oral hearing or, if there is none, in advance of the Advocate General’s Opinion, to reply to questions in writing or to supply documents.

The oral hearing is fixed for a date about two months after the General Meeting. Lawyers for the parties may be asked in writing or at the hearing itself to concentrate their arguments on any aspect of the case which the Court thinks particularly useful or relevant for a decision in

the case. Lawyers must notify the Registry in advance of the estimated length of their oral argument. Anything in excess of thirty minutes is quite unusual. These times, once accepted, are rigorously enforced. Although entitled to question the lawyers for the parties at the hearing, many judges and advocates, especially those from the civil law tradition, do so sparingly, if at all. The utility of the oral hearing depends greatly on the language of the case and the extent to which the members of the Court, particularly the reporting judge or the Advocate General, are familiar with it. The most lively hearings are often in three judge chambers where the language is English or French. Repetition of arguments contained in the written pleadings is pointless. These will already have been well noted both by the Reporting Judge and the Advocate General and summarized in the Report for the Hearing. An experienced advocate will concentrate on one or two points of central importance.

The Advocate General at the end of the hearing announces a date for delivery of his Opinion usually within four to six weeks of that date.

Thereafter the formation of judges which has heard the case meets to consider its judgment. There may be several meetings and circulation of confidential notes in more difficult or controversial cases. The reporting judge takes responsibility for drafting the judgment. This will often be quicker if the Court decides to follow the Advocate General. In any event, a delay of the order of three to four months is normal. Anything more than six months is rare.

The total average time taken to dispose of cases in the years 1994 and 1995 was from deposit of the case in the Registry to judgment about twenty months.

CHAPTER 8

Commercial Actions: An Example of Case Management in Northern Ireland

Presentation by *The Honourable Mr. Justice Brian Kerr, Judge of the High Court, Northern Ireland*

In this short talk I would like to give a brief description of my experience of case management as a Judge of the High Court in Northern Ireland. I have responsibility for judicial review applications and I am the Commercial Judge for Northern Ireland. In both fields case management is practised.

In judicial review applications, the case management system is flexible and informal. It is, I suppose, much as is practised in many fields in this jurisdiction. In a significant percentage of applications for leave to apply for judicial review I arrange for a short oral hearing. I find that this provides the opportunity to direct a number of interlocutory steps which help to prepare the application for an effective and economical substantive hearing.

In particular, I find it useful to have the proposed respondent represented on all but the most straightforward leave applications. At its most prosaic level this allows for some estimate to be made of the programme for the filing of replying affidavits and the fixing of the date for hearing. On a more practical level many judicial review applications benefit from what might be described as “judicious refinement”. Because of the requirement to apply for leave promptly the temptation to the traditional “scatter gun” form of pleading is as understandable as it is strong.

A short oral hearing with (hopefully) a succinct contribution from the respondent can identify the essential points in issue. This can focus the applicant’s presentation of his case on the substantive hearing. It also allows me to confine the grant of leave to those grounds on which I consider there is a genuinely arguable case. Further, the significance of the most commonly encountered problems in judicial review (in my experience — delay, the reviewability of the decision i.e. whether it is within the sphere of public law and locus standi) can be assessed.

Finally it is possible to give directions as to the submission of skeleton arguments and, in a small but increasing number of cases, to impose time limits on the length of oral submissions.

Speaking of time limits, I must remain conscious of the injunction which I have been given to keep this talk brief and I will move directly to case management in the Commercial List where it is — if not more formal — certainly more structured.

I have had prepared a small dossier of documents, and I would like, if I may, to use these as the basis for my description of the regime of case management in the Commercial List.

The Commercial List was established in 1992 by the introduction to the Rules of the Supreme Court (Northern Ireland) 1980 of Order 72 which is the first of the documents to which I wish to refer. It is marked “A”.

This introduction of Order 72 was prompted — to a significant extent at least — by representations made by the commercial community in Northern Ireland about the cumbersome and protracted nature of commercial litigation in our jurisdiction. This Order and its implementation have been the legal community’s reaction to those representations and its own acknowledgement of the need to streamline and adapt traditional proceedings — particularly at the preparatory or interlocutory stage — to cater for the particular requirements of commercial actions. It is perhaps a measure of its success that the haemorrhage of commercial cases to other forms of dispute resolution such as arbitration has been staunch. That is not to say that we are averse to alternative dispute resolution in Northern Ireland. It is merely that we have not experienced pressure to have recourse to ADR. In England and Wales a recently issued practice direction has required that, as a matter of practice, the possibility of ADR should be explored by litigants in the Commercial Court. I have considered whether such a practice direction is required in Northern Ireland but have decided that it is not. This conclusion is based not only on the lack of any representations that such a direction is required; it reflects our current ability to provide a hearing date within a relatively short time of an action being set down for hearing.

Turning then to Order 72 may I draw your attention to some of its material provisions? Rule 1 paragraph 2 defines commercial actions as “any cause relating to business or commercial transactions and, without prejudice to the generality of the foregoing words, any cause relating to works of building or engineering construction etc”. You will note that there is a useful and enlightened provision at the end of this paragraph

to the effect that commercial actions shall include “such other causes as the commercial Judge may think fit to enter in the Commercial List”, so that, effectively, an action is a commercial action if I say it is. The temptation to judicial megalomania is mitigated, however, by the knowledge that I have no corresponding power to declare that actions which are clearly commercial should not be so regarded!

As a matter of practice, actions enter the Commercial List by two routes. Firstly and usually, parties will apply to me through the Commercial Office to have an action included in the List. Less commonly, the Registrar of the Commercial List will carry out a trawl of actions which have been set down in the Queen’s Bench List and identify actions which are clearly commercial. These will then be taken into the Commercial List. This type of intervention which is, I suppose, case management at its most basic and direct, is not always welcomed, as you might imagine.

In any event when it enters the Commercial List, an action comes under my direct control — see Order 72 Rule 2(3). Copies of all pleadings, notices, lists of documents etc must be furnished to the Registrar not later than two days after service thereof on other parties — Order 72 Rule 4. All interlocutory applications are made to the Commercial Judge — Order 72 Rule 5. Directions as to the conduct of the action are given by me after the close of pleadings — Order 72 Rule 6. I shall return to this presently. A highly significant recent addition to Order 72 Rule is 9. This provides that where a party to a commercial action proposes to adduce expert evidence at the trial he shall disclose it to the other party at the time and in the manner that the Commercial Judge shall direct.

The second document in the bundle is a sample of the type of directions which I give in a normal commercial action. The first four of these set deadlines for the transaction of the usual interlocutory matters and, apart from being rather more prompt than one might encounter in *laissez faire* litigation, there is nothing exceptional about them. Directions 5 and 6 are significant, however. These require the exchange of expert evidence and the coming together of those experts in advance of trial. With the possible exception of the resolution of discovery disputes, these directions are the most valuable preparatory steps taken in commercial actions. Generally the enforcement of the directions about expert evidence does not present a difficulty. One minor problem arises where the experts which a party proposes to call are “in-house”. This problem is usually easily overcome, however, by requiring the production of statements of evidence from those witnesses. Often, of

course, such witnesses cover both factual or historical evidence and expert opinion. By and large, these are relatively easy to segregate in the informal setting of the review hearings which are held in every commercial action. I shall say something about these in a moment.

May I just mention paragraph 10 of the directions, however? In my experience this is vital. A report on progress will be drawn to my attention in each case. This allows me to judge whether a review of the case is required; whether stimulation of the parties to rather more concerted effort is necessary or whether some assistance from the court is warranted and feasible.

The next document (C) in the file of documents is a typical list of the cases which I will review each morning. This is prepared by the Registrar or her deputy and provides a rapid and concise aide memoire of the issues which require to be dealt with in each case. This document has been especially chosen for me for two reasons. Firstly, it provides a very typical cross section of the matters which I have to deal with on a review hearing. Secondly, it illustrates a quality which I think is an essential character prerequisite for anyone who works in the Commercial Office and that is a well developed sense of humour. It will be seen that the letter "O" is depicted on the first line of the list by an unhappy face; in the final line which anticipates the weekend and imminent release from the Commercial Judge the "Os" have become happy faces. My revenge on the Deputy Registrar for this barely concealed rebuke has been to tell her that I would expose her handiwork to this conference. Needless to say, blessed as she is with the scepticism with which all Civil Servants regard any judicial utterance, she refused to believe me.

Document D is a typed copy of the handwritten notes which I make on the review hearings in a typical case. Review hearings are held in my chambers each morning at 9.30 a.m. Usually some six to nine cases are listed for review. All of these reviews will usually be completed by 10.15 a.m. or 10.30 a.m. Counsel and solicitors sit around a table in my room. Formality is kept to a minimum. Counsel and solicitors are addressed by their Christian names.

I will have read the papers before the review hearing and most of the exchange between the parties is Judge led. Primarily I am concerned to find out how the parties are complying with my directions. It is astonishing how much can be achieved in the 5/7 minutes which is typically devoted to each case. As a matter of practice, I will not allow the issue of a summons or the filing of affidavits save in exceptional cases. Disputes about the adequacy of discovery, replies to notices, the

administration of interrogatories etc are ventilated by the exchange of correspondence in advance of the review hearing. This correspondence is provided to the Commercial Office a few days before the review hearing is to take place and I will have read it. Counsel and solicitors are aware that they have a limited time in which to make their case during the review hearing and then not as a conventional submission but by way of reply to my questions. As a result correspondence on contentious issues tends to be more pointed and pertinent and response to judicial questioning concise and well prepared.

Once a case has been reviewed I will continue to review it until I am satisfied that it is ready for trial when it will be listed. Once listed, the case will not be reviewed again unless I am asked to review it. Any case requiring urgent review can be listed before me merely by contacting the Commercial Office by telephone. Such a review will take place usually within 24 hours and at most within 48 hours.

Two possible misconceptions about these review hearings should be dispelled. Firstly, it should not be assumed that because review hearings are Judge led that they are Judge dominated. On the contrary, review hearings can only be effective and successful, in my opinion, if there is co-operation between Bench and profession. Much of my work in review hearings is preoccupied with efforts to help the parties to arrive at a state of readiness for trial. My role is more as a pro-active chairman rather than a conventional judge. Thus, for instance, I frequently suggest to parties how problems might be overcome — examples of this interventionist role are — suggesting the issue of *Khanna* subpoena, pointing out areas of inquiry for expert witnesses and how to deal with recalcitrant witnesses and clients.

The second and — certainly for my judicial brethren in this audience — more important possible misconception which requires to be scotched is the impression that a substantially increased workload for the case management Judge is required. It would be idle to suggest that preparation for review hearings does not involve more work than for a normal action but two factors deserve mention on this topic. Firstly, much of the work is carried out by the staff of the Commercial Office. In this regard, although they are not present to hear it, I should pay tribute to the work which they do and say that efficient, industrious and personable staff are vital to the success of any case management system.

Secondly, any increase in the amount of work which I am required to do is, for me, more than compensated for by the enjoyment that I get from the sense that I am participating in the progress of the action. In a

way it is like being an impresario without the responsibility and the financial risk. When case management in the Commercial List is working at its best there is a dimension to the conduct of litigation which is both exceptional and rewarding. It would be wrong to suggest that hostilities between the parties are suspended but litigants and their lawyers recognise that they can make common cause with each other and with the Judge in ensuring that the best possible level of preparation is achieved.

I could dwell on this theme at some length but I must remember the constraints of time. The remaining documents bear witness to the industry and efficiency of the Commercial Office staff. Document E is a summary of the telephone calls which a member of staff of the Commercial Office makes to the solicitors for the parties. This list is rather longer than I would wish to see and is, I hope, not entirely typical. But contact between court staff and solicitors is essential, in my experience, and should be encouraged. I find the case management in the Commercial List can only work if there is strict adherence to the deadlines imposed in directions or if application is made to extend the time within which directions are to be complied with. This is best achieved by the system of regular review. Counsel know that if a list of documents is not served or a reply to a notice has not been furnished they will have to account for it at the next review hearing. It is therefore very much in their interests to ensure that deadlines are met.

Document F recites the Commercial List Office Courts Charter and sets out the return for October, 1996. This records the actions listed for hearing in that month. Five out of the thirteen actions have not fulfilled the aspiration of the Charter but I can say that in each of these cases we have been able to offer the parties a listing date within 3 months of the action being set down or included in the Commercial List. The actions have not been listed because the parties have not been ready for a hearing.

Document G is the list of outstanding actions which is produced monthly. This provides an invaluable check on the progress of all actions outstanding in the Commercial List and must be read in conjunction with Document H which provides a snapshot of the activity in the Commercial List for the month of October, 1996. Again this is a document which is produced monthly and is, I hope, largely self explanatory.

May I say this finally? The experience of case management that we have had in Northern Ireland and such success as it has achieved are not, I acknowledge, necessarily exportable. Although judicial review and commercial cases are probably the only species of litigation that are

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expanding in Northern Ireland, the number of cases remains more or less comfortably case manageable. I hope however that the description of my experience as a case manager, incomplete and imperfect as it is, will infect at least some of you with the enthusiasm that I feel for the extra dimension that it brings to my work as a Judge.

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THE HONOURABLE MR. JUSTICE BRIAN KERR**

DOCUMENT A Order 72 of the Rules of the Supreme Court (NI) 1980. (2 pages)

DOCUMENT B Sample of Directions given in a Commercial Action. (2 pages)

DOCUMENT C List of Cases to be reviewed. (1 page)

DOCUMENT D Record of Review Hearings in Chambers. (2 pages)

DOCUMENT E Record of telephone contact between Commercial Office and solicitors. (1 page)

DOCUMENT F Commercial List Office Courts Charter. (1 page)

DOCUMENT G Actions outstanding in Commercial List. (9 pages)

DOCUMENT H Statistical Return for October 1996. (1 page)

DOCUMENT A

Order 72 (Suppl. No. 20 July 1992)

Order 72*

Commercial Actions

Application and interpretation

1. (i) This Order applies to commercial actions in the Queen's Bench Division, and the other provisions of these Rules apply to those actions subject to the provisions of this Order.
- (ii) In this Order "commercial actions" shall include any cause relating to business or commercial transactions and, without prejudice to the generality of the foregoing words, any cause relating to contracts for works of building or engineering constructions, contracts of engagement of architects, engineers or quantity surveyors, the sale of goods, insurance, banking, the export or import of merchandise, shipping and other mercantile matters, agency, bailment, carriage of goods and such other causes as the Commercial Judge may think fit to enter in the Commercial List.

Commercial List and Commercial Judge

2. (i) There shall be a list which shall be called "The Commercial List", and the Commercial List shall consist of such commercial actions as the Commercial Judge shall direct to be entered in that list, having regard to the amounts involved or the issues concerned in those actions.
- (ii) The Lord Chief Justice shall nominate one of the Judges of the High Court to be the Commercial Judge.
- (iii) The Commercial Judge shall be in charge of the arrangements for the listing and disposal of all actions listed in the Commercial List and of all interlocutory applications therein. One of the officers serving in the Supreme Court shall act as Registrar of the Commercial List, and shall be concerned with the carrying out of such arrangements.

Commencement of proceedings in a commercial action

3. (i) On the commencement of proceedings in a commercial action the plaintiff's solicitor may request the Registrar in charge of the Commercial List to have the action entered in the Commercial List.
- (ii) Any party to a commercial action may at any stage of the proceedings request the Registrar to have the action entered in the Commercial List.
- (iii) The Registrar shall refer any such request to the Commercial Judge for his decision.
- (iv) The Commercial Judge may if he thinks fit remove any action from the Commercial List.

*Order inserted by S.R. 1992 No. 313 with effect from 1.9.1992.

Conference on Case Management

Pleadings to be furnished to Registrar

4. A copy of every pleading, including notices for particulars and replies thereto, and of interrogatories and replies thereto and lists of documents, served by any party to an action in the Commercial List, shall be furnished to the registrar not later than two days after service thereof upon the other party or parties to the action.

Interlocutory application

5. Unless the Commercial Judge shall otherwise direct, either generally or in a specific case, all interlocutory applications in actions in the Commercial List shall be made to him.

Order 72 (Suppl. No. 24 Jan. 1996)

Directions as to conduct of action

6. (i) As soon as practicable after the close of pleadings in an action in the Commercial List the Registrar shall refer it to the Commercial Judge for directions as to the conduct of the action. The Commercial Judge may give such directions without hearing the parties, or may receive written proposals for directions, or may hear the parties, as he may think fit.

(ii) Any party may at any stage of the action apply to the Commercial Judge for directions as to the conduct of the action, and the Commercial Judge may receive written proposals or hear the parties, as he may think fit.

Dates for the hearing of actions

7. Dates for the hearing of actions in the Commercial List shall be fixed in advance by the Registrar in consultation with the Commercial Judge. The Commercial Judge may if he thinks fit hear the parties or receive written proposals before fixing or altering a date for hearing. Any party may apply at any stage for a date for hearing to be fixed, whether or not the pleadings have been closed.

Hearings by judges other than the Commercial Judge

8. (i) Any interlocutory application in an action in the Commercial List may be heard by any judge or by any master if the Commercial Judge requests him to hear it.

(ii) Any action in the Commercial List may be heard by any judge if the Commercial Judge requests him to hear it.

(iii) At the request of the Lord Chief Justice any judge may at any time exercise the powers of the Commercial Judge.

Disclosure of expert evidence†

9. (i) Where a party to a commercial action proposes to adduce expert evidence at the trial he shall disclose it to the other party or parties at the time and in the manner that the Commercial Judge shall direct.

(ii) When a party discloses any evidence to any other party in accordance with paragraph (1), he shall furnish a copy thereof to the Registrar as soon as possible and not later than two days after such disclosure.

†Rule 9 inserted by S.R. 1995 No. 462 with effect from 9.1.96.

- (iii) Where any party fails to comply with any of the directions as to disclosure given by the Commercial Judge, the Court may stay the action or strike out that party's defence, as the case may be, or make such other order as to the Court may seem meet.
- (iv) Subject to any directions which may be given by the Commercial Judge, any party disclosing expert evidence under this rule shall do so by furnishing any relevant expert's report or reports, together with any documents emanating from the maker thereof which are intended by him to accompany or supplement any such report. All such reports or other documents shall be signed and dated by the maker thereof and shall specify his professional qualifications. A Photostat copy of any such report or document shall be sufficient for this purpose.
- (v) On the ex parte application of any party bound to disclose any expert evidence under this Order the Court may give him leave—
 - (a) to adduce at the trial the evidence contained in any report without disclosing the report, or
 - (b) to omit or amend any part of any evidence when disclosing the report.

DOCUMENT B

1995 No. 2688
IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL LIST)
BETWEEN
V.G.M.
PLAINTIFF
AND
M O'H & D LTD
DEFENDANT
DIRECTIONS

given by the Commercial Judge. The Honourable Mr Justice Kerr on 14th December, 1995.

1. Discovery of documents by each party shall be completed not later than 11th January 1996, and inspection shall be held within 14 days thereafter.
2. Any interrogatories required shall be served not later than 25th January, 1996, answers shall be provided not later than 8 February 1996.
3. Any notices for particulars required shall be served not later than 25th January 1996 and replies shall be furnished not later than 8th February 1996.
4. Any interlocutory application required shall be brought not later than 22nd February 1996.
5. Statements of evidence of expert witnesses, if any, shall, so far as possible, be exchanged and agreed not later than 7th March 1996.
6. Meetings of expert witnesses to attempt to agree evidence and items of damages claimed shall, so far as possible, be held not later than 21st March 1996.
7. Solicitors shall attempt to agree a hearing date, target April 1996, and consult the Registrar of the Commercial List, to fix the date. They shall furnish to the Registrar an assessment of the probable duration of trial.
8. The plaintiff's solicitors shall prepare the following documents for trial and lodge them with the Registrar not later than 14 days before trial:
 - (a) Agreed bundle(s) of documents for the judge's use, with numbered pages and index;
 - (b) Copies of disclosed statements of evidence of expert witnesses;
 - (c) Agreed bundle of correspondence in chronological order to be prepared separately from (a), above;
 - (d) Agreed bundles of (i) photographs (ii) plans if appropriate, identified and indexed; these should be separate from (a) above.

The Honourable Mr. Justice Brian Kerr

9. Liberty to either party to apply to the Commercial Judge for further or amended directions or extension of time to comply with any direction.

10. The plaintiff's solicitors shall report in writing progress on the above matters to the Registrar not later than 25 January 1996 and again not later than 22 February 1996.

DOCUMENT C

My Lord.

Commercial business listed for Friday 8th November, 1996 AT 9.30 a.m. in CHAMBERS

1. Boorman Owen Associates & Ors -v- Irish Life Assurance PLC.
SUMMONS adj from 21/10 — Settlements for mention.
2. Glenmills Dairy Limited -v- McEvoy x 2 t/a Glenmills Dairy
Adj from 11/10 — Final discovery (Listed 21st December 1996).
3. Britannia Life Association of Scotland Limited -v- Magee & Anr
Adj from 25/10 — Final Discovery (Listed 21st December 1996).
4. Crozier & Anr t/a Commercial Negotiations -v- Breen & Ors
Adj from 25/10 — Amended Writ and SOC.
5. Lombard and Ulster Ltd -v- O'Hara & Ors.
Adj from 4/10 — Amended 4th Party Notice (no address for 4P).
6. Robinson & McIlwaine (a firm) -v- Ryobi Aluminium Casting (UK) Ltd.
Adj from 18/10 — Listing.
7. Markey -v- O'Hare and Donington Ltd.
Adj from 11/10 — Reports exchanged — Final review.
8. Norbrook Laboratories Ltd -v- Southtrim Autoclaves Ltd.
Adj from 11/10 — Discovery dispute.
9. McKay t/a NCC Systems -v- Morton Welding Contracts & Anr.
Adj from 4/10 — Final discovery position.

DOCUMENT D

QUEEN'S BENCH DIVISION [COMMERCIAL LIST]

List No. 63337

Date of hearing 17th April 1996
9th December 1996

Markey -v- O'Hare and Donington Limited

13.2.96

Supplemental List of Documents from the defendants within 3 weeks (ext. to 22/3)
(Rec'd 26/3)

Defendants seek further discovery re VAT returns.

Defendants to write letter re this by end of week.

Supplemental List of Documents from the Plaintiff in 3 weeks (Ext to 22/3)

2 weeks for Plaintiffs reply to Defendants' NFBP. (Ext to 11/3)

Action Listed for hearing on 17th April 1996 — three days.

No review unless requested.

29.3.96

Reply to NFBP outstanding — extension granted until 5th April, 1996 (Rec'd 12/4)

Defendants' Supplemental List served on 26th March, 1996.

Phone call on 22nd March from Plaintiff saying they had documents — Defendants replied on 27th March, 1996 — Will require accountancy advice.

Extension for Plaintiff Supplementary List until 16th April, 1996. (Rec'd 16/4)

Action TOOL for 17th April, 1996.

17.4.96

Defendants accountant to inspect and indicate when the report is likely to be available.

Possible listing this term.

Review in 2 weeks.

1.5.96

Problems re obtaining documents.

Defendants accountant requires 1 month for preparation of report.

Review again 29th May, 1996.

29.5.96

Accountant able to prepare some preliminary reports.

Documentation not in existence 2-3 weeks before he can provide report.

Review in 4 weeks.

26.6.96

Defendants accountants report served last Wednesday.

Action Listed for hearing on 9th December, 1996 — three days.

Exchange of experts reports by 31st August, 1996.

Conference on Case Management

27.9.96

Plaintiff's Solicitors wrote a letter on 27/6 re accountants report saying they had Legal Aid.

They do not. Certifying committee on 4th October, 1996.

Exchanged on 31st October, 1996.

Review 11th October, 1996.

11.10.96

Legal Aid has been obtained.

Exchange should take place in time.

Review for final time on 8th November, 1996.

DOCUMENT E

QUEEN'S BENCH DIVISION
(COMMERCIAL LIST)

TITLE — *Markey -v- O'Hare and Donington Limited.*

Date of Phone call	Person spoken to	Message left
15.1.96	Pl. Solr	Requested List of documents on application for extension. (Rec'd 16/1)
15.1.96	Defs Solr	Senior counsel consulted with client on 20/12 — Solr pressing for list (Rec'd 18/1)
30.1.96	Pl. Solr	To confirm inspection and any requirement for NFBP or interrogatories. Requested progress report (Rec'd 31/1)
6.2.96	PI & Defs Solrs	Notified of review on 13/2/96.
12.3.96	PI Solr	Requested supplemental list and replies.
26.3.96	PI Solr	Requested supplemental list and replies.
26.3.96	Defs Solr	To send Supplemental List tomorrow (Rec'd 26/3)
10.4.96	PI Solr	Replies requested.
9.9.96	Defs Solr (Secretary)	To confirm exchange of Plaintiff's expert report.
10.9.96	Defs Solr	Reports not exchanged. Plaintiff awaiting L' Aid.

DOCUMENT F

THE COMMERCIAL LIST OFFICE
COURTS CHARTER

A Commercial action will be included in a call-over list or fixed for hearing within three months of setting down the action or inclusion in the Commercial List whichever is the later.

Return for the month of October, 1996.

Writ No.	Date of entry	Date of set down	Date of First call-over	Date on which fixed for hearing	Fixed hearing date
95/3506	19. 6.96	7. 2.96	—	2.10.96	19.12.96
94/5113	8. 5.96	—	—	9.10.96	20.10.96
93/1854	20. 3.96	10. 3.95	—	9.10.96	20. 1.97
95/1994	29.11.95	18. 6.96	—	11.10.96	2. 1.97
94/4359	23. 5.96	26. 6.96	—	14.10.96	6. 1.97
95/4823	19. 4.96	31.10.96	—	21.10.96	15.11.96
89/4457	30. 1.96	1. 8.96	—	22.10.96	19.11.96
95/5013	22. 5.96	29. 5.96	—	22.10.96	21. 1.97
95/4202	26. 2.96	2.10.96	—	21.10.96	16. 1.97
96/1327	6. 6.96	—	—	1.10.96	15. 1.96
96/2102	7.10.96	2.10.96	—	21.10.96	19.11.96
93/4641	18. 9.96	24. 1.96	—	25.10.96	4. 2.97
93/4524	21. 9.95	—	—	25.10.96	3. 2.97

Signed J. Martin
H. D. Carr

Date 31/10/96.

DOCUMENT G
QUEEN'S BENCH DIVISION
(COMMERCIAL LIST)

Actions outstanding at 31st October 1996

List No.	Title	Entry Date	Remarks
"A"			
—	Abbey Life Assurance Co Ltd V Buchanan and others	7/ 2/96	
—	Anderson McMeekin Photography Ltd V Wm I Laing Ltd	19/ 4/96	Fixed 15/1/97 (2/3 days)
61104	Agri-Ware Ltd & Anr. V Riddles (Sen) & Riddles (Jnr)	30/11/94	Action settled 13/3/95 Motion on Notice fixed for 5/12/96 (2 days)
—	Auld V Nestle UK Ltd	5/ 9/96	
65740	Armstrong V Breamar Construction (NI) Ltd	29/10/96	
"B"			
{ 61580	Boorman & Owen t/a Boorman Owen Ass V Irish Life Ass. PLC	16/ 2/95	} TBM 8/11/96 (Settled)
{ 65450	Lavery V Irish Life Ass. PLC	23/10/95	
{ 61581	McPhilips V Irish Life Ass. PLC	15/ 2/95	
{ 65381	McPartland V Irish Life Ass. PLC	10/10/95	
62169	Britannia Life Ass. of Scotland Ltd V Magee & JMJ Contractors Ltd	31/ 5/95	Fixed 2/12/96 (1 week)
—	Beaufort Developments (NI) Ltd V Gilbert-Ash (NI) Ltd & Parker & Scott p/a Parker & Scott Solicitors	23/ 4/96	Appeal from Pringle J. to COURT OF APPEAL Listed for 18/11/96
—	Blick Time Systems Ltd V Hylands & Others	18/ 4/96	
655557	Bothwell V Strathroy Milk Marketing Ltd & another	13/ 5/96	T/O 14/10 Carswell LJ Late service of Reply & Defence to Claim
64788	Bell V Owens & Ors	29/ 5/96	Fixed 27/11/96 (3 days)
{ —	Belfast City Hosp. Health & Social Services Trust V Mirrlees Blackstone (Stamford) Ltd & Ano.	12/ 9/96	}
{ 65550	Mirrless Blackstone Ltd V Belfast City Hospital Health & Social Services Trust		
—	BioMar Ltd V Mairs T/A Glen Oak Fisheries	15/10/96	

Conference on Case Management

List No.	Title	Entry Date	Remarks
"C" 62755	Carryduff Auctions Ltd V Colas (NI) Ltd & ano	23/ 8/95	
{ —	Craigavon Borough Council V James M McCormick & Company	21/12/95	
{ —	Craigavon Borough Council V Gilbert-Ash NI Ltd & James McCormick & Co	21/12/95	
57708	Ceramic Linings Ltd V Mallon & Ors p/a Mallon & Haughey & Speers	8/ 1/96	Pltf. Co Wound up & Official Receiver apptd.
64055	Coastal Container Holdings Ltd V The Mersey Docks & Harbour Co.	9/ 2/96	Fixed 20/11/96 (4 days)
64427	Cullen t/a Raymond Cullen & Sons V Dredging International (UK) Ltd	14/ 2/96	Fixed 21/11/96 (3 days)
64466	Carey V Limavady Building Co Ltd & Others	15/ 4/96	Fixed 3/12/96 (3 days)
64554	Campbell & Campbell V McQuilty & Co. Ltd T/a "McQuilty Ross"	15/ 4/96	Fixed 22/ 1/97 (3 days)
—	Collins V Bangor Football & Athletic Club Ltd.	15/ 5/96	
65531	Crozier & ano t/a Commercial Negotiation V Breen, Breen and Keelco Ltd.	29/ 5/96	
63648	Cichton V Fincombe Limited	4/ 6/96	Fixed 28/11/96 (2 days)
64979	Christie & Christie t/a Christie Devs. V Russell McConville Ass.	19/ 6/96	Fixed 11/12/96 (3 days)
{ —	Cummins V Willis Wrightson Harris Marrian Ltd.	2/ 9/96	
{ —	Cummins V Willis Corron Harris Marrian Ltd.	23/ 9/96	
63786	Carson, Mills & Kelso etc Members of Mallusk Angling Society V Wimprey Hobbs Limited	18/ 9/96	Fixed 4/2/97 (3 days)
"D" 60408	James Dowling Ltd (In Admin. Receivership) V Moberge Ltd.	27/ 7/94	Settled consent to be filed T/O 12/11/96
63232	Dungannon District Council V Kennedy & ano T/a Kennedy Fitzgerald & Associates; Tyrone Brick Ltd & Heron Bros. Ltd. (Third Parties)	7/11/95	
—	Dunnes Holding Co. & ano V NI Insurance Brokers Limited	15/ 3/96	

The Honourable Mr. Justice Brian Kerr

List No.	Title	Entry Date	Remarks
65368	Department of Environment for NI V Tayto (NI) Ltd	26/ 3/96	
64565	Dowling & Dowling V Halifax Building Society & Halifax Estate Agencies Ltd t/a Colleys	15/ 4/96	Fixed 4/12/96 (3 days)
—	Dunnes Stores (Bangor) Ltd V Deramore Lamont Ltd	19/ 6/96	
	Dunnes Stores (Bangor) Ltd V Deramore Lamont Ltd & GUS Property Management Ltd.	19/ 6/96	
65268	Derry T/A Derry Bros. V JE Coulter (Trucks) Ltd, Humberclyde Finance Ltd & Renault V I United Kingdom Ltd	23/ 8/96	
“F”			
—	Victor Fulton Ltd & ors V Snape, Cummins & InterClean Hygiene Cleaning Supplies Ltd.	29/ 3/96	
64543	Farrar V Erin-Gardena Limited	15/ 4/96	
“G”			
62389	Grant V Sec of State for NI & others	16/ 1/95	
62390	City & County Pharmacies Ltd V Sec of State for NI & others		
—	Glenmills Dairy Ltd V McEvoy & McEvoy t/a Glen Dairy Farms	6/ 3/96	
64733	Green and Curran V Curran	2/ 7/96	Fixed 18/12/96 (2 days)
65681	Group 4 Securitas NI Ltd V Montupet (UK) Ltd.	16/10/96	
65612	Graham & Graham V city Fire Insurance Co. Ltd and others	29/10/96	
“H”			
64932	Hamilton V McBurney & Co (a firm) and McBurney	16/10/96	
“I”			
—	IT Records and Tapes Ltd V Stewarts Supermarkets Ltd; BI Services Ltd (3rd Party)	21/ 9/95	
—	McKnight formerly Country Cooking V Stewarts Supermarkets Ltd; BI Services Ltd (3rd Party)	21/ 9/95	
—	Stewart Miller & Sons Ltd V Stewarts Supermarkets Ltd; BI Services Ltd (3rd Party)	21/ 9/95	Fixed 3/ 2/97 (2 days)
—	Wilson V Stewarts Supermarkets Ltd; BI Services Ltd (3rd Party)	21/ 9/95	
—	W McCalla & Co. Ltd V Stewarts Supermarkets Ltd; BI Services Ltd (3rd Party)	21/ 9/95	

Conference on Case Management

List No.	Title	Entry Date	Remarks
65325	Interland Transport (Belfast) Ltd V Lavery T/a Lavery Haulage	30/ 1/96	Fixed 19/11/96 (1 day)
65551	IM Properties Finance Limited V Dunnes Stores (Bangor) Limited	30/ 1/96	
<i>"J"</i>			
64124	Jardine V Haughey & ors p/a Mallon & Haughey Solicitors	23/ 2/96	Fixed 13/1/97 (3 days)
<i>"K"</i>			
61458	Kearney t/a Eugene Kearney & Son Structural Engineering Ltd; Steelwork & Cladding Ltd. (3rd Party)	6/ 4/95	T/Q/7/10/96 — Related Writ issued 26/9/96
—	Magherafelt District Council V Kearney t/a Eugene Kearney & Son & ors	3/10/96	
64141	Killeen V Dungarvan & District Co-Operative Enterprises Ltd & Anor	23/ 2/96	Fixed 25/11/96 (4 weeks)
65133	Killiner McCourt Ltd V McMitchell	23/ 5/96	Fixed 8/1/97 (3 days)
—	John Kelly Ltd V Pyper and Craig	19/ 9/96	
65648	Robert Kirk Limited V PJ Conway (Contractors) Ltd.	29/10/95	
<i>"L"</i>			
61805	Logan V Rank Zerox (UK) Ltd & RX Pensions Ltd	20/ 3/95	Fixed 20/1/97 (4 days)
—	Logan V Rank (UK) Limited	8/ 5/96	
62648	Lennon t/a Status Contracts V O'Hare & Pewter Investments Limited	7/ 9/96	Fixed 12/12/96 (4 days)
65080	Loxroy Limited V FG Wilson (Engineering) Limited	29/11/95	Fixed 7/1/97 (3 days)
64360	Lannon t/a Lenco Status V McSorley t/a The Roost Bar	20/ 3/96	Fixed 14/11/96 (2 days)
—	Lombard & Ulster Limited V O'Hara & Adelaide Finance Ltd; McGinn Freight (Heavy Haulage) Limited (3rd Party); O'Hara (4th Party)	15/ 5/96	
64912	Lomac Tiles Ltd V Mivan Marine Ltd	22/ 5/96	Fixed 21/ 1/97 (3 days)
—	John Laing Construction Ltd V Kilmorey Arms Hotel Ltd	25/10/96	
<i>"M"</i>			
64327	Molloy & Molloy V Mellon & McCormick t/a McCormick Design and Omagh District Council	19/ 9/94	Fixed 18/11/96 (1 week)

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List No.	Title	Entry Date	Remarks
63337	Markey V O'Hare & Donington Ltd	14/12/95	Fixed 9/12/95 (3 days)
64511	Mahon V Hull	15/ 4/96	
"Mc"			
61474	McGrath V Northern Ireland Housing Executive	18/10/95	
64726	McConachie t/a Park Electrical Services V Square "D" (UK) Ltd	22/ 1/96	
64547	McCann & McCann V Morgan	27/ 2/96	Fixed 26/11/96 (5 days)
—	McBurney V Lewis and Morgan's of USK Limited	29/ 4/96	
54378	McQuaid V McQuaid The Insurance Corporation of Ireland PLC and Leer	15/ 5/96	Fixed 6/ 1/97 (3 days)
64651	McKay t/a NCC Systems V Alex Morton Welding Contracts and Police Authority for N. Ireland	2/ 5/96	
65159	McCadden Design Group (a firm) V The Salmon Leap Limited	21/ 5/96	
65294	McSpadden & McCall V McFarland MacCorkell & Graham and others	27/ 6/96	
65410	McMullen Architectural Systems Ltd V Pilkington Ltd Glass T/A Pilkington Architectural	23/ 8/96	
65524	McNally V Bogue and McNulty Trading as Bogue & McNulty	25/ 9/96	
—	McDonald V Harford, Ewing, Cairns & McKeegan	29/10/96	
"N"			
—	North eastern Education & Library Board V Kart Construction Ltd & Ors	10/10/94	Appeal to COURT OF APPEAL to be withdrawn
61866	North Down Building Co Ltd V Holmes & Holmes (By original action) and Holmes & Holmes V North Down Building Co Ltd & Coey & Whitley p/a Coey Whitley (By counterclaim)	21/ 3/95	Fixed 6/11/96 (2 weeks)
65281	Norbrook Laboratories Limited V Southtrim Autoclaves Ltd	11/12/95	
—	North Shore Marina Services Limited V Monaghan	18/ 4/96	
—	Northern Bank Limited V Moore	4/ 6/96	

Conference on Case Management

List No.	Title	Entry Date	Remarks
64080	Northern Ireland Housing Executive V Slane T/a Slane Brothers	19/ 6/96	Fixed 19/12/96 (1 day)
—	North Western Diving Company Ltd V Marine Blast Limited	21/ 6/96	
—	Nicholl (Fuel Oils) Ltd V Gordon T/A Gordon Fuels	16/10/96	
“O”			
65643	O'Neill V Wm. Laughlin & Sons Ltd	29/10/96	
“P”			
—	Peninsula Hi-tech Limited V AVM Telecom Limited	29/ 4/96	Fixed 7/11/96 ($\frac{1}{2}$ day)
65560	Pallett Services (NI) Ltd V Hogg; Dale Insurance Underwriting Services Ltd. (Third Party)	8/10/96	
“R”			
62718	R & A Developments Ltd V Cresta Building Services (Larne) Limited	21/ 9/95	Fixed 16/12/96 (3 days)
62070	Russell & McConville t/a Russell McConville Associates V Miskelly	26/ 1/96	Fixed 11/11/96 (3 days)
64706	Royal British Legion Housing Association (NI) Limited V WDR & RT Taggart (a firm) and Louerne Homes Limited	2/ 5/96	
65132	Russell Simpson Construction Co Ltd V Charles Hurst Limited	2/ 9/96	
—	Robinson & McIlwaine (a firm) V Ryobi Aluminium Casting (UK) Ltd	7/10/96	
63090	Rankin & Rankin T/A Rankin Brothers V Nelson	29/10/96	
“S”			
{ 65492	Spence t/a DSD Design V Beltany Limited & Heron Brothers Limited	25/ 4/95	
{ 65491	Heron Brothers Limited V Castle Entertainment Centre Ltd & Ors	23/11/95	
61535	Scott Feeds Limited V McKeever and Finnegan; Silver Hill Duckling Limited (3rd Party)	31/ 5/96	T/O 17/10/96 2nd Dft ill.
{ —	Stewart V Glendinning and Glendinning	2/10/95	
{ —	Glendinning & Glendinning V McCausland	15/ 4/96	

The Honourable Mr. Justice Brian Kerr

List No.	Title	Entry Date	Remarks
62895	Sherwood Systems Limited V Moyola Cellars Ltd	18/10/95	Fixed 27/1/97 (2/3 weeks)
63115	Sherwood Systems Limited V Moyola Cellars Ltd	18/10/95	
—	St. Canice's Educational Trust V Hegarty & others P/a HMD Chartered Architects	2/ 5/96	
—	Sydney & Antrim Properties Ltd V Dunnes Stores (Bangor) Ltd	23/ 8/96	
—	Schmale V Schmale (otherwise Small)	29/10/96	
<i>"T"</i>			
64166	Tweed V Lindsay and others	21/ 2/96	Fixed 10/12/96 (3 days)
65353	Trio-Kenwood UK Limited V Michael Black (NI) Limited	23/ 8/96	Fixed 14/ 1/97 (2 days)
65597	Tolan & Per Rep of Tolán Dec/d V Kane Design Ltd and Logue T/A Logue Engineering	16/10/96	
<i>"U"</i>			
—	Utilicom V Northern Ireland Housing Executive	19/ 9/96	Preliminary Issue to be set down for trial on 11/12/96
65608	Ulster Factors Ltd V The Mayor & Councillors of Lisburn Borough Council	7/10/96	Fixed 19/11/96 (1 day)
<i>"W"</i>			
60683	Walker Air Conditioning Limited V A & N Shilliday & Company Limited	3/ 5/95	
62298	Silent Valley Foods Limited V A & N Shilliday & Company Limited; Walker Air Conditioning Limited (3rd Party)	3/ 5/95	
64111	Wilson & Wilson V McNicholl p/a Francis J McNicholl	23/ 2/96	Action settled: consent to be filed a.s.a.p.
65532	Wallace V Henry Brothers (Magherafelt) Limited	26/ 2/96	Fixed 16/1/97 (2/3 days)
64260	Watt V Lummus Mackie	23/ 2/96	Fixed 17/12/96 (2/3 days)
65382	Wellington Park Development Company Limited V McClure & Shelvin p/a McClure & Company and Brady	6/ 6/96	Fixed 19/12/96 (1 day)
—	Wilson t/a Wilplas UPVC V BCE Cellular Extrusions Limited	6/ 6/95	Prel. issue re Jurisdiction Fixed 15/11/96 (½ day)
65391	Walsh-Dunseith V The Royal London General Insurance Co Ltd and Granleese T/A P & R Properties	29/10/96	
<i>"Y"</i>			
64505	York Superbowl Limited V The Savoy (Newry) Limited	15/ 4/96	

DOCUMENT H

QUEEN'S BENCH DIVISION
(Commercial List)
Actions Entered in Commercial List And Disposed Of

Return for the Month of October 1996

Type	Actions Pending (1)	Entered in Commercial List (2)	Set Down during Month (3)	Total Actions (4)	Disposal				Total (9)	Actions Pending (10)
					Tried (5)	Settled in Court (6)	Remitted (7)	Settled by Consent (8)		
Set down	83	11	+4	98	2	13	0	1*	16	82
Not set down	43	6	-4	45		3	0	1	4	41
Total	126	17		143	2	16	0	2	20	123

Judges sitting in Chambers 15

*Discontinued

Signed
(Registrar of the Commercial List)

Date 31/10/96

CHAPTER 9

The History of Delay Reduction and Delay Prevention Efforts in American Courts

Presentation by *Mr. David C. Steelman, Senior Staff Attorney, National Center for State Courts, United States of America*

NATIONAL CENTER FOR STATE COURTS

This paper has been prepared for a presentation at a case management conference on November 16, 1996, in Dublin, Ireland, organized by the Working Group on a Courts Commission, which is chaired by Mrs. Justice Susan Denham, Judge of the Supreme Court of Ireland. The views expressed here are those of the author and do not necessarily represent the official policies or positions of the National Center for State Courts. The Supreme Court of Ireland and the Working Group on a Courts Commission have a royalty-free right to use, reproduce, or distribute all or any part of this document, and to authorize its use by others for any legitimate public purpose.

THE HISTORY OF DELAY REDUCTION AND DELAY PREVENTION EFFORTS IN AMERICAN COURTS

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THE HISTORY OF DELAY REDUCTION AND DELAY PREVENTION EFFORTS IN AMERICAN COURTS

David C. Steelman⁷

November 1996.

Of all the problems facing court leaders, few have been more difficult than court congestion and delay. The assertion that “justice delayed is justice denied” is one of the most frequently-quoted themes in the discourse of American court management. In recent decades, both federal and state courts in America have given considerable attention to this problem. This paper reviews the course of delay reduction and delay prevention efforts in American courts, with particular attention to the pace of litigation for civil and criminal cases in state trial courts between the mid-1970s and the early 1990s.

I. A RECURRING PROBLEM OVER THE CENTURIES

Delay in the courts is not a new problem. Over the centuries, various writers have referred to it as a problem for society. American courts have been no more free from delay than European courts.

A. Court Delay in Western Civilization

The great literature of western civilization suggests that court delay has been an ancient and persistent problem. In the Old Testament, the prophet Habakkuk complained of the social iniquity of his day and observed that, “The law is slackened, and judgment doth never go forth.”⁸ The poet Juvenal, satirizing the vices and follies of Roman society in the first and second centuries, referred to “the slow drag-train of the law’s delay.”⁹ Johann Wolfgang Goethe wrote of the Reichskammer Court in Wetzlar, where he practiced law briefly in the eighteenth century, that, “It was not unusual for a case to remain on the docket for more than a hundred years.”¹⁰ And in the mid-nineteenth century, Charles Dickens described an English Chancery Court matter “which was commenced twenty years ago . . . and which is (I am

⁷ Senior attorney with the National Center for State Courts, which has headquarters in Williamsburg, Virginia, in the United States.

⁸ Habakkuk 1:4.

⁹ Juvenal, *Satires* 16.68.

¹⁰ J.W. Goethe, *Aus Meinem Leben, Dichtung und Wahrheit*, chapter 12 (1811-22), as quoted in H. P. Haynes, “Reducing Court Delay,” in *National Symposium on Law Enforcement Science and Technology: Reducing Court Delay*, 45 (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1973).

assured) no nearer to its termination than when it was begun,” as one of the real-life examples for his fictional case of *Jarndyce and Jarndyce*.¹¹

B. The American Experience Up to the Early 1970s

Courts in the United States have hardly been immune to the enduring problem of court delay. In criminal matters, the right to a speedy trial is enshrined in the US Constitution¹² and in almost every state constitution.¹³ Yet for nearly two centuries the right to speedy trial received little attention from either courts or legislatures. In 1905, the US Supreme Court held that, “The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.”¹⁴ It was not until 1967 that the US Supreme Court held that the speedy-trial provisions of the Sixth Amendment to the US Constitution apply through the 14th Amendment due-process clause to criminal proceedings in state courts.¹⁵ And only after the US Supreme Court’s 1972 decision in *Barker v. Wingo*¹⁶ did the US Congress pass legislation mandating speedy trials in federal courts.¹⁷

Traditionally, there have been no comparable imperatives for the speedy adjudication of civil matters in American courts. David Dudley Field (whose Field Code of Civil Procedure for New York State influenced the federal court system and many other American states, as well as England and Ireland) wrote in an 1839 letter that, “Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare.”¹⁸

Dean Roscoe Pound (a seminal figure in the twentieth-century American court reform movement) spoke of the “uncertainty, delay and expense” of court proceedings as being among “The Causes of Popular Dissatisfaction with the Administration of Justice,” in his famous 1906 speech at an American Bar Association (ABA) meeting.¹⁹ In the years after that speech, there were occasional efforts to examine the

¹¹ C. Dickens, preface to *Bleak House* (1853).

¹² US Const. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”

¹³ B. Fort, *Speedy Trial: A Bibliography and Comparative Analysis of Speedy Trial Provisions*, p. 148 (1978), as cited in J. Trotter and C. Cooper, “State Trial Court Delay: Efforts at Reform” [hereinafter, Trotter and Cooper, “State Court Delay”], 31 *Amer.U.L.Rev.* 213, at 214. (1982).

¹⁴ *Beavers v. Haubert*, 198 US 77 (1905).

¹⁵ *Klopfer v. North Carolina*, 386 US 213 (1967).

¹⁶ 407 US 514 (1972).

¹⁷ Federal Speedy Trial Act of 1974, 18 USC §§3161-3174 (1976).

¹⁸ As quoted in A. Vanderbilt, “Improving the Administration of Justice — Two Decades of Development,” 26 *U.Cin.L.Rev.* 155, at 157 (1957).

¹⁹ 29 *ABA Reports* 395 (1906), reprinted, 35 *FRD.* 273, at 284 (1964).

organization and structure of state court systems.²⁰ Stung by Pound's analysis, however, judges and lawyers were not eager to accept or implement the changes that he urged.

As a result, Chief Justice Arthur T. Vanderbilt of New Jersey could still write in 1957 that "complaints about the evil of delay in litigation come from every quarter" of American society.²¹ By the time of Vanderbilt's 1957 article and the 1967 US Supreme Court speedy-trial decisions in 1967 and 1972, pressures were building in American society for its courts to come to grips with the problem of delay.²²

II. DEFINITION AND MEASUREMENT OF COURT DELAY AFTER 1970

In the 1970s, an early step in American efforts to understand delay and fashion appropriate remedies was to reach agreement on the answer to questions relating to the definition and measurement of delay. What do we mean when we use the word "delay?" When we measure elapsed time in the court process, what should our starting and ending points be, and should we limit our measurement only to cases with certain types of disposition? If "delay" applies only to those cases pending disposition for an "unacceptable" length of time, by what criteria do we ascertain what length of time is "unacceptable?" In the court environment, by what methods can we study delay so that we can achieve results reliable enough to form the basis for valid conclusions? It was only after a general consensus was reached on the answers to these questions that American court leaders and researchers were able to undertake cross-jurisdictional studies that would form the basis for a new understanding of the nature and causes of delay in the courts.

A. Changes in the Definition of Delay²³

In much of the literature on court delay published before the 1970s, the word "delay" was considered self-evident and was seldom defined. The

²⁰ See, for example, A. Vanderbilt, *The Challenge of Court Reform* (1955); and Shafroth, "Improving Judicial Administration in the State Courts," 8 *Mo.L.Rev.* 1 (1943).

²¹ Vanderbilt, *supra*, 26 *U.Cin.L.Rev.* at 155.

²² Population growth and changes in society led to a great increase in the volume and complexity of civil and criminal cases filed in the state courts. See T. Church, J. Lee, T. Tan, and V. McConnell, *Pretrial Delay: A Review and Bibliography* [hereinafter, Church, *Pretrial Delay* (1978)], pp. 24-25 (1978). Key among the factors contributing to this development were the growth of automobile use, leading to a phenomenal increase in personal injury litigation, and the US Supreme Court's holdings that the right to counsel in felony cases and a wide panoply of other procedural rights were applicable in state court criminal cases through the fourteenth amendment due process clause. See Trotter and Cooper "State Court Delay," 31 *Amer.U.L.Rev.* at 219-220.

terms “backlog” and “congestion” were often used interchangeably with “delay” to describe a court experiencing difficulty with its caseload.²⁴ It was not until the mid-1970s, when the Law Enforcement Assistance Administration in the US Justice Department instituted a “Court Delay Reduction Program,” that a distinction was made between “acceptable delay” and “unacceptable delay:”

‘Acceptable delay’ was defined as that span of case processing time, between critical events . . . considered to be reasonable or ‘tolerable’ in the jurisdiction. ‘Unacceptable delay’ was defined as that amount of time . . . which exceeds tolerable time limits.²⁵

The general consensus about the definition of “delay” was eventually expressed by the ABA’s National Conference of State Trial Judges in 1984: “Delay is declared to be any elapsed time beyond that necessary to prepare and conclude a particular case.”²⁶ Before further consensus could be reached on what might generally be considered an “acceptable” period of time for the disposition of cases, however, it was necessary to reach agreement on the critical events between which delay should be measured.

B. Changes in Ways of Measuring Delay

Beginning in June 1953 and continuing once a year until September 1974, the Institute of Judicial Administration (IJA) undertook calendar status studies by which its researchers sought to gain comparable data on a state-by-state basis on court congestion and trial delay in civil cases in the principal trial courts of general jurisdiction in all the states.²⁷ The information that IJA asked officials in about 100 courts to report each year was the average time to trial (in months) for civil cases

²³ In the title to this paper, the phrase “delay reduction” is followed by the term “delay prevention.” It is worthwhile to consider these as two related but separate notions, suggesting that attention to problems of court delay is not just a one-time affair, but rather is an important aspect of the ongoing management of the business of the courts. American courts troubled by having a large number of cases pending for an unacceptable period of time have introduced “delay reduction” programs involving steps to reduce the size and age of their pending inventories. The courts that have avoided a *return* to such troubles, and instead been able to maintain the size and age of their pending inventories at a more suitable level, have done so by implementing an entirely different set of strategies, as part of what might properly be called their “delay prevention” programs.

²⁴ See Church, *Pretrial Delay* (1978), p. 1.

²⁵ Trotter and Cooper, “State Court Delay,” 31 *Amer.U.L.Rev.* at 221.

²⁶ ABA National Conference of State Trial Judges, *Standards Relating to Court Delay Reduction*. Sec. 2.50 *Commentary* (1984) [hereinafter, ABA, *Delay Reduction Standards* (1984)].

²⁷ Institute for Judicial Administration (IJA), “State Trial Courts of General Jurisdiction: Calendar Status Study” (1953-1974).

disposed by trial. They did not request information on cases disposed by settlement or other nontrial means.

In the studies for 1953, 1954 and 1955, the time measurements were from the time that each case was “at issue” (that is, the time when a case was ready to be set for trial — when preliminary motions and demurrers had been disposed and final pleadings on both sides had been filed). For some states, cases were considered “at issue” when a first responsive pleading had been filed. In others, however, cases were not considered ready for placement on the trial calendar until a “note of issue” was filed at or near the conclusion of discovery. In 1956, IJA therefore expanded its survey to include time from “first filing” to trial as well as that from “at issue” to trial.²⁸ Starting in 1963, however, the IJA studies began measuring elapsed time from the date of service of an answer until the date of trial, being concerned that service of process would usually be beyond the court’s control, and that there would in effect be no “case” until jurisdiction of a defendant had been obtained by service. Because procedures varied so much from state to state, “at issue” was dropped as a starting point.²⁹

The calendar status studies by IJA from 1953 through 1974 raised two questions about the measurement of delay in courts. First, should we measure time to disposition for all cases, regardless of disposition method, or should we be concerned only with cases that went to trial? Second, should we measure time from the initial filing invoking the court’s jurisdiction, from issue joinder when a defendant has been served and brought within the jurisdiction of the court, or from trial readiness after the conclusion of any discovery?

In criminal cases, there had long been agreement that the courts are responsible for cases from the time they are filed. With regard to civil cases, however, there was serious debate over these questions among researchers studying American trial courts before the mid-1970s. Professors Zeisel, Kalven and Buchholz,³⁰ as well as Rosenberg and Sovern,³¹ were among those who argued that only the time from trial readiness to trial is significant (because elapsed time before that is in the control of counsel and parties and not the court) and that elapsed time for jury trial cases is most important (because they are

²⁸ See IJA, “State Trial Courts of General Jurisdiction: Calendar Status Study — 1956,” p. 1 (June 30, 1956).

²⁹ See IJA, “State Trial Courts of General Jurisdiction: Calendar Status Study — 1963,” pp. 1-2 (July 15, 1963).

³⁰ See H. Zeisel, H. Kalven and B. Buchholz, *Delay in the Court*, p. 5 (1959, reprint 1978) [hereinafter, Zeisel, *Delay in the Court* (1978 reprint)].

³¹ See M. Rosenberg and M.I. Sovern, “Delay and the Dynamics of Personal Injury Litigation,” 59 *Columbia L.Rev.* 1115, at 1124-26 (1959).

overwhelmingly the most time-consuming events in the civil court process for judges). Others, such as Solomon³² and Flanders, S. Flanders,³³ urged a much broader court role in civil cases.

They argued that delay should be measured from the time of initial filing to the time of disposition for *all* cases, regardless of the manner of disposition.

Essentially because focus only on jury trial cases would overlook the vast majority of cases that are disposed by settlement or other means, and because attention to cases only after trial readiness would cause courts to ignore responsibility for *every* case before them, that position was ultimately rejected. In 1976, ABA standards for trial courts provided that, “The court should supervise and control the movement of all cases on its docket from the time of filing through final disposition;” yet they limited consideration of “timely disposition” to trials or hearings on the merits of cases.³⁴ In 1984, however, ABA standards were revised to reflect the new general consensus: “From the commencement of litigation to its conclusion, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated,” and references to “timely disposition” related to all cases, and not just to cases disposed by trial.³⁵

Those same 1984 standards, developed by a committee of the National Conference of State Trial Judges, included standards by which to measure timely disposition, including the following standards for general civil cases and felonies:

General Civil — 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur.

Criminal Felony — 90% of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arrest; 98% within 180 days and 100% within one year.

³² M. Solomon, *Caseflow Management in the Trial Court* (1973) [hereinafter, Solomon, *Caseflow Management* (1973)].

³³ *Case Management and Court Management in United States District Courts* (1977) [hereinafter, Flanders, *Case Management* (1977)].

³⁴ See ABA, *Standards Relating to Trial Courts*, Sec. 2.50 and Sec. 2.52 (1976).

³⁵ ABA, *Delay Reduction Standards* (1984), Sec. 2.50 and Sec. 2.52.

These standards were offered as goals that a court system should reach and maintain, providing measurable objectives toward which planning could be directed. They were designed to strike a balance between (a) allowing litigants enough time to develop their cases and exercise procedural rights, and (b) barring delay due to neglect by either court or counsel.

C. Results of Pivotal Multijurisdictional Studies Measuring Delay

Before the 1970s, virtually all studies of court delay focused on just one court, such as the classic 1959 study of court congestion in Manhattan by Zeisel, Kalven and Buchholz.³⁶ The major exceptions to this were the IJA calendar status studies. These studies found a general overall correlation between the size of the population of the county area of a court's jurisdiction and the delays experienced in reaching trial, although the range among courts within broad levels of population was wide. The correlation between population and calendar congestion was found *not* to be a necessary one, however. Some courts in small counties had longer delays than those serving large counties; and some courts in large metropolitan areas were relatively current. It was not possible to assess the reasons for such variations. Researchers observed that delay is sometimes not solely within court control, for cases might not always be made ready for trial by counsel within a reasonable time, and adjournments might often be granted two or three times at the request of counsel.³⁷

For at least the first ten years of the IJA studies, elapsed time figures were supplied by the courts themselves. Ordinarily, they reflected the first five personal-injury cases tried to a jury verdict.³⁸ By 1966, however, data reflected in the studies were based on samples of the actual number of cases going to jury trials in the reporting courts, with sample sizes ranging from all cases (in courts with 17 or fewer jury trials) to 82 cases (in those with 1,001 or more jury trials). The data continued, however, to be based on figures supplied by the courts themselves.³⁹

One of the first studies to overcome the methodological constraints reflected in the IJA calendar status studies was a 1977 study of US District Courts by Steven Flanders and other staff members of the Federal Judicial Center, based on data from fiscal years 1974 and 1975.

³⁶ See Zeisel, *Delay in the Court* (1978 reprint); see also, parts II and III of the annotated bibliography in Church, *Pretrial Delay* (1978), pp. 54-74.

³⁷ See IJA, "State Trial Courts of General Jurisdiction: Calendar Status Study — 1963" (July 15, 1963).

³⁸ *Ibid.*

³⁹ See IJA, "State Trial Courts of General Jurisdiction: Calendar Status Study — 1966" (August 9, 1966).

The goal of the study was “to identify the differences between fast courts (those that process cases quickly) and slow courts (those that process cases slowly), and between courts with high disposition rates and low disposition rates.”⁴⁰ Based on interviews with judges and attorneys, court observations, and analysis of detailed samples of closed cases, the study concluded that the following procedures distinguished fast or highly productive courts from others:⁴¹

An automatic procedure, invoked at the start of every case and subject to few exceptions, whereby pleadings are strictly monitored, discovery begins quickly and is completed within a reasonable time, and a prompt trial follows if needed.

Procedures that minimize or eliminate judges’ investment of time through the early stages of a case, until discovery is complete: docket control, attorney contacts and most conferences are delegated, generally to the courtroom deputy clerk or magistrate.

The role of the court in settlement is minimized: judges are highly selective in initiating settlement negotiations, and they normally do so only when a case is nearly ready for trial. Relatively few written opinions are prepared for publication. All proceedings that do not specifically require a confidential setting are held in open court.

The first comprehensive and rigorous national study of delay in state courts was led by Professor Thomas Church in a collaboration between the National Center for State Courts (NCSC) and the National Conference of Metropolitan Courts, with funding from the Law Enforcement Assistance Administration (LEAA) in the US Justice Department.⁴² Examining the pace of civil and criminal litigation in 21 state trial courts of general jurisdiction, this study’s goals were to provide a national context for the concept of “delay,” to determine why cases move faster in some courts than in others, and to evaluate the most promising remedies for expediting litigation. Church’s study concluded that:⁴³

“The speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed *and* backlog are determined in large part by established expectations, practices, and

⁴⁰ Flanders, *Case Management* (1977), p. 1.

⁴¹ *Ibid.*, ix-x.

⁴² T. Church, A. Carlson, J. Lee, and T. Tan, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978) [hereinafter, Church, *Justice Delayed* (1978)].

⁴³ *Ibid.*, p. 54.

informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the 'local legal culture.' Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys' offices. These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Thus most structural and caseload variables fail to explain interjurisdictional differences in the pace of litigation. In addition, we can begin to understand the extraordinary resistance of court delay to remedies based on court resources or procedures."

Church and his colleagues continued with the observation that trial court delay is not inevitable, but that "changes in case processing speed will necessarily require changes in the attitudes and practices of all members of a legal community." To achieve an accelerated pace of litigation in a court, "the crucial element . . . is concern on the part of judges with the problem of court delay and a firm commitment to do something about it."⁴⁴ They found that attempts to alter individual judge caseloads by adding judges or decreasing filings is not likely to increase either productivity or speed. To reduce pretrial delay, they recommended that courts:

Establish management systems by which the court, and not the attorneys, controls the progress of cases. Use trial-scheduling practices and continuance policies that operate to create an expectation on the part of all concerned that a trial will begin on the first date scheduled. Emphasize court readiness to try cases, instead of court involvement in case settlement activities, as a means to induce settlements. Increase judicial accountability and productivity in civil cases, perhaps through the institution of the "individual calendar" method of assigning cases to judges. Increase effectiveness of speedy-trial standards for criminal cases through the introduction of operational consequences for their violation and through reduced ease of waiver by defendants.

Taken together, the studies by Flanders and Church contributed to a shift in the terms by which causes and remedies for delay in American courts were discussed. They laid the groundwork for the implementation in many courts in the 1980s of approaches to delay emphasizing early

⁴⁴ *Ibid.*, p. 83.

court intervention in cases and active court oversight of their progress to disposition.

III. THE EMERGENCE OF COURT CASEFLOW MANAGEMENT IN THE 1980s AS A PRINCIPAL MEANS TO ADDRESS DELAY

In the wake of the studies by Flanders and Church, there were a series of further developments. Caseload management theories were tested in practice in selected jurisdictions. There was debate about the implications of early court intervention in cases for the fairness of case outcomes. Further national studies were conducted that confirmed the conclusions of those done in the late 1970s. And the accumulated results of both research and implementation became a “new” conventional wisdom shared widely with judges and court administrators in workshops on caseload management.

A. Multijurisdictional Tests of New Approaches to Delay

Two significant multiple-court efforts were undertaken at the completion of the Church study to test the value of court control of the movement of cases as a way to control delay. The first of these was conducted by a team from the Whittier College of Law. The second — undertaken by the “Reducing Trial Court Delay” project — was a direct followup to the Church study, in which various techniques of case management *by the court* were tested to determine which might be successful. As a result of these tests of caseload management techniques, it seemed clear that active court control of the pretrial movement of its cases to disposition was an effective way to address problems of court delay.

1. Whittier team

While the studies by Flanders and Church were being completed, the Law Enforcement Assistance Administration (LEAA) of the US Justice Department provided funding support for Dean Ernest Friesen and colleagues associated with the Whittier College of Law in Los Angeles to work with a small group of general jurisdiction on the implementation of approaches to reducing delay in felony cases. The Whittier College team’s approach focused on enhancing court control of the felony case process, through (a) the court’s organization for decisionmaking; (b) its organization for case inventory control; (c) use of arraignment in the general-jurisdiction court as a key control point; (d) development of operating standards to provide control; (e) provision of statistical information for control; and (f) ensuring adequate resources to support

control.⁴⁵ Whittier team members worked with court officials, prosecutors and others in courts hearing felony matters (in Providence, Rhode Island; Dayton, Ohio; Miami, Florida; and Harris County, Texas) to change their expectations about the pace of felony case progress. In effect, they sought to change the “local legal culture” in these courts with regard to felony cases. Each of the courts showed significant success, and efforts in two of the courts (Providence and Dayton) were the subject of an independent evaluation.⁴⁶

By any measure, the *Providence Superior Court* was a court with a severe delay problem in the early 1970s, with criminal cases often taking years to be processed and disposed.

A series of innovations were introduced, including (a) a one-time crash program to remove the old backlog; (b) an administrative order placing all cases on a 90-day track from arraignment to trial date; (c) the involvement of the Whittier team to “resocialize” judges and court personnel with regard to management prerogatives and controls. Local resistance to such alien concepts as plea cutoff dates and reciprocal discovery prevented their implementation. Yet the innovations that were put into effect had a dramatic effect on case processing times, reducing the court’s median time of 277 days from arraignment to disposition in 1976 to one of only 61 days in 1978.

Unlike Providence, the *Montgomery County Court of Common Pleas* in Dayton was not in crisis when its chief judge sought the assistance of the Whittier team in the development of a criminal caseflow management improvement plan. The plan as implemented included (a) giving defendants dates for all court appearances in advance; (b) mandatory provision by the prosecutor of discovery information at the preliminary hearing before bindover to the common pleas court; (c) centralized arraignments in common pleas court; (d) the removal of judges from pretrial negotiations; (e) the implementation at an early scheduling conference of a plea cutoff date, after which a defendant must either go to trial or plead to the highest offense charged; and (f) shortening the time intervals between events in the case process.⁴⁷ While the court was already a fast court at the commencement of the

⁴⁵ See E. Friesen, M. Geiger, J. Jordan and A. Sulmonetti, *Justice in Felony Courts: A Prescription to Control Delay* (1979), pp. 16-27.

⁴⁶ An evaluation of the Whittier team’s efforts in Providence and Dayton was done for LEAA by a team sponsored by the American Judicature Society and reported in D. Neubauer, M. Lipetz, M. Luskin and J. Ryan, *Managing the Pace of Justice: An Evaluation of LEAA’s Court Delay-Reduction Programs* (1981)[hereinafter, Neubauer, *Managing the Pace of Justice* (1981)]. See pp. 10-11 of that report for a discussion of the manner in which the local socio-legal culture (Church’s “local legal culture”) influences delay and delay reduction programs. See pp. 414-432 for the overall results of the evaluation.

⁴⁷ See *Ibid.*, p. 202.

effort, the implementation of the improvement plan had the effect of shortening the median time from arrest to common pleas trial or other disposition by about 38%, from 69 days for cases disposed in 1978 to 43 days for those disposed in 1979.

2. Reducing trial court delay project

Based on the results of the findings in the 1978 Church study, Larry Sipes and staff members of NCSC, with LEAA funding and in cooperation with the National Conference of Metropolitan Courts, assisted the testing of various techniques for case management in several courts: (a) total case management (Phoenix, Arizona, and Cleveland, Ohio); firm trial date and firm continuance policies (Portland, Oregon, Oakland, California, and West Palm Beach, Florida); and an expedited disposition program for older cases (Cambridge, Massachusetts).⁴⁸

The *Cuyahoga County Court of Common Pleas* in Cleveland and the *Maricopa County Superior Court* in Phoenix worked with National Center staff members on the development of a total approach to court management of civil cases. Elements of the approach included (a) development of time standards; (b) monitoring receipt of the answer or other responsive pleading; (c) identifying cases suitable for alternative dispute resolution (ADR); (d) monitoring the filing of a trial-readiness document; (e) developing realistic trial-setting policies; (f) applying a firm continuance policy; (g) giving special attention to older cases; and (h) developing a useful information system. An experimental team of judges in each court agreed to implement this approach, with other judges serving as a "control group." In both courts the approach was a success. The combined pending case inventories of participating judges dropped significantly when compared with the rest of the judges in their respective courts: in Phoenix, by 36%, and in Cleveland by almost 12%.

The participants in the project reasoned that a court that is able or willing to undertake only partial management of the litigation process can profitably concentrate on trial dates and continuances, since research results from the studies by Flanders and Church suggested that early and firm trial dates are associated with more prompt disposition of cases. An effort to introduce firm trial dates and limit continuances was undertaken by the court in Phoenix, as well as by the *Multnomah County Circuit Court* in Portland, Oregon; the *Alameda County Superior Court* in Oakland, California; and the *15th Judicial*

⁴⁸ See L. Sipes, *Managing to Reduce Delay*, pp. 3-5 and 6-19 (revised and abridged edition, 1982).

Circuit Court in West Palm Beach, Florida. The different courts' experiments with firm trial dates produced mixed results, suggesting that rates of case termination are sensitive to the number of cases set for trial in relation to expectations about the portion of those that would be tried, settled, or continued. In Phoenix and Portland, where the experiment was with civil cases, there was a surge of dispositions by settlement by virtue of the fact that trial dates were more certain. In Oakland and West Palm Beach, on the other hand, the experiment was with criminal cases, and the number of cases set for trial was never reduced enough to achieve firmer trial dates. As a result, there was no corresponding change in disposition rates.

Monitoring and moving older cases to disposition can be viewed as the first stage in a total approach to caseload management, or as the first step in instituting a plan where none has previously existed. Emphasis on older civil cases was part of the experiment in Portland; and it was the primary activity in the *Middlesex County Superior Court* in Cambridge, Massachusetts. The first step in each court was to identify the oldest active pending cases as a class of cases deserving priority in the work of the court and the bar. The courts reviewed the cases so identified to determine what actions would be needed to conclude them, followed by planning by the court with counsel to take the necessary steps. In both Portland and Cambridge, the emphasis on older cases resulted in a noticeable increase in disposed cases, suggesting that it is a very easy and effective way to control the age of the pending inventory.

B. The "Old" and the "New" Conventional Wisdom

The efforts by the state trial courts working with the Whittier team and the staff of "Reducing Trial Court Delay" project had the effect of giving practical validation to a theoretical shift regarding the causes and remedies for delay in the courts. Professor Church discussed this shift in a 1982 journal article entitled, "The 'Old' and the 'New' Conventional Wisdom of Court Delay."⁴⁹

According to Church, discourse on court delay assumed until the 1970s that the pace of litigation was determined by court resources and formal rules and procedures. For example, a 1968 review of remedies for court delay discussed the following options: (a) such techniques to reduce inefficiency and delay in a court's calendar procedure as pretrial conferences, trial-readiness rules, and "blockbuster" parts; (b) referral procedures to remove cases from the trial system, such as auditors and

⁴⁹ 7 *Justice System J.* (No. 3, Winter 1992) 395.

compulsory arbitration, and (c) removal of claims from the tort liability system by means such as no-fault basic insurance protection and administrative agency operation of an automobile accident victim compensation program like worker's compensation.⁵⁰

A classic expression of this view was in the 1959 study of delay in the Manhattan trial court by Zeisel, Kalven, and Buchholz. There delay is viewed as a problem of matching resources to workloads, to be cured by additional judge effort (articulated in the number "judge years" needed to eliminate delay), by the adoption of "streamlined" or "businesslike" procedures, such as the use of impartial medical experts or certificates of readiness, or by taking steps to increase the efficient use of judge-time, as by reducing loss of judge days per year or judge hours per day.⁵¹

In contrast to this "old" conventional wisdom, Church's article described the growing emphasis among social scientists on the informal relationships, norms and practices of court practitioners. With regard to criminal matters, Raymond Nimmer referred to the "local discretionary system;"⁵² and David Neubauer used the phrase "local socio-legal culture" in his analysis of factors affecting court delay.⁵³ The studies by Flanders and Church cast doubt on many of the traditional tenets of the old wisdom, Church wrote:⁵⁴

Faster courts were not differentiated from slower ones by their workload, their trial rates and judicial involvement in settlement, the type of cases in their caseload, or by the presence of speedy-trial rules. Rather, it appeared that courts could be relatively speedy despite burdensome caseloads, high trial rates, limited judicial settlement activity and the absence of speedy-trial rules. Conversely, slower courts were frequently found among those with comparatively light caseloads, low trial rates, and all the other presumed determinants of speedy disposition time.

The research by Church and others emphasized the importance of local practices, the centrality of practitioner incentives and the importance of practitioner expectations and norms. Against these factors, a "quick fix" or single "miracle cure" for court delay based on formal rules and procedures (whether a particular system for case assignments to judges, pretrial conference programs, speedy-trial rules, pleading and discovery reforms, or one-time "crash" programs) would

⁵⁰ See Comment, "Remedies to Court Congestion," 19 *Syr.L.Rev.*714 (1968).

⁵¹ Zeisel, *Delay in the Court* (1978 reprint), pp. 8-17.

⁵² See R. Nimmer, "A Slightly Moveable Object: A Case Study in Judicial Reform in the Criminal Justice Process: The Omnibus Hearing," 48 *Denver L.J.* 206 (1976).

⁵³ See Neubauer, *Managing the Pace of Justice* (1981), p. 10.

⁵⁴ Church, 7 *Justice System J.* at 399.

be futile as methods to eliminate delay. In contrast, court control of the pace of litigation through a comprehensive case management program, *if based on a long-term commitment by the court to change practitioner expectations about the pace of litigation*, would have potential for success. It would be necessary, however, to test whether case management techniques, applied in an atmosphere of long-term court commitment to ensuring their success, would yield the desired result of reducing court delay.

C. Concerns About “Managerial Judges.”

Another aspect of the needed further research, wrote Church, would be to ascertain whether there were unanticipated costs to society from too great an emphasis on achievement of speedier dispositions. Such concerns were raised by Professor Judith Resnick in a thoughtful article on “managerial judges.”⁵⁵ While judges have traditionally held themselves apart from litigation until cases are ready for trial, she wrote, their involvement in efforts at “calendar control” might expose them to information that might bias their objectivity in the determination of cases. It might also reflect an interest in the prompt resolution of cases by settlement that is inconsistent with the requirement of due process that judges remain disinterested. To guard against this risk, she urged the adoption of appropriate safeguards to assure due-process protections where judges are more focused on case management, such as (a) prohibitions against *ex parte* communications; (b) identification of acceptable management and settlement techniques; (c) a requirement that judges involved in pretrial settlement efforts not later adjudicate contested issues; (d) having court personnel serve as court managers; and (e) having the pretrial progress of cases guided by rules recognizing differences among cases.

D. Further Cross-Jurisdictional Studies to Corroborate and Refine the Conclusions of the Studies Done in the Late 1970s

Following the studies by Flanders in federal trial courts and Church in state trial courts, there were further national studies of the state court delay in the 1980s — in part to verify the findings and conclusions of the earlier research; in part to address such concerns as those expressed by Church about the importance of such informal aspects as court commitment to the success of caseflow management; and in part

⁵⁵ J. Resnick, “Managerial Judges,” 96 *Harv.L.Rev.* 374 (also published as a monograph by the Rand Institute of Santa Monica, California) (1982)[hereinafter, Resnick, “Managerial Judges” (1982)].

to explore the potential costs of judicial emphasis on case management. These included detailed analyses of the pace of civil and criminal litigation in urban trial courts led by Barry Mahoney and John Goerd, as well as a study of the management of trials done under the direction of Dale Sipes.

1. Study of 1983 and 1985 civil and criminal dispositions

Against the background of the findings in Church's study and the efforts of a number of courts to apply those findings in addressing the problem of court delay, NCSC began a new round of research on urban general jurisdiction courts in 1984, led by Barry Mahoney. The study focused on 18 courts that had either been the subject of a prior empirical study of case-processing times, had themselves undertaken a significant delay reduction effort in the past 5-8 years, or were in a state where a statewide delay reduction program had been mounted during that period.⁵⁶ Based on a systematic analysis of random samples of 1983 and 1985 felony and tort dispositions, augmented by surveys and interviews, the study's major conclusions were that:⁵⁷

Trial court delay is not inevitable. Where delays exist, they can be reduced significantly. Moreover, successful programs can be institutionalized, so that further delays can be prevented and manageable pending inventories maintained over time. The pace of civil and criminal litigation is not clearly correlated with the size of the court, population of the jurisdiction, composition of the caseload, per-judge caseloads, or the percentage of cases that proceed to jury trial. The general type of calendaring or case assignment system used in a jurisdiction (i.e., master calendar, individual calendar, or hybrid) does not appear to be a decisive factor determining case processing times. On the civil side, implementation by the court of key concepts of caseload management (i.e., early and continuous court control of case progress and the provision of relatively firm trial dates) is strongly correlated with speedy case processing times. The presence of an alternative dispute resolution (ADR) program, whether mandatory or voluntary, is not correlated with speed of civil case processing. On the criminal side, courts with speedy felony case processing are generally ones in which both court and prosecutor's office have a strong

⁵⁶ B. Mahoney, L. Sipes, and J. Ito, *Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings from Current Research*, pp. 4-5 (1985)[hereinafter, Mahoney, *Implementing Delay Programs* (1985)].

⁵⁷ B. Mahoney, A. Aikman, P. Casey, V. Flango, G. Gallas, T. Henderson, J. Ito, D. Steelman, and S. Weller, *Changing Times in Trial Courts: Caseload Management and Delay Reduction in Urban Trial Courts*, pp. 192-197 (1988)[hereinafter, Mahoney, *Changing Times in Trial Courts* (1988)].

commitment to speedy case processing and have worked cooperatively to develop and maintain efficient procedures (such as rapid prosecutor post-arrest screening of cases and filing of charges after probable cause is found; early assignment of defense counsel for indigents; early disclosure of prosecution evidence; early filing and resolution of motions; and strong case management by the court). Jurisdictions that use a prosecutor's information to charge defendants with a felony generally have speedier case processing than those who charge by grand jury indictments. There is no single model of a successful delay reduction or delay prevention program. Successful courts have used a variety of approaches and adapted program details to local circumstances, although they have usually been comprehensive and not sought a single "miracle cure."

2. *Study of 1987 dispositions in light of the "war on drugs"*

Despite the multiple-court studies done previously, good reasons remained for continuing to monitor the pace of litigation in urban trial courts of America. In particular, a dramatic increase in the number of drug-related cases in the 1980s created a crisis for urban courts that threatened to spin out of control. To test whether caseload management programs developed by courts could permit them to withstand such changes as the explosion of cases caused by the "war on drugs," the US Justice Department's Bureau of Justice Assistance funded John Goerdts's leadership of the most broadly-based national studies of the pace of litigation that had ever been conducted, first of 1987 dispositions in 26 urban trial courts,⁵⁸ and then of 1987 dispositions in 39 trial courts (including the initial 26 courts).⁵⁹ This study generally confirmed the findings of the earlier research.

Unlike the earlier studies, however, the report on 26 courts found caseload composition (i.e., the relative composition of different types of offenses) to be associated with felony case-processing time after controlling for the effects of other potentially important factors. It also found evidence to support a hypothesis, not tested in earlier research, that the early resolution of pretrial motions is an important correlate of faster felony case-processing times.⁶⁰ With regard to civil cases, the researchers provided some important enhancements to the findings of

⁵⁸ J. Goerdts, C. Lomvardias, G. Gallas, and B. Mahoney, *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts, 1987* (1989)[hereinafter, Goerdts, *Examining Court Delay* (1989)].

⁵⁹ J. Goerdts, C. Lomvardias and G. Gallas, *Reexamining the Pace of Litigation in 39 Urban Trial Courts* (1991)[hereinafter, Goerdts, *Reexamining the Pace of Litigation* (1991)].

⁶⁰ See Goerdts, *Examining Court Delay* (1989), pp. 86-90, for a summary of factors found related to felony case processing.

the earlier studies. They found that caseload composition was in fact correlated with the pace of litigation: a higher percentage of tort cases was correlated with longer case-processing times. They also tested hypotheses presented in earlier works, finding that the case management techniques of early court control of cases and strict compliance with disposition time goals are in fact generally associated with courts that have shorter civil case disposition times.⁶¹

Among the findings of the 39-court study were the following:⁶²

Larger pending caseload per judge was strongly correlated with longer felony case-processing times. A lower percentage of violent crimes, early resolution of pretrial motions, and a higher percentage of firm trial dates were strong predictors of shorter felony case-processing times. Some courts experienced a substantial increase in felony case-processing times due to a dramatic increase in drug cases between 1983 and 1987. Courts with a higher percentage of drug cases and those that had experienced the greatest increase in drug cases between 1983 and 1987 were more likely to have longer *civil* case-processing times. From 1976 through 1987, few courts reduced their median times to disposition for civil tort cases. Larger pending caseload per judge was strongly correlated with longer civil case-processing times. Nonetheless, courts with early court control and comprehensive delay programs had shorter civil case-processing times, even when the effects of pending caseload per judge were taken into account.

This study confirmed that effective caseload management is important in reducing case-processing times, even when caseloads are swollen. Where courts with effective programs are faced with mounting volume, however, the study concluded that additional resources may be necessary to reduce delay.

3. Study of jury trial times

Most of the caseload management efforts undertaken in the 1970s and 1980s involved the *pretrial* stages of civil and criminal litigation, and relatively few cases are actually disposed by trial rather than by negotiated resolution or other means. Yet trials still consume a significant amount of judge-time and other court resources, and they can be very difficult for citizens participating as either parties, witnesses or jurors. This prompted Dale Sipes of NCSC, with 1985 grant support

⁶¹ See *Ibid.*, pp. 38-41, for discussion of factors associated with civil case-processing times.

⁶² See Goerdts, *Reexamining the Pace of Litigation* (1991), p. 1.

from the US Justice Department's National Institute of Justice, to measure and compare the length of civil and criminal jury trials among general jurisdiction courts within the same state and among three different states, to identify factors contributing to longer trials as well as promising techniques for expediting trials without adversely affecting fairness or perceptions of fairness.⁶³ The conclusions reached by Sipes and her colleagues included:

In the courts with longer trials there is generally more of everything (e.g., examination of jurors, number of witnesses, length of testimony, and number of exhibits) in every type of case than in courts that try the same types of cases in much less time.

In jury selection — the area of greatest actual and potential judge involvement — trial time expended by courts with high levels of judge control is significantly less than the time consumed in courts where attorneys control jury selection.

Effective judge management of trials can result in significantly more judge-time available to try other cases, hold hearings and ensure firm trial dates. In jurisdictions with shorter average trial times, attorneys do not feel that fairness or due process is sacrificed.

One of the strongest arguments for attention to trial management was its effect on availability of judge-time. By shortening average trial times through trial management, courts in effect have greater judge resources available for their caseloads. In the wake of the findings in this study, NCSC and the National Judicial College⁶⁴ cooperated in the presentation of workshops on trial management for judges.⁶⁵

E. Propagation of the "New" Wisdom

Dissemination of the insights of the national-scope studies and the experience of trial courts that had been successful in the implementation of delay reduction and delay prevention programs was carried out in the 1980s and early 1990s through a series of educational programs sponsored by national and state-level court-related organizations.

⁶³ D. Sipes and M. Oram, *On Trial: The Length of Civil and Criminal Trials* (1988)[hereinafter, D. Sipes, *On Trial* (1988)].

⁶⁴ Affiliated with the ABA, the National Judicial College has facilities located on the campus of the University of Nevada at Reno. A common practice for state court systems is to have judges new to the bench attend "new judge seminars" sometime during their first year on the bench. Refresher courses and advanced seminars are presented for more experienced judges.

⁶⁵ See B. Mahoney, V.R. Payant, R. Silver, and Linda Ridge, "Manage Trials More Effectively," 29 *Judges J.* (No. 4, Fall 1990) 35.

Taught by such experts as Ernest Friesen, Maureen Solomon and Barry Mahoney, caseload management became a standard topic for workshops around the country. Educational courses for judges at the National Judicial College and for court managers at the Institute for Court Management (ICM)⁶⁶ served as key national-level vehicles for the promulgation of the “new” conventional wisdom.

Under the auspices of the ABA’s Judicial Administration Division Task Force on Reduction of Litigation Cost and Delay, Maureen Solomon and Douglas K. Somerlot published a monograph in 1987 on caseload management (updating Mrs. Solomon’s seminal 1973 monograph) that has served as essential reading on the topic, providing a succinct review of caseload management principles.⁶⁷ In 1991, with funding from the State Justice Institute, ICM produced an educational videotape program on caseload management for judges and court administrators.⁶⁸ In the same year, with funding from the US Justice Department’s Bureau of Justice Assistance, ICM also published a two-volume guide on the conduct of felony delay reduction workshops.⁶⁹ With the aid of such resources as these, a host of statewide and county-level programs on caseload management paralleled the efforts sponsored by national organizations and provided further opportunities for judges, court managers, and attorneys to consider the utility of adopting active caseload management by the court as an approach to addressing problems of backlog, delay and calendar congestion.

F. “Managerial Judges” Revisited

Concerns raised in the early 1980s by such commentators as Professor Judith Resnick, about the possibility that “managerial judges” might threaten the impartiality and fairness of court proceedings,⁷⁰ had by the end of the decade generally been addressed through the development of procedures and practices safeguarding against undue judicial bias as a result of any involvement in the pretrial management of cases. Such

⁶⁶ The Institute for Court Management (ICM) was established in 1971, and its “Court Executive Development Program” has been a leading educational program for court administrators. In 1982, ICM merged with NCSC, becoming the educational division of NCSC.

⁶⁷ M. Solomon and D. Somerlot, *Caseload Management in the Trial Court: Now and For the Future* (1987) [hereinafter, Solomon and Somerlot, *Caseload Management* (1987)].

⁶⁸ See National Center for State Courts, Institute for Court Management, “Caseload Management Principles and Practices: How to Succeed in Justice” (videotape with instructor’s manual and user’s guide) (1991).

⁶⁹ See B. Mahoney, C. Friesen, E. Friesen, R.D. Lefever, M. Solomon and D. Somerlot, *Planning and Conducting a Workshop on Reducing Delay in Felony Cases, Volume One: Guidebook for Trainers* (1991) [hereinafter, Mahoney, *Felony Delay Workshop Guidebook* (1991)].

⁷⁰ See Resnick, “Managerial Judges” (1982).

mechanisms as differentiated case management,¹⁷ case management by court personnel, avoidance of *ex parte* contacts with parties, and judge reluctance to sit in bench trials if they have presided over settlement discussions, all served to diminish the prospect of judge bias from exposure to information that would be inadmissible at trial.

IV. COURTS THAT HAVE SUCCEEDED OVER TIME IN THEIR DELAY REDUCTION AND DELAY PREVENTION EFFORTS

Those conducting national studies of the pace of litigation have found several courts that have been able to establish and maintain successful caseload management programs over time for civil or criminal cases. Examples of such courts are the general-jurisdiction trial courts in Dayton, Ohio; Detroit, Michigan; Phoenix, Arizona; Fairfax, Virginia; and Wichita, Kansas. As part of a major program funded by the Bureau of Justice Assistance in the US Justice Department, these courts agreed during 1988 and 1989 to become focal points for the study and exchange of practical information about how caseload management theory is applied in courts on a day-to-day basis.

Each of these courts has been involved in two or more of the national studies of delay conducted by NCSC.⁷² The following brief descriptions of caseload management in these courts are based on profiles written by researchers from NCSC “as visitor’s guides for court officials whose interest in reducing and avoiding delay would lead them to visit other courts that shared their concerns.”⁷³

A. Dayton, Ohio

The *Montgomery County Court of Common Pleas* in Dayton, Ohio, is a 13-judge court serving a county of about 570,000 people.⁷⁴ Like other trial courts in Ohio, the court since 1971 has been subject to Rules of

⁷¹ See below, *V. Common Elements of Successful Programs*.

⁷² Civil and criminal cases disposed in 1976 in 21 courts were the subject of analysis in Church, *Justice Delayed* (1978); 1983 civil and criminal dispositions in 18 courts were assessed in Mahoney, *Implementing Delay Programs* (1985); Mahoney, *Changing Times* (1988) considered 1985 dispositions in the same 18 courts; 1987 dispositions in 26 courts were studied in Goerd, *Examining Court Delay* (1989); that number of courts was expanded to 39 (again with 1987 dispositions) in Goerd, *Reexamining the Pace of Litigation* (1991); and 1992 dispositions (in civil tort and contract cases only) in 45 courts were assessed in Goerd, *Litigation Dimensions* (1995). Unless otherwise noted, disposition data for any of these years for the six courts highlighted in this section are from these studies.

⁷³ W.E. Hewitt, G. Gallas, and B. Mahoney, *Courts that Succeed: Six Profiles of Successful Courts* (1990) [hereinafter, Hewitt, *Courts That Succeed* (1990)], v.

⁷⁴ This short description is from W. Hewitt, B. Mahoney, L. Ridge, and A. Larkin, “Montgomery County Court of Common Pleas, Dayton, Ohio,” in Hewitt, *Courts That Succeed* (1990), at pp. 1-22.

Superintendence promulgated by the Supreme Court of Ohio. Those rules addressed backlogs, delay and efficiency through individual assignment of cases to judges; guidelines to limit continuances; time limits for criminal and civil case dispositions; and monthly reporting to the Supreme Court on the number and age of cases pending on each judge's docket. Since before promulgation of the Rules of Superintendence, however, the court in Dayton was reasonably current with its civil and criminal cases; and the court has maintained this over time.

In 1977, the chief judge of the court worked with the Whittier School of Law team headed by Dean Ernest Friesen on the development and implementation of a criminal caseflow management program. The program's main elements were (a) early screening and continuous case control by both prosecutor and court; (b) use of arraignment on an indictment as a key control point for the common pleas court; (c) early discovery provided by the prosecutor to defense counsel; (d) early pretrial conferences between prosecutor and defense counsel after common pleas arraignment; (e) scheduling conferences held by judges two weeks after pretrial conferences, to accept pleas or schedule dates for hearing motions and for trial; (f) firm trial dates; and (g) acquisition and effective use of management information to monitor caseflow management effectiveness. With the implementation of this program, the court reduced its median time from arrest to disposition from 69 days in 1978 to 43 days in 1979.⁷⁵ That time increased to 88 days in 1983; but in 1985 it was back to 61 days, and in 1987 it was down to 57 days.

Between 1982 and 1984, the court developed a computer system designed to provide management information for its implementation of a civil caseflow management program. The program included (a) maximum time frames for the disposition of nine categories of civil cases; (b) computerized monitoring of case status from time of filing; (c) monitoring of service and answer, and dismissal of cases where plaintiffs have failed to proceed; (d) early case scheduling conferences held by judges to set times for completion of discovery and such other case events as a trial date; (e) involvement of attorneys in the selection of dates for trial and other case events; and (f) court delivery of firm trial dates. Despite a 17% increase in civil filings from 1983 to 1987, civil terminations under the program exceeded filings, and median times from filing to disposition dropped from 345 days in 1983 to 279 days in 1985 and 275 days in 1987.

⁷⁵ See Neubauer, *Managing the Pace of Justice* (1981), p. 225.

B. Detroit, Michigan

Detroit is America's fifth largest city, and it is the county seat of Wayne County, Michigan (with a 1986 population of 2.1 million people). Its criminal cases are heard by its Recorder's Court, and its serious civil cases are heard in the Wayne County Circuit Court.⁷⁶ Each of these courts has achieved remarkable success in reducing serious delay and then maintaining current calendars.

1. Detroit Recorder's Court

In 1976, the *Detroit Recorder's Court* was in serious difficulty: with felony caseloads rising steadily and total dispositions decreasing, its pending caseload was four times that in 1973.⁷⁷ In 1976, the Michigan Supreme Court intervened by appointing a former intermediate appellate judge as special judicial administrator to oversee a crash backlog and delay reduction program, with significant funding support for the cost of temporary additional judges, prosecutors, court staff and security personnel for the crash program. From the beginning, however, the crash program was conceived as a means to introduce ongoing efficiency in the management of cases, so that old cases could be disposed and delay would not arise again for new cases.

Beginning in January 1977, the court operated under a two-track system for 18 months — one for older pending cases, which were heard by visiting judges, and the other for more recently-filed cases and all future filings. The program devised for new cases by the special administrator and the court's chief judge included the following elements: (a) a docket control center to collect and analyze information about courtroom activity, to monitor case progress, and to identify problems in court performance; (b) a system of executive judges responsible for a cluster of judges and courtrooms; (c) a hybrid system for assignment of cases to judges, under which a case would initially be assigned randomly to an executive judge for arraignment on a prosecutor's information and thereafter (if not disposed at arraignment) be assigned to one of the other judges in the cluster; (d) a set of docket directives providing rules for judges and clerks in scheduling cases for motion hearings, trials and other hearings; and (e) a plea cutoff date

⁷⁶ 1996 legislation approved by the Michigan State Legislature and signed into law by the Governor of Michigan abolishes the state-funded Recorder's Court and merges it with the county-funded Wayne County Circuit Court. Implementation of that change may be stayed by litigation challenging the legislation.

⁷⁷ This description is based on B. Mahoney, W. Hewitt and A. Larkin, "Detroit Recorder's Court, Detroit, Michigan," in Hewitt, *Courts That Succeed* (1990), at pp. 23-44.

policy coupled with a trial-scheduling policy designed to ensure that trial dates were firm.

The program was strikingly successful. The court's active pending caseload was reduced in 17 months to a level only one-fifth of what it had been when the crisis was at its peak in 1976. Since then, the court has retained its effectiveness in the prompt disposition of cases. In 1983, median time from initial complaint to disposition was 69 days; in 1985 it was 58 days; and in 1987 it was 71 days.

2. *Wayne County Circuit Court*

In terms of 1976 civil dispositions, the *Wayne County Circuit Court* (with a median time to disposition of 788 days from filing to disposition for tort cases) was the slowest court among all those participating in the groundbreaking national study of trial court delay conducted by Thomas Church and NCSC. In 1983, its median tort disposition time was 721 days, again the slowest civil court in a further national study by NCSC. In a program aimed at enabling it to meet civil time standards of the ABA, the court sought to address the problems of delay reflected by these statistics.

The elements of the program included (a) records consolidation project leading to a complete inventory and analysis of pending cases, which by itself resulted in the formal disposition of a significant number of cases that had already been settled or abandoned; (b) an old-case backlog reduction effort, operated in 1986 and 1987, in which about 1,600 active cases over 30 months old were screened by central docket management staff of the court and assigned to a special settlement conference program with a temporarily-assigned judge, with cases not settled set for trial with firm trial dates before judges (both circuit court and volunteer judges from other courts); (c) an individual calendar pilot program for pending cases not in the "old case" category and for newly-filed cases, begun in 1986 with a team of seven judges taking individual responsibility for cases from filing and having two different tracks (with different timetables for discovery completion and progress to trial) based on relative complexity; and (d) expansion of the individual calendar program throughout the court in phases from 1987 through 1989.

As a result of this program, the court "has taken control of its caseload, reduced its pending inventory, and is concluding all of its cases more quickly than at any time in the recent past."⁷⁸ By 1985, its

⁷⁸ D. Somerlot, M. Solomon and B. Mahoney, "Wayne County Circuit Court, Detroit, Michigan," in Hewitt, *Courts That Succeed* (1990), 103, at 107. The summary here of the court's efforts is from that profile of the court.

median time for tort cases was 648 days; by 1987, it was 532 days; and in 1992 its median time to disposition for tort cases was only 334 days, making it one of the fastest among 45 large urban courts in a National Center study of civil litigation.

C. Fairfax, Virginia

The Fairfax Circuit Court, for the 19th Judicial District of Virginia, is a court of general jurisdiction serving a population of about 740,000 people in Fairfax County and the City of Fairfax.⁷⁹ The court is one in transition: serving a suburban area for the nation's capital in Washington, D.C., it faces rapid demographic changes, with a growing and changing caseload. Yet it has preserved a tradition of prompt case processing through innovations in caseload management. For criminal felony cases, its median time in 1980 from indictment to trial or other disposition was 57 days; in 1987, the median time from indictment was only 29 days, and the court was the fourth-fastest of 39 courts in a study by NCSC. In 1980, its median time from filing to disposition for civil cases at law was 292 days; in 1987, it was 275 days (making it the fifth-fastest civil court among 37 studied by NCSC). These median times, however, do not show problems that were emerging in the processing of civil cases. Increases in caseload and requests for trial by 1989 had caused elapsed times to increase dramatically from case filing to assigned trial dates.

To address this problem, the court took steps in 1989, with the cooperation of members of the local civil trial bar, to implement a differentiated caseload management and delay reduction program. The new civil case-processing system, structured around the civil case-processing time standards of the ABA, provides for the court to exercise early and continuous control of case progress. The program was begun in 1989, with full transition completed in 1990. The elements of the program include: (a) court monitoring of case status, service and answer 50 days after filing; (b) a status conference 100 days after filing, in which a judge sets cases on differentiated case management (DCM) tracks; (c) simple cases ("Track I") are assigned to judges on a master calendar basis, with discovery to be completed 30 days before trial and trial to be held within 12 months after filing; and (d) complex cases ("Track II," comprising about 2-3% of the total) are assigned to judges on an individual calendar basis, and times for completion of discovery and trial preparation are set by the assigned judge, but trial is generally to be held

⁷⁹ The discussion here is derived from W. Hewitt, C. Boersema and B. Lynch, "Fairfax Circuit Court, Fairfax, Virginia," in Hewitt, *Courts That Succeed* (1990), pp. 45-82.

within 18 months after filing. In 1994, the program was supplemented by a neutral evaluation program, in which senior members of the bar would review cases with counsel about 45 days before the scheduled trial date, with the result that a high percentage of the cases would settle. With the addition of the neutral evaluation element and the effects of the civil case program, the court by 1995 and 1996 has been able to bring the size and age of its pending civil inventory back to the manageable level of the 1980s, even in the face of rapidly-growing volume.⁸⁰ The involvement of trial attorneys, and their support for court control of the movement of cases, have made a significant contribution to the success of the program. In fact, relations between bench and bar have improved as a result of the court-initiated collaboration with the bar to improve civil caseflow management.

D. Phoenix, Arizona

The *Maricopa County Superior Court* in Phoenix is a general jurisdiction trial court serving a population of about two million people.⁸¹ Excellence in civil case management has been an important goal of the court since the late 1970s, when the "Phoenix fast-track program" was developed as a means for the court to *prevent* delay in the processing of civil cases. The elements of this program included (a) random assignment of cases to judges on an individual-calendar basis; (b) case monitoring by the court's civil department central case management office; (c) attorneys are expected to complete discovery and file a certificate of trial readiness within 270 days after filing; (d) active judge involvement in case management only after filing of a certificate of readiness; and (e) aggressive emphasis on maintaining firm trial dates.

The court's median time from filing to disposition for civil tort cases in 1976 was 308 days, and the court's civil case management program helped maintain an expeditious pace of case disposition. By 1985, although total civil filings had increased by about 75% over the 1976 level, median time to disposition for tort cases disposed in 1985 was 292 days. By 1987, however, when case filings were twice the 1976 level, the court's median time from filing to disposition for tort cases had risen to 376 days.

To address this problem, the court began experimenting with much earlier judge involvement in cases. Under the experiment, court staff

⁸⁰ Personal communication from Mark Zaffarano, Director of Judicial Operations, Fairfax Circuit Court, November 1996.

⁸¹ For the court profile on which this brief description is based, see M. Solomon, B. Mahoney, M. Thornton and A. Larkin, "Maricopa County Superior Court, Phoenix, Arizona," in Hewitt, *Courts That Succeed* (1990), pp. 83-102.

would send a request for information about cases 100 days after filing, to permit judges to review the status of cases. Counsel would be asked whether service had been completed and answers filed; whether cases were subject to compulsory arbitration; whether settlement had occurred or was imminent; and whether a pretrial conference would assist scheduling or discussion of settlement. The information permitted judges to make a rough assessment of the level of judge involvement that would be needed in cases. The early judge involvement effort has been continued and expanded after the experimental stage to include participation by other judges. Median time from filing to disposition for tort cases was shortened to 344 days in 1992, although a reduction in civil filings after 1987 has also contributed to improved case-processing times.

E. Wichita, Kansas

Wichita is the county seat of Sedgwick County, Kansas, and its *18th Judicial District Court* is a trial court of general jurisdiction serving a population of about 390,000 people.⁸² In the 1970s, the court was known for its expeditious civil case processing — in 1979, its median time from filing to disposition was 290 days for tort cases. By 1983, however, while other courts in the state were improving their civil case management to comply with statewide time guidelines promulgated by the Supreme Court of Kansas, the Wichita court saw its median time to disposition for tort cases increase to 492 days, making it one of the *slower* civil courts in the state.

A major reason for the slowdown in civil case processing was resistance from the local bar to the new statewide rules for timely disposition. It was only under the leadership of court leaders that the time standards came to be accepted by the judges and attorneys in Wichita.

The court introduced a civil case management system under which it assumed early control of the flow of civil cases, set up a system of scheduling cases, and eliminated old or inactive cases from its docket.

The court's civil case management system has features that include the following: (a) computer-supported monitoring of cases from filing, with computer-generated notices scheduling a discovery conference 60-70 days after filing; (b) scheduling of discovery completion at the discovery conference, with dismissal of cases within 90 days after the conference if service has not been perfected; (c) scheduling of cases

⁸² This description is taken from C. Boersema, W. Hewitt and B. Lynch, "Sedgwick County District Court, Wichita, Kansas," in Hewitt, *Courts That Succeed* (1990), pp. 127-159.

for trial by the discovery judge after completion of discovery, with pretrial conferences scheduled for jury trial cases; (d) limited grant of trial-date continuances, with all continuance requests decided by the court's administrative judge or civil presiding judge; and (e) an expedited track for cases valued at under \$5,000, with discovery and pretrial conferences bypassed and early trial dates assigned.

The introduction of the court's civil case management system had a dramatic affect on civil case processing times. Median time from filing to disposition in tort cases was down to 411 days in 1985. By 1987, it had been reduced to 215 days. Not only was the court expeditious by comparison to other trial courts in Kansas, but it was the fastest of 37 urban courts around the country in NCSC's study of the pace of litigation based on 1987 dispositions.

V. COMMON ELEMENTS OF SUCCESSFUL PROGRAMS

As the above descriptions of courts with successful delay programs suggests, there is no single solution to problems of delay, and there are a variety of techniques that courts can use to reduce or prevent delay. Yet these courts share common features *not reflected* by the specific elements of their respective programs for addressing the flow of civil or criminal cases. The national-scope research undertaken in the 1980s by such researchers as Mahoney, Goerdt and their colleagues confirmed the conclusions offered by Church and others in the late 1970s — that the critical determinant of success in attacking court delay is the ability of local and state court and bar leaders to establish and maintain a set of expectations among judges and attorneys (the "*local legal culture*") that justice can be achieved in civil and criminal cases through the prompt and expeditious movement of cases.

To be sure, the six courts described above (and other courts with successful delay programs) have implemented a set of case management techniques centering on early and continuous monitoring of case status and the provision of firm trial dates. But the success of these techniques has been achieved because the court leaders have shown a long-term commitment to expeditious case processing, have communicated well with the bar and other institutional case participants, and have actively involved nonjudicial court staff members in case management efforts. In addition, they have developed goals for case processing as a measure of what constitutes success, and they have effectively used management information about cases to measure progress toward goals and identify problems. It is only in this context

that such courts as the six described above were able to succeed over time in their implementation of caseflow management techniques.⁸³

A. Providing an Atmosphere Conducive to Success

Efforts by American courts to implement new caseflow management programs were not necessarily an easy undertaking. Introduction of a new program required major changes in the established pattern of relationships and interactions among judges and lawyers.

The results of the American experience in the 1980s suggests that the accomplishment of such changes requires all of the following elements.

1. Leadership and commitment

To accomplish an alteration of the pre-existing local legal culture, court leaders have to exercise leadership for the court's caseflow management policies and programs in order to overcome resistance to change. It is important to accept and understand such resistance, which can be based on fear of the unknown, a sense that change may lead to loss of status or power, stress from uncertainty about ability to function effectively in the new environment, changes in the nature of established relationships, or feelings of having been left out of the decisionmaking process.⁸⁴

2. Communications

The likelihood of success in the change effort is greatly enhanced if court leaders provide for good communication and broad consultation among trial court and court system leaders and with probate practitioners and the key representatives of other institutional participants in the probate process. Through this process of communication, those promoting improvement can undertake to modify attitudes and expectations in the local legal culture by providing information about the need for change, helping to build motivation to carry it out, and establishing broad organizational support for it.

⁸³ The ideas presented here are based on the discussion of the "common elements" of successful caseflow management programs in Mahoney, *Changing Times* (1988), pp. 197-205, the "fundamental elements" discussed in Solomon and Somerlot, *Caseflow Management* (1987), at pp. 7-31; and the "elements of effective caseflow management" offered in Solomon, *Caseflow Management* (1973), pp. 30-46. The discussion here also reflects an earlier effort by the author of this paper to summarize these elements for application to probate cases. See D. Steelman, "Managing Probate Workload and Dockets," 11 *Probate L.J.* (no. 3, 1993) 273, at 292-307.

⁸⁴ See B. Mahoney, C. Friesen, E. Friesen, D. Lefever, M. Solomon, and D. Somerlot, *Planning and Conduction a Workshop on Reducing Delay in Felony Cases. Volume One: Guidebook for Trainers*, at P8-4 to P8-6 (1991)[hereinafter, Mahoney, *Felony Delay Workshop Trainers' Guidebook* (1991)E].

3. Staff involvement

While leadership and commitment on the part of the judge and other leaders in the court process is essential to success, judges alone cannot make a caseflow management program work. Court support staff (including the clerk, the court administrator, the court information systems director, and the judge's own secretary and other confidential staff) must understand and participate fully in the improvement effort.

4. Caseflow management improvement plan

Before implementation, the new program should be articulated in a written plan that incorporates time standards, identification of necessary caseflow management information, and the specific caseflow management policies and procedures to be adopted, along with an implementation timetable. The process of preparing and reviewing drafts of the plan can serve as a means to identify detailed problems and to think through what will be the main tasks, the key individual persons and their specific roles and responsibilities, and the target dates for accomplishment of implementation steps. Once completed, the plan can be a key reference for those who seek to understand what the court seeks to accomplish, when and how. Finally, it can serve as a reference in the evaluation of the implementation effort, as the document in which the goals and expectations for the caseflow management improvement program are set forth.

5. Education and training

For courts to manage their caseloads successfully, both judges and court staff need to know why and how to do it. Training is essential to familiarize judges, staff members, and members of the bar with the purposes and fundamental concepts of caseflow management and with the specific details and techniques essential to effective case management in the court on a day-to-day basis.⁸⁵

B. Goals and Information Relevant to Performance

One of the critical steps in seeking to achieve success in such endeavors as delay reduction and delay prevention is to have some indicator of what "success" entails, and to have information by which to measure progress toward goals.

⁸⁵ *Id.*, at 203.

1. *Time Standards*

The Kansas Judiciary was the first state to have adopted overall time frames for civil and case dispositions.⁸⁶ In 1980, the Kansas Supreme Court Standards Committee set caseload guidelines and procedures for all courts in the state to follow. These standards were not mandatory, but were rather to serve “as a guide for the disposition of cases, with the understanding that the system must have flexibility to accommodate the differences in the complexity of cases and the different problems arising in urban and rural judicial districts.”⁸⁷

By 1988, 24 states and the District of Columbia had adopted statewide goals for the time required to process cases in the state trial courts. By 1992, this number had increased to 33 states and the District of Columbia. In nine states, the time standards are mandatory, while in the remainder of the jurisdictions they are voluntary.⁸⁸

2. *Caseload Management Information*

Successful caseload management requires information on the size and age of the pending caseload, rates at which court events are continued and rescheduled, and trends in filings and dispositions. In order to develop a plan for improvement of caseload management, it is necessary for judges to have information about problems associated with the current state of case processing. Once an improvement plan has been put into effect, information is needed to assess progress toward achievement of time goals, as well as to identify ongoing or new problems and to determine what techniques or practices work well.

After the court has begun to implement any improvements in caseload management, the judges should regularly review information about the size and age of the pending caseload, continuance rates and trends in filings and dispositions. Caseload-management information should be provided as part of the management reports produced with the aid of the court’s automated probate case-management information system. While information is vitally important for effective caseload management, it is possible to suffer from “information overload.” To avoid such overload, attention should be given to the key types of caseload management information: (a) pending caseload information; (b) age of cases at disposition; (c) monthly and annual aggregate data; and (d)

⁸⁶ See H. Schwartz and R. Broomfield, “Delay: How Kansas and Phoenix are Making it Disappear,” 23 *Judges J.* (No. 1, Winter 1984) 22.

⁸⁷ See Kansas Supreme Court, “General Principles and Guidelines for the District Courts,” 230 Kan. 698 (1988).

⁸⁸ See NCSC, Information Service, Memorandum No. IS 92.0006, “Case Processing Time Standards and Goals,” by J. Fernette (July 1, 1992).

reports on open cases.⁸⁹ Information by itself does not solve problems. Judges in successful courts have used it to manage cases and caseload, by asking key questions.⁹⁰ The individual judges in such courts ask such questions as the following on an ongoing basis:

Case-related questions:

What is happening in this case? How old is it? What is its status? What should be happening next? By when?

Calendar-related questions:

What is the overall status of my calendar? How many pending cases are there, and what is their age and status? What are the oldest cases, and are they beyond the time standards? Why are they old? What needs to be done about them?

For a supervising judge or court administrator in a successful court, different questions have been asked in order to use information effectively for caseload management and delay reduction.

Overall status of calendar:

How many old cases are there? That is, how many cases are pending beyond the time suggested by time standards? What is the "backlog" (the number of cases that cannot be completed within a tolerable time period, as defined by the time standards)?

Troubleshooting questions:

Are there problems with particular types of cases? Are there particular procedural bottlenecks? Are particular judges experiencing difficulties?

With such information, the judges in successful courts have been able to identify problems and determine where caseload management efforts are needed. The steps taken to address problems should be consistent with basic principles of effective caseload management.

C. Caseload Management Techniques and Procedures

The basic principles of effective caseload management must be turned into policies and procedures that enable the court to exercise early and continuous control over probate cases; to set realistic schedules for the completion of case events; to give cases differential management

⁸⁹ See Mahoney, *Felony Delay Workshop Trainers' Guidebook* (1991), at P6-3 through P6-6.

⁹⁰ *Ibid.*, P6-7 through P6-9.

treatment as needed; to ensure firm dates for trials and hearings; and to manage trials effectively.

1. *Early and continuous court control over case progress*

A basic tenet arising from caseload management research in the last fifteen years is that the court, and not the other case participants, should control the progress of cases.⁹¹ The court should accept responsibility for case movement from the time that it is filed, assuring that every case has no unreasonable interruption in its procedural progress. The court “controls” case movement by setting it into the clerical and automated case-management routine. This control process should then be continuous, so that progress to each scheduled control point or event causes the next scheduled control point to be applied to the case.⁹²

2. *Realistic schedules for completion of court events*

The scheduling of future events should balance off a need for reasonably prompt completion of necessary case-related activities with reasonable accommodation of the conflicting demands being placed on the time of the participants in the proceedings. Forthcoming events should be scheduled far enough in the future to allow accomplishment of necessary tasks, but soon enough to maintain awareness that the court wants reasonable case progress and does not want to have such forthcoming events to be scheduled and then continued because participants have not completed necessary preparation.

3. *Differentiated case management (DCM)*

Traditional case management approaches treat all cases of a given type as fungible, handling them on a “first in, first out” basis, and applying the same procedures and timetables to them. In a 1984 law review article reviewing almost 50 years of experience with the Federal Rules of Civil Procedure, Professor Maurice Rosenberg reasoned that any potential subversion of important values in the adversarial system by “managerial judges”⁹³ might be avoided by having rules providing different court supervisory modes for the pretrial progress of different kinds of cases.⁹⁴ First tried in a state court in a 1986 experimental

⁹¹ See Church, *Justice Delayed* (1978), pp. 66-67. This principle is embodied in the ABA’s delay reduction standards, which provide that, “To enable just and efficient resolution of cases, the court, and not the lawyers or litigants, should control the pace of litigation.” ABA, *Delay Reduction Standards* (1984), Secs. 2.50 and 2.51.

⁹² E. Friesen, “Cures for Court Congestion,” 23 *Judges J.* (No. 1, Winter 1984) 4, at 7.

⁹³ See Resnick, “Managerial Judges” (1982).

⁹⁴ M. Rosenberg, “The Federal Civil Rules After Half A Century, 36 *Me.L.Rev.* 242, at 248 (1984).

program in the Bergen County Superior Court in Hackensack, New Jersey,⁹⁵ the concept of differentiated case management (DCM) is intended to put Rosenberg's suggestion into practice:

DCM is an attempt to define case-specific features that distinguish among cases as to the level of case management required. Thus, the essence of differential case management is reorganization of the caseload system to recognize explicitly that the speed and method of case disposition should depend on cases' actual resource and management requirements (both court and attorney), *not* on the order in which they have been filed.⁹⁶

In a simple differentiated case management scheme, cases might be divided into three "tracks" reflecting their respective case management requirements: (1) an *expedited* track, for cases that move quickly with little or no judge involvement; (2) a *standard* track for those that do require conferences and hearings, but are otherwise not exceptional; and (3) a *complex* track, for those requiring special attention. Within an overall set of time standards, the court might establish different overall time standards for each track applied to cases — for example, 6 months for cases assigned to the expedited track, 12 months for those in the standard track, and 24 months for the small number in the complex track.⁹⁷

4. Firm dates for trials and hearings

It is important for the court to create the expectation that events will occur as scheduled. If participants doubt that trials or hearings will be held at or near the scheduled time and date, they will not be prepared.⁹⁸ A court that routinely sets many more matters to be heard than can be reached may find that cases at the end of its calendar must be continued solely because the court cannot reach them.⁹⁹ To avoid the problem of

⁹⁵ See R. Rossetti, "Special Civil Tracks," 33 *Judges J.* (No. 1, Winter 1994) 34.

⁹⁶ H. Bakke and M. Solomon, "Case Differentiation: An Approach to Individualized Case Management," 73 *Judicature* (No. 1, June-July 1989) 17, at 18.

⁹⁷ For a review by *judges* of civil and criminal DCM programs in Tacoma, Washington; St. Paul, Minnesota; Philadelphia, Pennsylvania; New Brunswick, New Jersey; Camden, New Jersey; and St. Joseph, Michigan, see J. Arnold, C. Cooper, L. Davis, T. Mott, G. Nicola, R. Rossetti, and R. Taylor, "Differentiated Case Management: What Is It? How Effective Has It Been?" 33 *Judges J.* (No. 1, Winter 1994) 2. For a review by *trial court administrators* of the DCM programs in Tacoma, New Brunswick, St. Paul, Camden, Philadelphia and the Detroit Recorder's Court, see 8 *Court Manager* (No. 1, Winter 1993) 24, (No. 2, Spring 1993) 12, and (No. 3, Summer 1993) 23. The US Justice Department's Bureau of Justice Assistance has funded the preparation of a manual on DCM: see C. Cooper, M. Solomon, and H. Bakke, *Differentiated Case Management: Implementation Manual* (1993).

⁹⁸ Friesen, "Cures for Court Congestion," 23 *Judges J.* at 8.

⁹⁹ This problem was first described in Solomon, *Caseload Management* (1973), p. 50.

excessive oversetting, a court might choose to do *no* oversetting. With this practice, however, the judge might find that there is excessive “down time” because of case “fallout” due to unavoidable continuances or party settlement of contested matters set for hearing.

The most effective way to avoid these two extremes and to promote reasonably firm trial and hearing dates, permitting the court to keep pace with time standards and new filings, is to develop a “reasonable overset factor” and to apply a reasonable but firm policy limiting the grant of continuances. The second part of the formula for assuring reasonably firm trial and hearing dates is for the court to adopt a firm policy for minimizing continuances that is applied in a firm and consistent manner. The third necessary part of any effort to provide firm trial dates is to provide for capacity to make last-minute adjustments among judges, so that a judge whose docket has more than one case ready for trial can be assisted by a judge for whom all cases set for trial have settled.¹⁰⁰

5. *Effective trial management*

While trials occur in only a small percentage of the probate cases that are filed, they can consume a great deal of judge time. The 1988 study of trials by Dale Sipes found that trials in one court took three times as long as trials in comparable cases in another court. Yet the study also found that a large majority of judges and attorneys found no lack of fairness or justice in the courts where trials are conducted more rapidly.¹⁰¹ By managing trials effectively, judges thus can continue to do justice in individual cases while expanding the availability for other matters of the scarcest resources in the courts: judge time and courtroom space.¹⁰² To conserve judge time and help ensure that fair trials take no longer than necessary, judges in many courts with effective caseflow management have adopted some or all of the following trial management techniques:

Resolve motions before cases reach the “trial ready” stage;

Hold trial-management conferences shortly before trial;

Exercise court control over *voir dire*;

Limit opening statements;

¹⁰⁰ See Institute for Law and Social Research, *Guide to Court Scheduling: A Framework for Criminal and Civil Courts* (1976).

¹⁰¹ See D. Sipes, *On Trial* (1989).

¹⁰² E. McConnell, “Court Management: The Judge’s Role and Responsibility,” 15 *Justice System J* 710, at 715.

Reduce unnecessary and repetitive evidence;

Maintain trial momentum by holding trial on contiguous court days and using the full day without interruptions for other business;

Limit closing statements;

Use such means as pattern jury instructions or submission of proposed instructions before trial start as a means to manage selection of jury instructions; and Enhance calendar productivity by being available to commence another trial or other hearing as soon as jury deliberation begins.¹⁰³

VI. FURTHER EFFORTS IN THE 1990s RELATED TO CASEFLOW MANAGEMENT

With the centrality of caseflow management firmly established in the 1980s, attention to research issues associated with it has continued during the 1990s. There has been continued attention to the dimensions of civil litigation. In particular, researchers from NCSC investigated civil jury trial disposition times as part of a major study of civil litigation. In another study, they addressed the effects of civil motion practice on case processing. Still another area has to do with the pace of litigation in domestic relations cases. Finally, NCSC has made it easier for individual courts and court systems to conduct their own caseflow management reviews, through the publication of a monograph on the topic.

A. Disposition Times for Civil Jury Trials

With tort reform legislation in the US Congress and many state legislatures, civil justice is very much in the public eye in America. Through the "Civil Trial Court Network" project, funded by the US Justice Department's Bureau of Justice Statistics in 1992, NCSC undertook the most ambitious investigation ever taken of civil justice in the United States, sampling tort and contract cases disposed in 1992 in

¹⁰³ The trial management techniques suggested here come from those offered in trial-management workshops conducted by NCSC in coordination with the National Judicial College. See B. Mahoney, V. R. Payant, R. Silver, and L. Ridge, "Manage Trials More Effectively," 29 *Judges J. E*(No. 4, Fall 1990) 34.

45 of the country's 75 largest counties, to provide systematic, broadly-based empirical data on some fundamental issues relevant to the ongoing debate about the need for civil justice reform.¹⁰⁴

Among the findings were a number of details previously unavailable about times to disposition for cases disposed by jury trial, which (a) are often the most publicly-visible of civil dispositions, and (b) can consume a considerable amount of judge time and court resources, even though (c) they typically represent only a small percentage of all civil dispositions. Some of the conclusions about civil jury trials were:

While cases disposed by jury trial take substantially longer to reach disposition than those disposed by other means, times to disposition for jury trials are much shorter than anecdotal information might suggest: the median time from initial complaint to entry of a verdict is only slightly over two years (the upper limit set out in ABA time standards for civil cases).

Yet there is substantial room for improvement, since more than half of all jury cases take over two years, and about one in ten take five or more years to reach a verdict.

There are dramatic differences, however, in the typical time from filing to jury verdict. There were five jurisdictions among the 45 studied that concluded seven of ten jury trials in less than two years. On the other hand, there were four jurisdictions in which seven of ten cases took four or more years to reach a verdict.

Reasons for such variations included variations in court resources and in the percentage of complex cases in courts' caseloads, as well as in the extent to which courts exercised active caseflow management techniques (as by setting schedules for case progress, controlling continuances, and managing trials).

B. Civil Motion Practice.

Because few civil cases go to trial, motion practice is often a primary means for judge involvement in the movement of civil cases to disposition: the way a judge rules on a pretrial motion can have a dramatic effect on the course and outcome of litigation. To address

¹⁰⁴ Judicial College. See B. Mahoney, V.R. Payant, R. Silver, and L. Ridge, "Manage Trials More Effectively," 29 *Judges J.* (No. 4, Fall 1990) 34.

J. Goerdts, B. Ostrom, D. Rottman, R. LaFountain, and N. Kauder, *Litigation Dimensions: Torts and Contracts in Large Urban Courts* [Special Issue, 19 *State Court Journal* (No. 1, 1995)] [hereinafter, Goerdts, *Litigation Dimensions* (1995)].

questions about the scope of motion practice and its effect on court and litigant resources, NCSC undertook an exploratory study in 1992 of motion practices in eight state courts of general jurisdiction, with closer attention to four courts.¹⁰⁵ The researchers' most significant findings were:

Five categories of motions accounted for 75% of the total motions filed in the four courts: (1) scheduling and case management motions; (2) dispositive motions; (3) discovery motions; (4) motions on the form and sufficiency of pleadings; and (5) default motions.

The vast majority of motions arose in contract and tort cases; and few motions arose in real property litigation.

The typical case had three motions, but most motions were uncontested.

Faster motion processing did not necessarily result in faster overall case processing.

Average case processing time was longer in cases *with* motions than in cases without motions, although this was more likely a consequence of case complexity than of motions activity.

The researchers concluded from these findings that fundamental elements of caseload management can be applied to motion practice, and that measures can be taken to streamline aspects of civil motion practice:

A system of differentiated procedures for contested and uncontested motions can increase judicial time for hearing and deciding motions that substantively affect the resolution of a case.

The court can identify motions that will not be contested by requiring attorneys to file with the motion a stipulated order or a certificate indicating that the matter is uncontested.

Motions that ultimately are uncontested but cannot be identified as such at filing can be placed on the hearing calendar first to ensure that they are reached and to reduce the amount of time attorneys spend waiting in court.

To identify motions that will not be contested at the hearing, the court can require that replies be filed by a time that coincides with the setting of the hearing calendar.

¹⁰⁵ S. Keilitz, R. Hanson, H. Daley, "Civil Motion Practice: Lessons from Four Courts for Judges and Lawyers," 33 *Judges J.* (No. 4, Fall 1994) 3.

Motion processing time can be accelerated by setting shorter time limits on filing reply briefs and by providing specialized dockets or daily calendars.

C. Domestic Relations Cases

Domestic relations cases are a large and socially important segment of the caseload in American state courts. According to the most recent national statistics, domestic relations cases constitute the largest and fastest-growing segment of state court civil caseloads. They represented 25% of total civil filings in 1994, and the total number of domestic relations filings has increased by 65% since 1984.¹⁰⁶ Because divorce cases represent a third of all domestic relations cases and are the matters from which most other domestic relations cases arise (e.g., child support, custody, visitation, modification and enforcement), NCSC undertook a study published in 1992 of divorce case management, case characteristics, and litigation pace in 16 urban trial courts.¹⁰⁷ Some of the key findings from the study were:

More than half of the cases involved children, and over a third of the cases with children had child-related motions filed.

In almost three-fourths of the cases, one or both of the parties appeared without counsel.

Most divorce cases were not contested; they did not have either answers or motions filed.

Six of the courts were close to meeting the ABA disposition time standard¹⁰⁸ that all divorce cases be disposed within one year after filing; only one court, however, was close to meeting the ABA standard that 98% of divorce cases be disposed within six months.

Case characteristics (especially attorney representation and child-related motions) and procedural differences across the courts explain a moderate amount of the variations found among courts in case-processing times.

Court control over the scheduling of divorce case events and the use of disposition time goals can affect the pace of litigation.

The number of divorce filings per full-time equivalent judge and

¹⁰⁶ B. Ostrom and N. Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project* (1996), p. 39.

¹⁰⁷ J. Goerd, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation in 16 Urban Jurisdictions* (1992).

¹⁰⁸ ABA, *Delay Reduction Standards* (1984), Sec. 2.52C.

quasi-judicial staff who handle divorce cases was not correlated with divorce case-processing times.

D. Guidance for Local Caseflow Management Reviews

With the experience of the series of national studies of court delay described in this paper, NCSC found itself in a position to summarize that experience so that state and local court officials could conduct their own assessments of delay and develop plans for addressing problems. With funding support from the State Justice Institute, NCSC published a guidebook on how to conduct a caseflow management review in 1994.¹⁰⁹ The guidebook presents a short review of the basic premises of effective caseflow management; offers advice on how to plan a caseflow management review and how to gather and analyze data; and gives suggestions on what should be the work products of the review — a memorandum presenting study results, and an action plan to address the causes of problems that have been found.

The publication of NCSC's guidebook on case management reviews signals the full development of American delay reduction and delay prevention efforts from the 1970s through the early 1990s. Before the mid-1970s, court delay had been poorly defined, and perceptions of causes and remedies were premised largely on anecdotal information and experience in single court jurisdictions. It was only through a significant commitment of institutional resources that national efforts were made to conduct comprehensive and rigorous multijurisdictional investigations of the dynamics of court delay, to test the initial insights from such investigations through the implementation of delay programs, and then to revisit the conclusions from earlier research through further studies viewing the conclusions in light of such implementation efforts. As the conclusions of research were corroborated by practical implementation experience, the "new" wisdom of caseflow management and the identification of common elements of successful court delay programs became the focus of workshops and educational programs offered across the country.

With full confidence in the methodology and conclusions of the caseflow management research, it was no longer necessary to commit massive institutional resources to further assessment of causes and remedies for court delay. Instead, it was possible to routinize caseflow management reviews through the preparation of a guidebook with which any court leader might conduct a case management review with

¹⁰⁹ B. Mahoney, H. Bakke, A. Bonacci-Miller, N. Maron, and M. Solomon, *How to Conduct a Caseflow Management Review: A Guide for Practitioners* (1994).

assurance that the results of such an effort might lead to the implementation of effective local programs.

VII. DELAY AND COURT PERFORMANCE AS THE TWENTY-FIRST CENTURY APPROACHES

As American state court leaders prepare for the commencement of the twenty-first century, they are coming to view delay reduction and delay prevention in the broader context of increasing attention to customer service. Key measures of customer service are the court performance standards that were developed by national commissions in the early 1990s.¹¹⁰ The performance standards for trial courts and probate courts emphasize (1) access to justice; (2) expedition and timeliness; (3) equality, fairness and integrity; (4) independence and accountability; and (5) public trust and confidence. Among the trial court performance standards for expedition and timeliness is Standard 2.1, stating that, "The trial court establishes and complies with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload."¹¹¹ Caseload management programs are now commonplace in trial courts throughout America. Effective caseload management is part of what is considered optimal performance for a court in terms of service to the public. And the ability to render just decisions in keeping with procedural fairness *and in a timely manner*

¹¹⁰ See Commission on Trial Court Performance Standards, *Trial Court Performance Standards, with Commentary* (1990). See also, Commission on National Probate Court Standards, *National Probate Court Standards* (1993) and Appellate Court Performance Standards Commission, *Appellate Court Performance Standards* (1995).

¹¹¹ *Trial Court Performance Standards*, p. 11. The commentary to the standard summarizes the conclusions that have been reached in American court efforts to address delay from the early 1970s to the early 1990s:

The American Bar Association, the Conference of Chief Justices, and the Conference of State Court Administrators have urged the adoption of time standards for expeditious caseload management. Timely disposition is defined in terms of the elapsed time a case requires for consideration by a court, including the time reasonably required for pleadings, discovery and other court events. Any time beyond that necessary to prepare and to conclude a case constitutes delay.

The requirement of timely case processing applies to trial as well as to pretrial and posttrial events. The court must control the time from civil case filing or criminal arrest to trial or to other final disposition. Early and continuous control establishes judicial responsibility for timely disposition, identifies cases that can be settled, eliminates delay, and assures that matters will be heard when scheduled. Court control of the trial itself will reduce delay and inconvenience to the parties, witnesses and jurors. During and following a trial, the court must make decisions in a timely manner. Finally, ancillary and postjudgment or postdeed matters need to be handled expeditiously to minimize uncertainty and inconvenience.

In addition to requiring courts to comply with nationally recognized guidelines for timely case processing, Standard 2.1 urges courts to manage their caseloads to avoid backlog. This may be accomplished, for example, by terminating inactive cases and resolving as many cases as are filed.

has become the way that effectiveness as an individual trial judge is typically measured.

Notwithstanding this fact, a recent NCSC study of civil litigation dimensions in large urban courts found many courts for which median times to disposition were well in excess of the “nationally-recognized guidelines for timely case processing.”¹¹² What does this say about the effectiveness of programs designed to reduce or prevent delay? If the national research conducted by NCSC and other organizations demonstrates a positive correlation between currently-favored caseflow management techniques,¹¹³ then there must be another explanation for the fact that court delay has not yet been conclusively defeated in American courts.

One possibility is that some courts may have reached a “saturation point,” at which the volume of cases filed exceeds even the most effective and efficient application of caseflow management techniques by fully-committed judges and court staff. For many other courts, however, the continuing presence of pending inventories of unacceptable size and age might be better explained by the theory of organizational dynamics known as the “Abilene Paradox.”¹¹⁴ Based on a probably-apocryphal story taking place in a small West Texas town near Abilene,¹¹⁵ the theory suggests that organizations fall into the Abilene Paradox when they experience the following symptoms:

Organization members individually agree in private about the nature of the situation or problem facing the organization;

Organization members individually agree in private about what steps would be required to cope with the situation or problem;

Organization members fail to communicate their desires or beliefs accurately to one another;

With such invalid and inaccurate information, organization members make collective decisions that lead them to take actions

¹¹² See Goerd, *Litigation Dimensions* (1995), p. 44.

¹¹³ See Goerd, *Examining Court Delay* (1989), pp. 38, 87 and 89; Goerd, *Reexamining Pace of Litigation* (1991), pp. 23, 55 and 64.

¹¹⁴ See J.B. Hayes, *The Abilene Paradox and Other Meditations on Management* (1988).

¹¹⁵ The story may be summarized as follows: When four family members were playing dominoes on a July afternoon in Coleman, Texas (population 5,607), one suggested that they might go to Abilene for a meal. While none of the others were enthusiastic about the idea, none objected. They all found themselves exhausted, however, by the 106-mile round-trip journey to Abilene through 100-degree weather in an old auto without air conditioning. It was only after their return that they all became aware that none of them really wanted to make the trip, and that none of them had enjoyed the meal.

contrary to what they want to do, thereby arriving at results that are counterproductive to the organization's intent and purposes;

As a result of taking actions that are counterproductive, organization members experience frustration, anger, irritation and dissatisfaction with their organization; and

If organization members do not take action to deal with the generic issue — inability to manage agreement — the cycle repeats itself with greater intensity.

The application of this theory to the failure of delay reduction and delay prevention programs¹¹⁶ suggests that the leaders and staff of courts with unsuccessful programs have agreed to their design and implementation without accurate communication to one another of their private desires, beliefs or concerns about such programs; that they have found implementation difficult and frustrating, and that they have subsequently been unable to retrieve their program from a downward course toward failure.

The Abilene Paradox complements the results of national research on court delay. It offers a theory of organizational dynamics explaining the presence or absence of such key features of effective caseflow management programs as leadership, judge commitment, communications with the bar, and active involvement of court staff members.

This observation offers a final lesson from the experience in American courts with their efforts to reduce and avoid delay. To enhance the likelihood of success in a new or revised delay reduction and delay prevention program, it is important that court and bar leaders exercise leadership in the program design stage to elicit accurate expression of individual judges,' bar members' and court staff members' wishes and concerns about the program; respond effectively to such concerns to promote judge commitment to the program, bar involvement and support, and court staff commitment and support; regularly communicate with judges, attorneys and court staff after implementation of the program to learn about perceived problems in the operation of the program; and take appropriate steps to address concerns that have been expressed and refine program operations accordingly.

¹¹⁶ The applicability of the Abilene Paradox to caseflow management programs in courts has been suggested by Barbara Sopronyi, co-leader of a workshop, "Systems That Work: Designing and Implementing Effective Systems," held on October 21, 1996, for the Mid-Atlantic Association for Court Management in Cape May, New Jersey.

Conference on Case Management

By such steps as these, leaders can avoid falling into the Abilene Paradox and can assure the continuing presence of the program operation features necessary for success in their efforts to reduce and prevent delay in their courts.

CHAPTER 10

An Overview of Case Management: Connecticut's Experience

Presentation by *The Honorable Aaron Ment, Chief Court Administrator, Connecticut Superior Court, United States of America*

INTRODUCTION

Case management is a technique used by the Connecticut Judicial branch to address the demands presented by a large and complex caseload. To better understand Connecticut's case management efforts, it may be helpful to consider an overview of the state and its court system. Connecticut, one of the smaller American states, is approximately one-fifth the size of the Republic of Ireland. However, the population of both Connecticut and Ireland is between 3.25 and 3.5 million people. The Connecticut Judicial Branch, along with the Executive Branch and the Legislative Branch, is one of three independent and distinct entities comprising the state's government. Connecticut's Judicial Branch has a strong, centralised administration and is one of 12 state judiciaries with a unified court system.¹¹⁷ A state court is said to be unified if it has a single level trial court financed by the state and no other court operated by a political subdivision such as a municipality or country.¹¹⁸ It has been the experience of the Connecticut Judicial branch that a unified court system and a strong, centralised administration are advantageous for the implementation of case management.

Connecticut has 158 superior court judges, an intermediate appellate court of nine judges, and a seven-judge supreme court, which is the state's court of last resort.¹¹⁹ Superior court judges are appointed on a

¹¹⁷ The Court having jurisdiction over a decedent's estate operates in a separate system known as probate court.

¹¹⁸ Because each state has a court system unique unto itself, it is difficult to compare one state to another and difficult to impose rigid definitions for terms such as "unified". Therefore, this definition may not be universally accepted.

¹¹⁹ In Connecticut, Justices of the Supreme Court and Judges of the Appellate Court are also Judges of the Superior Court. The addition of these individuals brings the total number of judges to 174.

state-wide basis with the authority to preside anywhere within the State of Connecticut and with the authority to preside over all types of cases.

The Office of the Chief Court Administrator assigns superior court judges to specific locations and to specific areas of law. These assignments are done annually and although, in theory, it is possible for judges to change location or subject matter each year, most judges preside over the same types of cases in the same location for many years. The Judicial Branch has a centralised administrative structure that oversees 12 local judicial districts, each of which has limited local autonomy and a limited administrative infrastructure.

The mission of the Judicial Branch of the State of Connecticut is to serve the public by resolving matters brought to it in a fair, timely and cost-effective manner. This philosophy drives our operations and actions, including the manner by which we manage our cases.

Connecticut's courts have a fundamental responsibility to the public to provide access to the justice system. Case management is one of the techniques employed by the Connecticut Judicial Branch to fulfil its mission, thereby promoting optimal access to the courts for all of the citizens of the state. The State of Connecticut has, for the past 20 years, made effective use of case management, which is a dynamic, continuously-changing process that is adjusted regularly to meet the needs of the court and the demands of its customers. Throughout its many years of experience with case management, the Judicial Branch has been able to learn from its experiences and adjust processes and procedures to more effectively meet its goals and objections.

One of the many benefits of case management is that it has enabled judges and staff to increase productivity. Each of the past five years has seen an increase in the number of civil jury trial cases disposed per judge. In state fiscal year 1991-92, each judge disposed of an average of 150 cases. That figure grew to 197 cases per judge in 1995-96. However, the number of new cases added per judge has increased at an even higher rate. Therefore, the Connecticut Judicial Branch is unable to keep pace with increased demand on the civil jury trial docket. Case management, while an effective tool, is not a substitute for having an adequate number of judges and staff.

Therefore, care must be taken so that funding sources do not expect more of case management than is deliverable and reduce funding as a result of inflated expectations. In Connecticut's experience, some members of its legislature had the impression that case management generally, and dispute resolution programs specifically, would allow courts to resolve disputes with a reduced budget. That is simply not true.

Commitment to case management can be helpful in obtaining additional funding as it delivers a message that existing resources are being utilised in an effective manner.

ELEMENTS OF CASE MANAGEMENT

The fundamental premise of case management in Connecticut is that it is the court's responsibility to control the movement of cases. The court's neutral role gives it a unique perspective to understand the needs of all parties. Therefore, when the court controls the movement of cases, the system operates more efficiently and without delay, resulting in the reduction of excessive costs.

There are a number of basic elements that comprise Connecticut's case management programme. First, the exercise of judicial control throughout the life of a case is critical. With control commencing at the very beginning of a case, the court provides the road map specifying the case management expectations from filing to disposition. The benefits derived from early application of case management include earlier disposition of cases, thereby freeing judicial time for those cases that need more extensive attention or a trial.

Another important component of case management is the expectation of certainty that trials and other events will occur when scheduled. In order for the court to manage caseload and sustain its credibility, it must adhere to its established schedule and ensure that the legal community complies with the schedule established by the court.

Commitment to case management must go beyond the court to the very leadership of the Judicial branch in order to ensure success. Ideally, a consensus must be reached between all members of the legal system. One way to achieve that consensus is through the sharing of information in a manner that leads to an understanding of the needs of all participants.

An adequate information system — another key component — is also necessary to properly monitor and manage the caseload. Specific programs are developed and implemented to provide this information to the entire legal community.

Finally, an administrative infrastructure is necessary to assist the court in maintaining its control of the movement of cases. Connecticut's administrative infrastructure provides leadership at the state level with the Chief Court Administrator and chief administrative judges, as well as at the local level with administrative judges and presiding judges (see Appendix I). Additional support and assistance is provided locally by

caseload co-ordinators and at both the state and local level by a technical assistance unit.

The principal responsibility for civil case management lies with the chief administrative judge for the civil division. He or she represents the Judicial Branch in meetings with judges, and many others, to exchange information affecting the operation of the division. He or she is also responsible for the implementation of Judicial Branch policies and caseload programs. Presiding judges manage specific subject matter dockets within local judicial districts. They are responsible for expediting the disposition of court business and apportioning that business among the assigned judges.

The CASE MANAGEMENT PROCESS

A significant characteristic of Connecticut's case management is that it is a continuous process. If one were to diagram the process, it would be shaped like a multi-segmented wheel, with each segment representing a different step in the process (see Appendix II). It is designed to continuously adjust to the changing needs of the court and the demands of its customers. The following steps, undertaken by the Connecticut Judicial Branch in its case management efforts, could be adapted for use elsewhere.

The first step in the development of a case management program is to measure the existing caseload for each court location. Measurement of the caseload is necessary because effective management decisions should be based upon facts not on perceptions of fact. A detailed assessment of the caseload provides the necessary facts upon which to base appropriate standards and plans.

The second step in the process is the establishment of ideal standards that should be based upon information gathered from measuring the caseload, benchmarking national standards, and benchmarking standards used by other states. In Connecticut, these standards are intended as deliberately aspirational ideals to which our courts aspire. Connecticut standards are more lenient when compared to national standards; however, they still represent a challenge. The standards adopted were divided into two categories: jury and non-jury, with the ideal standard for non-jury civil cases being disposition within 18 months and the ideal standard for jury civil cases being disposition within three years. Presently, 44 percent of non-jury cases are disposed within 18 months and 71 percent of jury cases are disposed within three years.

The third step in the process is to develop a state-wide plan to help achieve the previously-established standards. This plan should be initiated by the courts, but should be widely circulated for comment, prior to implementation. The state-wide plan contains policies that govern the court's conduct with regard to all civil cases. In Connecticut, there are a series of conferences with established objectives for each. The plan then sets forth time parameters for conferences during the pendency of the case. The first conference is held within six months after filing a case. At each conference, efforts are made to resolve the matter or narrow the issues. When a case is ready for trial, a final conference is held to prepare the case and to explore methods to limit the time required for trial.

The fourth step in the process is to establish short-term goals to incrementally move toward the ideal standards. The established goals vary location by location. For example, one short-term goal might be to initially reduce the number of jury and court cases pending over three years to 15% of the docket and ultimately dispose of all cases pending over three years.

The fifth step in the process is to develop and implement a local plan to achieve short-term goals. Local plans work within the frame work of the state plan, but will be adapted to local conditions and legal culture. The local plans are often altered to reflect the relationship between the bench and the bar in a specific region. In Connecticut, these plans are developed by the chief administrative judge of the civil division, local court judges and staff. Local plans may include a variety of delay reductions and/or court-annexed dispute resolution programs that will be summarised later in this narrative.

Finally, the process begins again when the caseload is remeasured. In Connecticut, the caseload is remeasured on a quarterly basis, but it can be done at any interval to fit the situation. There is a need to remeasure caseloads from a local and state-wide perspective in order to monitor progress and to provide the local courts with information regarding the results of their efforts. Based upon this remeasuring, facts are obtained which can lead to a modification of any step in the process, or segment of the wheel. As mentioned previously, delay reduction programs and court-annexed dispute resolution mechanisms are adjuncts to the case management plan and are also subject to evaluation.

DELAY REDUCTION PROGRAMS

Delay reduction programs are also effective tools for the efficient and expeditious resolution of certain types of cases. The Connecticut

Judicial Branch has, for a number of years, offered a variety of such programs.

The *Dormancy* program is one of the delay reduction options utilized for effective case management (see Appendix III). In Connecticut, certain time parameters are set for actions in each civil case. If they are not met, Connecticut rules permit the imposition of sanctions including the removal of the action from the court. Every six months cases are reviewed to see if they meet the established time parameters. This program allows the court to remove all cases where the parties no longer have an interest in pursuing the matter.

Early Judicial Intervention is another delay reduction option (see Appendix IV). All civil cases are screened/reviewed to determine if they are appropriate for this program. The determination is based upon differentiated case management concepts. All cases selected for early judicial intervention are then scheduled for an intervention conference within six months after the filing of the case. A judicial authority presides over the conference. Parties are encouraged to resolve their dispute, and, in appropriate matters, use Dispute Resolution (DR). If the matter is not settled, the presiding officer assists the parties in the formation of a scheduling order that sets forth times for future events to occur.

Unified Case Management is a technique used to manage civil cases arising out of a common cause of action and pending in various court locations. In Unified Case Management, one judge is designated to preside over all aspects of the litigation including trials, if needed. Case selection ranges from relatively simple multi-party accidents to vastly complex torts arising from exposure to harmful products or substances such as asbestos, lead paint or silicon breast implant cases.

Special Court Sessions have been created to assist the Connecticut Judicial Branch in relieving some of the backlog in certain areas. This delay reduction option was developed because certain types of cases require expertise and specific resources that cannot be made available in every location. This program provides an opportunity for a prompt and impartial hearing by judges specifically designated to hear these matters. In addition, it offers an expeditious, convenient, equitable and effective determination of their dispute. The creation of a consistent uniform body of laws for guidance of judges and litigants is another benefit of this program.

COURT-ANNEXED DISPUTE RESOLUTION (DR) PROGRAMS

Dispute Resolution, like delay reduction, is an effective tool for managing a civil caseload. Dispute Resolution includes any program

which attempts to resolve a dispute short of a trial and consists of the following options (see Appendix V):

Mediation — a program that utilises semi-retired or retired judges to assist the parties to reach their own agreement. Cases may be identified by counsel or a judge at any time prior to a trial and, if approved by a presiding judge, are referred for mediation.

Arbitration — a mandatory non-binding dispute resolution approach which utilises attorneys to resolve jury cases under a certain monetary limit. If any of the parties does not accept the decision, the matter will be returned to the regular docket for trial.

Fact Finding — a mandatory program limited to certain contract collection cases where non-judicial officers make findings of fact that are referred back to the court for final action. Monetary limitations apply to this program also.

Note that both the arbitration and fact finding programs were initiated by our legislature, therefore, the court has less flexibility than in programs that are instituted by court rule. They were also enacted when case management was a new concept in Connecticut, and in recent years, the legislature has relied on the courts to enact case management programs.

Attorney Trial Referees — a consensual dispute resolution approach which utilises attorneys to resolve civil non-jury matters without monetary limitations. This program is similar to fact finding except that it is consensual and there are no monetary limitations.

Special Masters — a program where attorneys assist parties in civil and family cases in order to reach agreements.

Summary Jury Trial — a program where jurors render a non-binding opinion in civil jury cases after an abbreviated presentation of the facts.

LESSONS LEARNED

The Connecticut Judicial Branch has learned a great deal from the mistakes made during its early case management efforts. These mistakes, while initially troublesome, have ultimately contributed to a greater understanding of those factors and circumstances that bring Connecticut's courts closer to achieving their goals.

The first mistake made by Connecticut was the development of projects without sufficient planning and consulting with all participants. From this mistake, the Connecticut Judicial Branch has learned that it is critical to consult widely so that the case management plan reflects the interests and realities of all the parties. One notable example of such a mistake was an attempt to institute a mandatory mediation program. This program was designed to allow the court to order the parties to participate in mediation. Successful mediation depends on eventual agreement between the parties, therefore, the lesson learned from this experience is that forcing parties to mediation more often than not results in a negative response and failure of the mediation effort. After the program was changed from mandatory to voluntary, the program achieved an 80 percent rate of resolution.¹²⁰

A second mistake is somewhat related to the first. The Connecticut Judicial Branch incorrectly assumed that carefully-planned, well-designed programs implemented after wide consultation would be immediately accepted by the legal community. In fact, many of the programs developed by the Branch were under-utilised because of inadequate efforts to inform or educate. The lesson learned is that a program or policy that altered an established practice or modified the local legal culture needed to be explained completely and that explanation needed to be repeated often.

Another mistake in the development of programs was to initiate them without thorough consideration and analysis of the staff and other resources necessary for their adequate support. Without needed resources, the programs were unable to achieve their goals or objectives, resulting in program failure unconnected to the merit, or lack of merit, of the specific program. The lesson learned from this is that it is critical to analyse sufficiently the needs of a program and provide resources at the outset.

Finally, the Judicial Branch failed to incorporate, at the outset, monitoring and evaluation devices. Without a monitoring component, flaws in the program cannot be detected and areas that require change cannot be identified. Without an evaluation component, there is no method by which to gather information, nor is there ability to conduct a statistical analysis of the results. The Connecticut Judicial Branch has learned that monitoring and evaluation are both necessary to prove the credibility of programs so that they may be accepted.

¹²⁰ Based on highly preliminary data.

SUMMARY

For the Connecticut Judicial Branch, case management is driven by its mission to serve the public by resolving matters brought to it in a fair, timely and cost-effective manner. Case management, by its very nature, is a continuously-evolving process that is adaptable to the needs of the court and its customers.

A successful case management plan is dependent upon a number of factors, specifically a strong administrative infrastructure; the ability to the court to take control of cases early and maintain that control throughout the life of each case; and an ongoing commitment to the case management plan. Because the case management plan will by its very nature undergo change, it should be understood that active involvement in the process should begin well before the plan is final. Therefore, the tendency to postpone action until the plan is complete should be avoided. Engaging in the process provides valuable information and a wealth of experience necessary for effective case management. A critical element of the case management process is the willingness to be receptive to implementing new ideas and programs and to learn from mistakes made.

Finally, the lesson learned in Connecticut underscore the necessity that case management should be well-planned, its elements should be well-articulated and communicated, and it should be implemented with care and be supported with adequate resources. Case management is not a substitute for adequate judges, staff and resources. Used appropriately, it is an effective tool for meeting the demands of a large and highly-complex caseload.

APPENDICES

APPENDIX I

Chief Administrative Judge

There are five chief administrative judges, one each for (1) the Family Division Part J (juvenile), (2) the Family Division Parts S (support) and D (dissolution), (3) the Civil Division Parts H (summary process), S (small claims), J (jury matters) and C (court matters), (4) the Civil Division Part A (administrative appeals) and (5) the Criminal Division. They have the following responsibilities:

- Represent the chief court administrator on matters of policy affecting their respective divisions.
- Solicit advice and suggestions from the judges and others on matters affecting their respective divisions, including legislation, and advise the chief court administrator on such matters.
- Advise and assist administrative judges in the implementation of policies and caseflow programs.
- Periodically meet and confer with judges assigned to their divisions to discuss and exchange information and developments affecting the operation of the division.
- Solicit from administrative judges information on the assignment of judges and advise and participate with the chief court administrator in the assignment of judges.

Administrative Judge

A.J. is the abbreviation for administrative judge. They have the following responsibilities and powers:

- Assume, as necessary, any assignment within the judicial district.
- In the event it is necessary to cover for vacation, illness, or an emergency, reassign any judge assigned within the judicial district to another division, part or court location. Such reassignment shall be temporary and shall not exceed two weeks. Prompt notice of the assignment shall be given to the office of the chief court administrator.
- Subject to the prior approval of the chief court administrator, determine the courthouse(s) which jurors shall be initially summoned within the judicial district.
- When required, order that the trial of any case, jury or non-jury, be held in any courthouse facility within the judicial district.
- Represent the chief court administrator in the efficient management of their respective judicial districts on matters affecting the fair administration of justice and the disposition of cases (C.G.S. 51-5a(3)).

- Solicit advice and suggestions from the judges and others on matters affecting their respective judicial districts, including legislation, and advise the chief court administrator on such matters.
- Implement and execute programs and methods for disposition of cases and administrative matters within their respective judicial districts in accordance with policies and directives of the chief court administrator.
- Insure non-discriminatory treatment of all persons affected by the court's operations.
- Promote the overall well-being of the judges and be mindful of their needs.
- Provide information to chief administrative judges regarding their assignment needs.

Assistant Administrative Judge

A.A.J. is the abbreviation for assistant administrative judge, which judge(s) shall have all of the aforementioned responsibilities and powers of the administrative judge for such judicial district, provided the A.A.J., in exercising powers, shall not issue orders contravening the orders of the administrative judge.

Presiding Judge

P.J. is the abbreviation for presiding judge. Such judges shall have the following responsibilities:

- Expediting the disposition, fairly, of the court business to which such judge has been entrusted.
- Reporting to the administrative judge and conferring with the administrative judge and the appropriate chief administrative judge concerning problems and accomplishments in achieving the aforementioned objective.
- Apportioning among the judges the judicial business to which such judge and other judges have been assigned.

APPENDIX II

State of Connecticut
Judicial Branch

Office of the Chief
Court Administrator

CASE MANAGEMENT PLAN
a continuous process

Measure
caseload/
remeasure
caseload.

Develop &
implement
Local Plan
to achieve
short-term
goals.

Establish
ideal
standards.

Establish
short-term
local goals to
achieve ideal
standards.

Develop
Statewide plan
to achieve ideal
standards.

APPENDIX III

DORMANCY PROGRAM

The purpose of the Judicial Branch's Dormancy Program is to encourage the litigants to pursue their cases vigorously and to clear the docket of cases which are no longer being litigated by the parties with due diligence.

Practice Book Sec. 251 provides the authority for the program, authorising the court, on its own motion, to render judgment dismissing an action for failure to prosecute with reasonable diligence. The Rule requires that at least two weeks' notice be given to counsel and the parties.

The Chief Court Administrator establishes the criteria used to determine eligibility for placement of cases in the program which runs twice a year. The criteria established focuses on key events in the litigation process and sets specific time parameters for compliance which are communicated to all administrative and presiding judges. The following is a list of the criteria used:

1. Writ only on file . . . SIX MONTHS from return date.
2. Writ and appearance only . . . SIX MONTHS from return date.
3. Pleadings not closed . . . TWELVE MONTHS from return date.
4. Pleadings closed but not claimed to trial list . . . TWELVE MONTHS from return date.

Additionally, all contract collections and small claims transfer cases which have remained at the pleading stage for six months are included. Certain other cases including receivership and bankruptcy cases are automatically exempted.

Litigants whose cases fit within the above criteria can be relieved from a dismissal of the action if they do one of the following:

1. file a claim for trial.
2. file a withdrawal of action.
3. proceed to final judgment; or
4. obtain an order granting an exemption for good cause.

The results of this program, generally speaking, have helped to relieve the docket of cases which are no longer actively being pursued.

APPENDIX IV

STATE OF CONNECTICUT JUDICIAL BRANCH JUDICIAL INTERVENTION PLAN

Policy I. Screening Cases

Each civil case where one or more defendants have appeared, excluding administrative appeals, shall be reviewed by the caseload office or where there is no caseload office, the clerk's office, to determine if such case is appropriate for early judicial intervention. The determination shall be based upon identifiable guidelines established by the Office of the Chief Court Administrator. (See attached Criteria for Assignment of Civil Cases for a Judicial Intervention Conference.)

Policy II. Intervention Conference

All cases determined to warrant early judicial intervention shall be scheduled for a conference approximately six months following the return day in every case where one or more defendants have appeared. The conference shall be presided over by a judge, senior judge, trial referee or a judicial adjunct. The individual presiding over the conference shall encourage the parties to resolve their dispute, and, in appropriate matters, referrals to court-annexed or private Alternative Dispute Resolution (ADR) may be considered. If the matter is not settled, the presiding officer shall aid the parties in formation of a scheduling order. (See attached scheduling order.) When the parties cannot agree on a scheduling order, a judge, senior judge or referee shall issue a scheduling order.

All scheduling orders should contain a date for a status conference approximately six months following the intervention conference.

Policy III. Status Conference (Pre-trial)

The status conference is presided over by a judge, senior judge, or trial referee who will review compliance with the scheduling order. An in depth pre-trial shall be conducted at this conference with all parties and representatives in attendance if ordered by the judge conducting the conference (pre-trial). If the matter cannot be resolved, the parties should in good faith explore settlement alternatives including all forms of court-annexed and private ADR. The court will continue the matter for a reasonable period if the parties agree to participate in any form of ADR. When the matter is not resolved, and the parties cannot agree on an alternate method of resolution, trial management orders shall be imposed and a firm trial date should be selected in judicial districts where feasible or the matter rescheduled for the selection of a firm trial date. (See attached Trial Management Order).

Policy IV. Trial Management Conference

A trial management conference shall be held by the civil presiding judge or a judge designated by that judge not more than fourteen days before the trial date in every civil case. The judge shall ensure that the provisions of the trial management order have been met and to determine if resolution of the matter prior to trial is possible. If no resolution is possible, the judge shall explore methods to limit the time required for trial.

Policy V. Exhibits

All exhibits indicated in the trial management conference report filed in a case should be marked with a clerk present. The civil presiding judge or a judge designated by that judge, should rule on as many disputed exhibits as possible before the commencement of trial.

Policy VI. Jury Selection

After a jury is selected, it should not be held (stacked) for more than two weeks before trial commences.

Criteria for Assignment of Civil Cases for a Judicial Intervention Conference

A judicial intervention conference is to be scheduled approximately six months following the return day in every case where one or more defendants have appeared and one of the following criteria is met:

- the case is designated as a tort casetype (all torts).
- the case is designated as a small claims transfer.
- in any other case as designated by the court.

APPENDIX IV

SCHEDULING ORDER

JUDICIAL DISTRICT OF	INTERVENTION CONFERENCE DATE	
CASE NAME	DOCKET NUMBER	
ALTERNATIVE DISPUTE RESOLUTION		
PRIVATE ADR Are all parties willing to refer the case to private ADR? <input type="checkbox"/> YES <input type="checkbox"/> NO		
ATTORNEY REFEREE In court cases, are the parties willing to try the case before an attorney trial referee? <input type="checkbox"/> YES <input type="checkbox"/> NO		
STATE TRIAL REFEREE In jury cases, are the parties willing to try the case before a state trial referee (with a jury)? <input type="checkbox"/> YES <input type="checkbox"/> NO		
DISCOVERY ORDER		
Per order of the Presiding Judge the following discovery order is entered. Failure to comply with this order shall result in the entry of sanctions, including but not limited to nonsuit or default.		
1. Close Pleadings and claim to trial list by:	DATE	
2. Written discovery requests and responses by:	DATE	
4. Complete depositions of	Fact witnesses by:	DATE
	Plaintiff's experts by:	DATE
	Defendant's experts by:	DATE
5. Any motions for summary judgment shall be filed on or before:	DATE	
6. Motion to consolidate this case with a _____ CV _____ case name _____ is to be filed and marked ready by:	DATE	
7. Schedule Independent Medical Exam(s) (I.M.E.) by:	DATE	
8. Other Orders: _____ _____	DATE	
9. A status conference (pretrial) will be held in this case on or about:	DATE	
AGREED	Plaintiff's Counsel:	Plaintiff's Counsel:
	Defendant's Counsel:	Defendant's Counsel
BY THE COURT:	, JUDGE	DATE ISSUED:

:SUPERIOR COURT

V. : JUDICIAL DISTRICT
: , 199

CIVIL JURY TRIAL MANAGEMENT ORDER

Counsel and pro se parties in this matter are ordered to attend a trial management conference before the undersigned judge in the _____ Judicial District Courthouse, _____, at _____, on _____.

At the commencement of the conference, counsel and pro se parties are to file with the court on pleading paper a *joint* trial management conference report providing the following information:

1. A joint non-argumentative description of the case suitable for reading to the jury panel, including the names and places of residence of the parties and the date, place and nature of the incident in issue. The description must contain no more than seventy-five (75) words.
2. A joint list of issues which are in dispute.
3. A joint list of pending motions, pending requests for discovery and proposed motions in limine.
4. A list of exhibits reasonably expected to be introduced by each party, indexed by P plus number for plaintiff(s) and by D plus number for defendant(s). The list shall briefly describe each exhibit and indicate whether any party objects to the admission of such exhibit and the grounds for such objection. After the trial management conference and prior to the commencement of trial, all exhibits listed must be marked with a court clerk as full exhibits or for identification.
5. A list of all witnesses reasonably expected to be called by each party, in sequence in which they will be called, including the name and the relationship of each witness to the case (e.g. party, eyewitness, expert) and whether there is a scheduling problem as to the testimony of any such witness. Rebuttal witnesses, i.e. those whose testimony is meant to rehabilitate, explain, qualify, negate or contradict that which has been presented during the defendant's case, need not be listed by the plaintiff. Likewise, surrebuttal witnesses, i.e., those whose testimony is meant to refute the plaintiff's rebuttal evidence, need not be listed by the defendant.
6. A joint estimate of the days required for jury selection and the days required for trial.

Failure to comply with this order may result in a judgment of non-suit, default, exclusion of exhibits or witnesses at trial or other sanctions.

_____, J.

APPENDIX V

COURT-ANNEXED DISPUTE RESOLUTION PROGRAMS

Court-Annexed Mediation

The Court-Annexed Mediation Program is designed to provide the litigants with an additional method for resolving their disputes without the need of a full trial. The mediation process utilizes a neutral third party (the mediator) to help the parties in a dispute discuss the issues, consider possibly settlement options and reach an agreement.

Referral of a case to the program is made either at the request of the parties in the case or, when appropriate, by order of the court. A request for referral may come at any stage in the proceeding of a civil and/or a family matter. Semi-retired and retired judges assigned to cases serve as mediators. The judges have taken part in special training sessions to help them prepare for their role as mediators.

The mediator does not render a decision in this process, but rather serves as a facilitator and assists the parties in crafting an agreement that they will be able to follow. The litigants benefit from a successful mediation by reaching an agreement they had a hand in fashioning. The court benefits from having an additional tool for the resolution of cases without a trial.

Arbitration

Arbitration is a court-annexed program designed to resolve certain civil jury actions with the use of non-judicial officers conducting arbitration hearings.

The qualifications for appointment as an arbitrator are as follows:

Arbitrators must be admitted to the practice of law in the state of Connecticut for at least five years. Upon recommendation by the Administrative Judge and approval by the Chief Court Administrator, arbitrators are appointed for a two-year period.

Any case claimed to the jury trial list in which the claim for damages is less than \$15,000.00, exclusive of interest and costs, can be referred to non-binding arbitration pursuant to e52-549u of the Connecticut General Statutes. The applicable rules for arbitration are found in Practice Book e546M-S. Arbitration is non-binding and the decision of the arbitrator will be null and void if either party elects a trial de novo pursuant to Practice Book e546S.

Fact Finding

The fact finding program is designed to accelerate the disposition of certain contract cases by referring them to non-judicial officers for fact finding.

The qualifications for appointment as a fact finder are as follows:

Fact Finders must be admitted to the practice of law in this state for at least five years, must be recommended by the Administrative Judge, and approved by the Chief Court Administrator to serve for a period of two years.

Any contract action claimed to the court trial list where only money damages are claimed based on an express or implied promise to pay a definite sum, and

Conference on Case Management

in which the amount, legal interest or property in demand is less than \$15,000.00, exclusive of interest and costs, is eligible for reference to a fact finder under C.G.S. e52-549n. The fact finder must follow procedures set forth in Practice Book e546C-K. An effective procedure is to select two fact finders to adjudicate all matters marked ready for trial at the call of the fact finding calendar. Half of all ready cases are referred to each fact finder for pretrial. Following the pretrial, unresolved cases are tried by the other fact finder. A firm "no" continuance policy should be adopted when conducting this program. This program is very successful; generally, all of the cases on a calendar can be resolved in one day and usually before luncheon recess.

Attorney Trial Referee

In addition to the fact finding and arbitration programs, the court can refer any matter with the written consent of all parties to an attorney trial referee for trial. See *Seal Audio, Inc. -v- Bozak, Inc.*, 199 Conn. 496, 508 A.2d 415 (1986) and *Bowman -v- 1477 Central Ave. Apartments, Inc.*, 203 Conn. 246, 524 A.2d 610 (1987).

The qualifications for appointment as an attorney trial referee are as follows:

Attorney Trial Referees must have considerable civil trial experience and be electors and residents of the state of Connecticut. They must have the recommendation of the Administrative or Presiding Judge. Their applications should be sent to Court Operations, Technical Assistance Unit, 75 Elm Street, Hartford, CT 06106. The applications are reviewed by the Chief Court Administrator and submitted to the Chief Justice for appointment for a one-year term.

Attorney trial referees act as fact finders whose determination of fact is reviewable by the court. It is the function of the court to render judgment on the facts reported by the attorney trial referee. It is also within the province of the court to correct the findings of the attorney trial referee or to reject the report in its entirety (Practice Book e443).

Special Masters

Special masters conduct pretrial conferences in which they mediate and/or pretry civil or family matters referred to them. Although there is no formal qualifications for the appointment of special masters, the presiding judge may use his/her own discretion in their selection.

Special masters are attorneys and other professionals, such as family relations counsellors, tax consultants, accountants, contractors, etc., who have been selected by the court for their knowledge and expertise in a specific area. Special masters are designated by the Administrative/Presiding Judge to serve on an ad hoc basis.

The use of a special master provides the litigants with an opportunity to resolve their dispute with a neutral third party who has expertise in the area central to their claim. Special masters are facilitators; they do not have the power to conduct hearings or to enter judgment.

Summary Jury Trials

Summary jury trials are advisory, abbreviated non-binding trials presented to juries who then render a decision on liability, damages, or both for the purpose of promoting settlement of a case.

Case selection usually involves those cases in which if tried conventionally, would require several weeks of trial and large expenditures of resources. Identification of such matters occurs during a pretrial conference. The only bar to settlement among the parties is the uncertainty of the perception of liability and damages by the members of a lay jury.

Summary jury trials are voluntary and are conducted by a judge in a courtroom under special ground rules. Ground rules are constructed by the parties and the judge. They are designed to give the parties confidence that their legal positions are effectively stated with the expectation that the advisory verdict may cause them to re-examine their positions and settle the case without a full trial on the merits.

CHAPTER 11

Case Management in Family Law Courts

Presentation by *The Honorable James D. Garbolino, Placer County Superior Court, Auburn, California, United States of America*

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CASE MANAGEMENT IN FAMILY LAW COURTS¹²¹

Hon. James D. Garbolino

I. INTRODUCTION — THE DIFFERENCE BETWEEN FAMILY LAW CASES AND ALL OTHERS

The administration of justice in family law involves complex and challenging issues. Family law courts deal with a far greater variety of issues than any other type of civil or criminal case. The outcomes of such cases are important not only to the parties directly affected, but to society in general. The combination of economic and humanistic factors in a family is what compels a different treatment of them in the courts. It is therefore quite essential that court planners and administrators bear these differences in mind when contemplating questions of how to best process the court's family law caseload. The comments which follow explore the differences presented by family law litigation, and offer some possible suggestions to assist in their successful adjudication.

A. *Positive Differences*

Judges Possess broad powers. By tradition, family law courts sit as courts of equity, hence judges have broad powers to manage and decide cases. In general, substantive family law and procedure in the United States are governed by statutes which have been enacted by the legislative bodies of each state. Judges in family law courts have plenary powers to enter orders which either restrain the parties' conduct, or compel them to act. Especially in matters of child custody and access, Judges are vested with the broadest discretion to decidewhat is in the best interests of children. Such powers are necessary to implement orders which divide marital property, award custody of children and access to them, and provide for the necessary protection and support of the family. As such, the powers to implement case management tools should be inferred as within a judge's inherent powers.

Importance of the subject matter. The importance of a family law case cannot be minimized. In a humanitarian sense, the family law courts represent the embodiment of governmental priorities in protecting children, continuing the preservation of family values, and encouraging a meaningful participation in children's lives by both parents. In economic terms the court acts to allow parents to separately lead

¹²¹ Prepared for the Conference on Case Management organized by the Working Group on a Courts Commission and held in Dublin on 16th November, 1996.

financially viable lives. One urban family law judge posed the following to colleagues on the bench:

“When was the last time you had a verdict in excess of \$1,000,000 in your court?”

The response was predictably small. He continued:

“In family law, we deal with cases involving \$1,000,000 or more on a weekly basis; when you add the value of a house, business, pension plans, and support awards, it is easy to understand that a \$1,000,000 case is not unusual at all.”

Clearly, the issues in family law are significant to the individuals directly involved in the process, as well as to the fabric of the society to which the litigants belong.

B. Negative Differences

Multiplicity of Issues. One of the hallmarks of a family law case is that there are numerous discrete issues which must be resolved. These involve the adjudication of marital property rights, the marital status itself, jurisdiction and venue issues, awards of custody and access rights, and orders for financial support of the children. It is because of this profusion of issues that case management is particularly suited to family law cases.

Emotional Issues. The separation of a family involves substantial emotional upheaval. The emotional phases which attend marital separation are not unlike those which are experienced when a person suffers the death of a loved one. It is the experience of judicial officers in the United States that family law cases involve the highest degree of emotional conflict of any which appear before the courts. This is attested to by the fact that the overwhelming majority of violent incidents which occur at courthouses deal with family law related cases.

Lack of finality. Entry of a final decree or judgment is no guarantee that the court will have effected an end to the controversy. Parties who have long ago obtained permanent orders regarding custody, access, and support, nevertheless return to court for adjudication of new issues, or modification of the old ones. Because the court has continuing jurisdiction to hear these disputes, the goal of bringing the case to a complete and final conclusion is often frustrated.

Highly Conflicted Cases. Family law cases have the potential to involve serious conflicts between parties. The most troublesome aspect of intense conflict is the serious risk that it poses to children. It is axiomatic that children react adversely to situations where their parents expose them to high and prolonged levels of conflict.

C. Interesting Differences

Results obtained by settlement and mediation are preferable to litigated results. As experience with family law litigation evolves in the United States, those involved with the system tend to favor a system in which the expected method of resolution of a case is through mediation, negotiation, and settlement. The traditional adversary system of resolving cases may still be necessary for a select type of case.¹²² Many legal authorities however, believe that family law cases are ill served by a system which seems to exacerbate, rather than solve, the problems experienced by a family in the course of breakup. A noted California jurist recently observed:

“The process stinks. It’s no good for family law, and yet that’s the system we have. This process was developed for civil and criminal cases. It is a process on the civilside that was developed for people who were never going to see each other again. It gives them a legal result. It doesn’t help them. And that’s the failure of the system. It makes them fight.”¹²³

What is unique about family law litigation is that the parties do not end their contact with each other, even after the litigation ends. They are still joined by the issues of custody and access, support and maintenance, and the continuing roles which they play as parents. No other area of the law binds the litigants together after a judgment has been pronounced.

Studies have indicated that parties to a family law action are generally more satisfied with the result in the case when the parties have been able to arrive at a negotiated result, as opposed to a litigated result. The reasons for this appear to fall into three categories. First, parties who resolve their family law case by negotiation and settlement are able to shape the ultimate outcome of their case — thus having the ability to

¹²² It is necessary that the adversary system be available for the trial of certain types of cases, such as those involving a history of domestic violence; cases where the parties’ bargaining or negotiation skills are at such an imbalance so as to skew any negotiated result unfavorably; cases involving abuse of children; and those involving high degrees of parental conflict.

¹²³ Duryee, M, and James Garbolino, “Family Law: is the System Broken?”, Family Law News, Vol. 19, No.1, San Francisco, CA 1996, quoting Justice Donald King, California Court of Appeal, 1st Dist.

control the result. Parties who litigate their cases lose control over the outcome of their case by submitting it to a judicial determination. Frequently a judicial decision falls outside the range in which the parties were negotiating. For example, parties may have attempted to resolve the issue of maintenance or support within a range of £100 — £300 per month. A judge may see the case quite differently, arriving at a support order of £500 — clearly outside a range which the parties themselves felt was fair or just. Secondly, parties who resolve their case by settlement pay less in fees for legal assistance than those who insist in litigating their result. Much of the cost of legal representation is spent in preparing a case for trial. Thus, the later the parties settle their case, the more expensive the legal bills. Third, parties who resolve their cases by settlement obtain closure of the issues involved at an earlier stage, tending to reduce the emotional cost which attends protracted litigation. Because of these factors most parties are best served by referring their cases to alternative forms of dispute resolution: binding or non-binding arbitration, mediation, counseling, supervised and unsupervised settlement conferences.¹²⁴

II. CASE MANAGEMENT — TWO CONNOTATIONS

The phrase “case management” is used interchangeably in a family law lexicon to refer to two distinct concepts: (1) management of cases by the process of imposing maximum time standards for obtaining a final disposition; and (2) The use of intervention techniques in selected cases to maintain judicial control over the manner in which the case proceeds toward resolution.

A. Delay Reduction

Other presentations will be made which more fully describe the fundamentals of delay reduction in civil and criminal cases. Therefore only passing reference will be made to delay reduction techniques in

¹²⁴ “Proper coordination of the court system’s handling of family matter is a recognition of the family as the primary socializer of its children. Through this system society acknowledges the developmental nature of children and makes a commitment to their future.”

“A variety of alternative dispute resolution options should be available for presentation at an early stage in many court proceedings so as to diffuse the adversarial posture. Most cases are resolved short of trial but the standard court-based assumption of adversarial positions often jeopardizes resolution and permanently polarizes the parties. While the parties are concentrating on their litigation postures, further attempt to correct the situation that brought them to court may be tabled and, until the matter is litigated to conclusion, time has been lost during which helping services could have been provided. Without question, full litigation maximally traumatizes the child and the family.” Szymanski, Homisak & Hurst, “Policy Alternatives and Current Court Practice in the Special Problem Areas of Jurisdiction Over the Family”, *National Center for Juvenile Justice*, Pittsburgh, PA., pp 3, 23.

this presentation. As early as 1974, the American Bar Association promulgated standards for the disposition of all civil cases.¹²⁵ These standards have been adopted in many jurisdictions. In general, they set goals requiring the disposition of 90% of cases within 12 months, 98% within 18 months, and 100% within 24 months. With regard to family law matters, the ABA has recommended that a majority of cases be resolved finally within six months, and all cases within one year. Although the recommendations regarding family law cases were not widely implemented at first, some states have now embraced the standards as desirable.

B. Whether to adopt delay reduction as a goal in family law court

There are two schools of thought on the issue whether family law cases ought to be subject to delay reduction. Proponents of delay reduction cite numerous instances of unconscionable delays in the resolution of family law cases. The case for delay reduction is well stated by the following:

“The importance of the recognition of a family court as a case processing and management system can neither be overlooked nor understated. Too often judicial planners and court reformers speak in terms of substantive principles for decision-making without a full understanding of the need to have each case effectively managed to the point of decision. The realities of ever increasing case loads and the need of litigants for timely decisions which affect their ongoing family concerns demand that any court adjudicating family disputes must provide the most effective methods for processing the cases filed and propelling them to comprehensive resolution. The adage: “justice delayed is justice denied” has its most serious impact in the family court.

“With the need to rely so heavily upon outside agencies and services, the one area which the family court can control is its own system for processing and managing the cases. Without such control the judicial resolution of the dispute becomes irrelevant since it is resolved *de facto* by the passage of time and the need of ongoing relationships to adjust to daily events. This may be particularly disastrous when a child is held in limbo without permanency planning or a battered woman is forced to remain in a violent situation because of ineffective judicial protection. As important as effective case processing and management is to the

¹²⁵ Solomon, Maureen “Caseflow Management in the Trial Court” *American Bar Association Commission on Standards of Judicial Administration*, 1973.

litigants, it is equally important to the judges who should not make substantial decisions on outdated information without knowing the present circumstances. This concern is also noted in the appellate review of family court matters which most often result in a “final” determination that is irrelevant to the present needs of the children of families involved. The need for timely decisions of issues involving children must be considered at all times by all court systems determining family disputes.”¹²⁶

One undeniable truth about family law litigation is that the more protracted the litigation, the greater the opportunity for children to be drawn into the vortex of their parents’ emotional stake in the case. A lengthy course of a family law cause is a breeding ground for re-arguing old conflicts and for the emergence of new ones. Two considerations come into play here. First, if jurists accept the notion that children require a stable environment in which to thrive, including the absence of parental conflict, then the sooner the final solution occurs, the more stable the children’s lives will be. Secondly, it is a given that prolonged conflict between parents is deleterious to the overall welfare of children. To the extent that court delay encourages conflict to remain unresolved, disservice is done to children who are thereby affected. Despite attempts to resolve cases at the earliest opportunity, a certain proportion of cases will surface where the parties continue to engage in legal conflict despite the existence of a final judgment or decree. In such cases, a final judgment may only be the platform from which “new” issues relating to custody or access may be launched.

On the other hand, some jurists believe that a family law problem must be allowed to proceed to resolution at its own pace. Advocates of this position point to the grieving process which parties go through in the breakup of their family, including denial, anger, and depression. The work of the noted Dr. Elisabeth Kubler-Ross is often referred to with regard to the breakup of a family, just as if the grieving process surrounding the death of a family member were involved. Those wedded to the notion that the process of grieving takes from two to three years, have little difficulty in accepting delay as a recognition of the ongoing psychological processes which accompany the dynamics of a family breakup. Advocates against delay reduction point to the inequity of forcing life-altering decision upon parties who are psychologically unprepared or incapable of participating in mediation or settlement

¹²⁶ Page, Hon. Robert W., “*Family Courts’ An Effective Judicial Approach to the Resolution of Family Disputes*”, *Juvenile & Family Court Journal*, Vol.44, No.1, National Council of Juvenile and Family Court Judges, Reno, Nev. 1993, pp. 12-13.

discussions. Important decisions made when emotionally handicapped may cause unfair results and unintended consequences.

C. Intervention Techniques

In the context of family law cases, the term “case management” also refers to various methods of court intervention to deal with “problem” or “complex” cases, as opposed to all cases in general. The use of intervention techniques is a concept separate and apart from that of delay reduction, yet the goals of each are frequently congruent. The analysis which follows is directed to an evaluation of intervention techniques and concepts.

III. INTERVENTION TECHNIQUES — CASE MANAGEMENT TOOLS WHICH MAY BE UTILIZED

A. Settlement Conferences

Settlement Conferences are used in most jurisdictions. The conference usually takes place from as long as a month before trial, to up to a few days before trial. In some instances, a judge conducts the settlement conference, and in other instances, disinterested attorneys are called upon to conduct the settlement conference *Pro Bono Publico*. One variation utilized successfully is the appointment of two attorneys to supervise the settlement negotiations, one who works primarily with each side involved in the case. The settlement attorneys discuss the strengths and weaknesses of the case with the parties’ attorneys, and attempt to explore areas susceptible of resolution.

B. Private Settlement Conferences

Rather than wait for a court to set a settlement conference date, counsel sometimes request the court to appoint an attorney mutually acceptable to both parties to conduct private settlement negotiations. The parties will typically share in the fee of the attorney so appointed. The advantage of private settlement conferences is that a judge’s time to conduct such conferences is limited by burgeoning caseloads.

Private settlement conferences often span several days, especially where the issues in the case are complex, or the marital property issues are extensive.

C. Judicially Supervised Settlement Conferences

Judges frequently schedule settlement conferences. Depending upon the style of the judge, the conference may occur with the judge and both

attorneys, or the conference may include the parties themselves. The conferences usually occur in the judge's chambers. Judges will frequently talk to the parties on one side of the case without the others present, and then meet with the opposing side individually as well. Depending upon the level of involvement which the judge undertakes, or the expression of opinion on the likely result in the case, judges hearing settlement conferences may prefer not to hear the trial if the conference fails to produce an agreement.

D. Pretrial Conferences

Pretrial conferences differ from settlement conferences in their purpose and scope. At a pretrial conference, emphasis is placed upon determining how a case will be tried.¹²⁷

It is typical for courts to determine which issues in the case have been settled, and which issues remain for trial. At the pretrial conference the court may do any of the following:

- Set a date for trial to commence;
- Determine the amount of time which will be allocated to the case;
- Determine which issues will be tried;
- Determine the order in which the issues may be tried;
- Require parties to produce additional documents or evidence before trial;
- Determine whether there are any indispensable parties who have not been made part of the litigation;
- Determine whether any pre-trial motions need to be heard, and set dates for the hearing of said motions;
- Make orders for referrals to court's experts, attorneys for children, etc.

¹²⁷ "The pre-trial process should be arranged in order to encourage and force counsel to evaluate their cases carefully and to complete preparation in order to resolve the dispute or at least to narrow the issues. Without an enforced pre-trial procedure, lawyers, more often than not, do not have meaningful communications until they arrive on the courthouse steps on the day set for trial. Experience shows that only a small percentage of cases are ever tried through to a final judgment. Clearly, an efficient pre-trial procedure should not only facilitate the settlement of most cases, but quickly pinpoint those cases which must be decided by the court." Ginsburg, Hon. Edward M., "Scheduling: *The Challenge*", Massachusetts Bar Journal, 1979. P.5.

E. Voluntary Arbitration

Arbitration refers to a procedure in which a single individual, or a greater number, up to three, will listen to the parties' evidence, and decide the issues in the case. It is usual in such cases to allow the parties to use less formal rules of evidence, such as submitting testimony by declaration or affidavits, allowing hearsay evidence on certain issues. The arbitrator is usually a legally trained person such as an attorney. In some cases, an arbitration panel may include persons trained in other disciplines, such as appraisers or accountants. Litigants who submit their case to arbitration may choose between binding and non-binding arbitration. Binding arbitration occurs when the decision of the arbitrator is final and conclusive upon the parties, and judicial review of the decision does not occur. Non-binding arbitration occurs when the parties agree that after arbitration, either party may relitigate the case *de novo* in the court, by filing a request within a certain number of days after the arbitration decision is announced.

F. Mediation

Mediation refers to a process in which a mediator or facilitator guides the parties in attempting to reach their own agreement. Mediators are generally trained in skills designed to allow parties to reach an agreement on issues in which they are unable to do so by themselves. Mediation has come to be recognized as an essential procedure in the family law process. In California, for example, absent an emergency, the court cannot hear any portion of a child custody or access case until the parties have met with a neutral mediator who attempts to guide the parties to an agreement.

“The mediation process facilitates the effectuation of a formal agreement in a relatively informal atmosphere using a presumed neutral third party as mediator. The mediator, in helping the parties to come to an agreement, may help clarify issues, suggest possible accommodations and alternatives, assist the divorcing couple to develop their own parental, financial, and property agreements, and help promote decision making within the family. Mediation differs from courtroom litigation in that it is not adversarial in nature. Instead of each party's retaining a lawyer who advocates for him or her, the parties speak for themselves and there is usually only one neutral mediator.

“There are several advantages to the mediation process with an experienced mediator. It may be less expensive and more

expeditious than protracted courtroom litigation. Mediation may be a more humane process than an adversarial proceeding and, in some instances, may be better able to discover and address the emotional issues that may be having a negative effect on resolving practical legal problems. Lawyers (especially those who specialize in litigation) in an adversarial proceeding are often accused of actually reinforcing conflict between the parties and creating obstacles to settlement. In some instances, this may be true. Because mediation is non adversarial, many technical legal issues, like procedure and rules of evidence, are set aside.¹²⁸

G. Bifurcation of Issues

“Bifurcation” refers to segregating out certain issues in a family law case and trying them in advance of the full case. The purpose of this practice is twofold: First, certain issues can be tried first as a method of resolving certain “key” issues. Frequently, the trial of these issues results in the parties settling the remainder of the case.¹²⁹ Especially where issues must be resolved quickly, (e.g. custody disputes) it is easier to allocate several hours to an evidentiary hearing several weeks away than it is to set a trial date for a full hearing on all issues. Secondly, the resolution of some issues controls the scope of issues to be tried later. An example of this occurs where the efficacy of a pre-nuptial agreement is in question.

H. Short Trials on Focused Issues

Occasionally, cases involve only one or two issues, such as child custody and maintenance. Since such a trial would not consume significant court time, it should be set with a time allocation of four hours or less. This affords the parties the convenience of a speedier disposition of their case, and focuses the attention of the court only upon essential issues.

¹²⁸ Katz, Sanford N., “*Historical Perspective and Current Trends in the Legal Process of Divorce*,” Children and Divorce, Center for the Future of Children, Volume 4, Number 1, Los Angeles, CA, Spring 1994.

¹²⁹ One experienced family law judge notes: “The property issues in the family law case resemble an Easter basket, containing eggs representing issues of different size and value. When the larger ones can be cracked first, the value of those remaining as compared to the cost of trial diminishes and the possibility of settling those issues increases.” Rutter, J.E.T., *California Family Law Bench Manual*, Ch. 5, California Family Law Reports, Sausalito, CA, 1996.

I. Motions on Declaration/Affidavits

Motions are typically heard by the court on a calendar reserved for matters which will take 20 minutes or less. These motions may deal with temporary custody, access, temporary support and maintenance, orders regarding safety or security, or motions relating to discovery or other pretrial matters. These motions are generally heard without testimony. The parties prepare declarations or affidavits which substitute for live testimony.

J. Compelling parties to use the same expert witness

The economics of family law cases are difficult enough without the parties feeling compelled to retain their own professional witnesses. The court can save significant amounts of money for the litigants, and reduce the probability of contested hearings by appointing experts who report directly to the court. Examples of such experts would be accountants to evaluate the value of businesses or cash flow; psychologists to evaluate what custody arrangement would be in the best interests of the children; actuaries to value pension or retirement benefits; and vocational evaluators to determine employability.

K. Managing the payment of attorney fees

Many U.S. jurisdictions confer the power upon courts to determine the source, and amount of attorney fees which can be expended upon certain aspects of a case. The spouse controlling the family finances is sometimes referred to as the in-spouse, and the spouse who is financially dependent is referred to as the out-spouse. Frequently the court is requested to determine the source and amount of fees to be paid to the attorney for the out-spouse. Should there be a reluctance on the part of the in-spouse to pay those fees, the court has the power to stay the proceedings until the fees have been paid.

L. Referrals to hear limited issues of an accounting, furniture lists, discovery disputes

Where long lists of assets, or accounting, or other protracted disputes are involved, the court may want to order a reference — that is, order the matter to be heard by either a subordinate judicial officer, or an

attorney, and a report made back to the court.¹³⁰ After the referee's report is made to the court the parties are usually allowed the opportunity to argue whether the court should adopt the referee's report. This is a time and resource saving device which can be valuable to the court on limited issues.

IV. RESOLVING CHILD CUSTODY AND ACCESS ISSUES — BEST INTERESTS/WELFARE OF THE CHILD

Most jurisdictions use a standard for deciding child custody issues based upon the test as to what is in the child's best interests. California requires courts to consider issues relating to the health, safety, and welfare of the child, any history of abuse by one parent against the child or against the other parent, and the nature and amount of contact with both parents. Many court processes deal explicitly with developing evidence relative to a child's best interests, or attempting to protect those interests.¹³¹

A. Mediation

Mediation of child custody and access disputes is used in the majority of U.S. jurisdictions. It is widely successful, and the participants in mediation are generally quite satisfied with the results of mediation.¹³²

“Generally, the highest level of participation is found in compulsory mediation programs such as those found in California which, in 1980, made such mediation mandatory for contested custody and visitation issues. Today, more than 30 states have such a mandatory mediation requirement. Voluntary mediation programs do not attract a substantial number of participants. This has been attributed to the legal community's somewhat neutral attitude toward mediation and the public's lack of information about

¹³⁰ Calif. Code Civil Proc. §639 provides that “When the parties do not consent, the court may, upon the application of any party, or of its own motion, direct a reference in the following cases: (a) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein. (b) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgement or other into effect. (c) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action. . . .”

¹³¹ Calif. Fam. Code §3011.

¹³² “The mediation process in divorce, however, poses a few potential problems. The leading writers in the field suggest that mediation between people of unequal bargaining power tends to lead to agreements reflecting that inequality. Therefore, mediation is particularly appropriate for parties who have already achieved some independence and have relatively equal bargaining power, but may be less appropriate for parties of unequal bargaining power.” Katz, *supra*, p.54.

mediation as an alternative to the adversarial process. However, researchers find that those who undergo the mediation process achieve a more successful outcome both in the short term and the long term than do their adversarial counterparts. Because parties are often more satisfied with the agreements which they, themselves, have forged through mediation, they are more likely to follow the terms of those agreements than court ordered settlements.”¹³³

B. Referrals to Social Service Agencies for Exercise of Jurisdiction/Reports

Where questions arise whether a child is receiving proper nutrition, nurturing, or caring, social service agencies can make contact with families to inquire into the child’s welfare. Most states also have resources available to conduct “home study” investigations which are performed by probation officers or official court attaches. Reports from such agencies are an important source of information to the court concerning the child’s situation at home. It is usually the goal of agencies vested with the responsibility to inquire into the welfare of children that the families remain intact insofar as that goal is possible, consistent with the safety of the child. The reports of the caseworkers, or other social welfare professionals assist the court in a determination as to what is ultimately in the child’s best interest.

C. Appointment of Counsel for children

Appointment of counsel for children in family law actions is gaining acceptance in many U.S. jurisdictions. Illustrative of the emphasis placed upon the importance of counsel for children, in 1990, the California Judicial Council adopted Section 20.5 of the *Standards of Judicial Administration* relating to the appointment of counsel in family law or other proceedings. Subsection (a) states, that

“In any family law or other proceeding where two or more persons are disputing the division of time with or responsibility for a minor child, the court should consider the appointment of an attorney to represent the best interests of the child if requested to do so by either party, the attorney for either party, a mediator . . . a professional person making a custody recommendation . . . a court-appointed guardian ad litem or special advocate, the child, or any

¹³³ Ibid. P. 54.

relative of the child. The court may also appoint counsel on its own motion.”¹³⁴

D. Court — Ordered Evaluations — Psychiatric/Psychological Reports

U.S. Courts frequently rely upon the reports of psychological professionals in assisting with custody or access question. Most judges will appoint a psychologist or psychiatrist to examine the parties, the child (if his or her age is appropriate), and any extended family members who are important in the child’s life. It is usual that the professional is appointed by the court, and is expected to offer a totally unbiased opinion. The parties are not foreclosed from hiring their own professional to render an opinion, but there are ethical hazards to a psychological professional who risks an opinion without having met with and evaluated all of the persons who have an impact upon the child or children.

E. Ordering Age-Appropriate Access

Special consideration must be given to questions of visitation or access for younger children. Alternate weekend visits may be productive for teenagers, but probably not for a child of tender years. Courts must consider a number of factors¹³⁵ in making such decisions including socioeconomic issues, the availability of extended family care givers, and the nature of the parent-child relationship. For example:

“Children living in homes without both biological parents are at serious risk for economic disadvantage. This is true regardless of race, ethnicity, or parental educational level . . . Children age five and under whose parents divorce may be at greater risk for longer term economic hardship than are their older peers. Parents with younger children are themselves more likely to be younger, and will

¹³⁴ The *Standards for Judicial Administration* suggest eight factors which should be considered in determining whether counsel should be appointed: “(1) whether the dispute is exceptionally intense or protracted; (2) whether the child is subjected to stress on account of the dispute which might be alleviated by the intervention of counsel representing the child; “(3) whether an attorney representing the child would be likely to provide the court with significant information not otherwise readily available or likely to be presented; (4) whether the dispute involves allegations that a parent, a step-parent, or other person with the parent’s knowledge has physically or sexually abused the child; (5) whether it appears that neither parent is capable of providing a stable and secure environment; (6) whether the child is capable of verbally expressing his or her views; (7) whether attorneys are available for appointment who are sensitive to the needs of children and the issues raised in representing them; (8) whether the best interests of the child appear to require special representation.”

¹³⁵ Whiteside, Mary F., “An Integrative Review of the Literature Pertinent to custody for Children five years of age and Younger, Ann Arbor Center for the Family, Ann Arbor, Mich., 1996.

therefore have had fewer years to advance in their careers and obtain an education, resulting in lower incomes and less accumulation of property. Because of the association of many risk factors with the likelihood of early parental separation, these children may come into the separation period already at a disadvantage.¹³⁶

F. Appointment of Special Masters

In some cases the parents are unable to resolve their own disputes concerning their parenting time, styles, and decisions. Frequent motions are made to the court to resolve issues such as where the children should be enrolled in school or day care, what type of medical insurance should be purchased, what type of dental care should be afforded, and who should pay for it; whether the children should attend public or parochial schools, and whether the children should accompany a parent out of the country for a vacation. Special Masters are not used as a substitute for judicial decisions in many cases. Judges recognize that they will be called upon to make these decisions in a few cases. The need for a special master is most often demonstrated when the parties are not only frequently, but continually before the court to micromanage every issue which the parties are incapable of resolving on their own. The court may employ a special master, typically a counselor or other professionally trained person, to attempt to mediate these disputes, but failing in that, to simply decide the issue. The special master may be vested with the authority of the court to make these decisions. Generally, the parties share in the cost of the services of the special master.

G. Providing Supervised/Monitored Access, and safe points of exchange

In an increasing number of family law cases, children are unable to have safe contact with one parent without supervision due to their exposure to high conflict, violence, physical and emotional abuse. These cases require the professional services provided by supervised visitation centers and individual monitors. The goal of supervised visitation is to protect a child from the inappropriate behaviors of a parent including abuse, neglect, and violence. In some cases supervision is needed for a limited period; however in the majority of the others this requirement is ongoing. Without the availability of appropriate and affordable services many children are unable to have any contact with the other

¹³⁶ *Ibid.* P. 8.

parent. Generally speaking, the impact on children with an absent parent is substantial, depending on the developmental needs and ages of the children. Issues of abandonment, blame, guilt, and the loss of a parent are felt deeply by these children.

There is an additional need to provide for locations where children may be safely exchanged for purposes of access or visitation. The lack of designated facilities designed for this purpose means that fast food restaurants, malls, police department lobbies, and other public areas become the sites for these exchanges. Law enforcement is often called to fast food restaurants to “keep the peace” between warring parents. Police departments struggling with a greater demand for services and fewer resources are increasing their objections to involvement in these cases and are either refusing to provide their public lobbies for exchanges or refusing to have police personnel available to provide security to ensure safe exchanges.¹³⁷

V. APPLYING CASE MANAGEMENT

Case management by court intervention can be time consuming for the court, although the benefits from utilizing such techniques outweigh the disadvantages. Where no formal program of delay reduction has been adopted, most courts will only intervene in a case with a “hands on” approach when it becomes necessary for a variety of reasons.

A. Default and Uncontested Cases

A great number of all family law cases are uncontested, and as a result, will not require any substantial attention from the court. In California, some cases proceed to a final judgment without the parties having to ever appear in court. Most courts feel that these cases need no supervision, and will allow them to proceed at their own pace.

B. Cases proceeding efficiently toward a normal resolution

Frequently, counsel will diligently pursue a case to an efficient and timely conclusion. When such is the case, there is little need for the court to intervene.

C. Cases which have been subject to undue delay

For whatever reason, some cases experience delays which become problematic. Courts are usually able, even without sophisticated case tracking computer systems, to determine which cases are outstanding

¹³⁷ Shaw, J., Director of Family Court Services, Orange County, California.

and unresolved over a long period of time. Without adopting formal delay reduction procedures which apply to all cases, the court may choose to schedule all of those cases for special calendar consideration, require appearances of counsel and parties, take control over the course of the litigation, and set mandatory dispositions dates.

D. Cases involving high degrees of conflict

The more protracted the proceedings in cases involving high degrees of parental conflict, the more opportunity for the conflict to negatively affect the children. Even when there are no children involved, parties who are highly conflicted will test the resolve of even the most patient jurist. Such cases should be put on a firm course toward resolution, with counsel being required to prepare status reports, and advise the court of the progress in the case.

E. Cases requiring resolution on a priority basis

Even without the adoption of formal delay reduction guidelines, certain types of cases present “priority” situations where calendar preference needs to be granted:

- Cases involving allegations of child abuse or neglect
- Cases involving child custody or access issues
- Cases where the parties are aged
- Cases where marital assets, including home, businesses or other financial interests are at risk
- Cases which have already experienced undue delay
- Cases arising under the Hague Convention.¹³⁸

VI. SCHEDULING HEARINGS AND TRIALS

There are various methods of calendaring cases. In an urban court, more than one department may be handling family law cases. In such a situation, the court may select from the “direct” calendar method, or the “master” calendar method, or hybrid methods utilizing portions of both systems.

A. Direct Calendaring

The direct calendaring method is also referred to as the “individual calendar.” It is implemented by assigning a case to a single judge for all

¹³⁸ 1980 Hague Convention on the Civil Aspects of International Child Abduction, Final Act, 14th Sess. Of The Hague Conference (1980), done at The Hague, Oct. 25, 1980, 19 I.L.M. 1501 (Nov. 1980).

purposes, including pretrial motions, settlement conferences, and trial. Courts frequently select the cases which will be heard by a certain judge by allocating certain numbers (the last number assigned to the file) to a certain judge. Hence Judge A will be assigned cases ending with the numbers 1,2, and 3; Judge B will be assigned cases ending with the numbers 4, 5, and 6; Judge C will be assigned cases ending with 7, 8, and 9. Cases ending in zero will be divided by assignment of each file to Judges A, B and C alternately. Each judge of the court is independent of other, and the judges do not interact to lend each other assistance with the disposition of the cases. The supposed strengths of such a calendar method include independent responsibility for calendars, accountability and motivation toward efficient case management. Such a calendar is also helpful in family law, where the concept of the same judge handling all aspects of the same case are deemed beneficial because of the levels of consistency and continuity which are achieved.

B. Master Calendar

In courts utilizing a “master” calendar, judges are assigned to cases according to the function which each serves. For example, one judge may be assigned to hear only pretrial motions, another to hear settlement conferences, and yet another to hear all trials. The method of assignment of cases is intimately connected with the sufficiency of judicial resources, the family law caseload, and the availability of judicial officers at a central location. Typically, cases are set for trial on the same day, and are then parceled out to available trial judges as they become available. If a department is not available, the case may be “trailed” or held in abeyance, until a court become available for trial. One of the benefits of this system is that maximum use of available judicial resources can be made. As soon as a courtroom is vacant, another case can be assigned to that judge for trial. This system has the potential for insuring quick movement of cases to trial, assuming that there is consistency in the treatment of requests for continuances. This system is also more flexible when dealing with scheduling conflicts of attorneys.

C. The “Team” Assignment system

Some courts, usually urban courts, utilize a team approach which is essentially a combination of the direct and master calendar systems. In this system, groups of judges are divided into teams for purposes of

dispositions of cases.¹³⁹ Before a case is set for trial, a single department may be assigned the task of hearing all pretrial motions. Once the case is in a condition to be tried, it is assigned to a team for disposition. The team consists of three or more judges, depending upon the number which is most workable. One judge is designated to handle the pretrial and settlement conferences, or both, if used. If the case does not settle, it proceeds to trial within the next few weeks in one of the team's trial departments. The team system is said to build comraderie among judges, who develop a team spirit in working together toward efficient case disposition. The system is limited, however, due to its effectiveness only in courts large enough to justify dividing its resources.

D. Cases requiring $\frac{1}{2}$ day or less to try

Some Family law cases or issues are susceptible of completion in a short period of time. Although practices differ from region to region, courts in California have managed to keep pace with the flow of family law cases by scheduling the bulk of family law trials for trials of $\frac{1}{2}$ day or less.

E. Motion Calendars

The number of motions scheduled before a court in a single day varies among jurisdictions. A number frequently encountered is 10 motions scheduled for a $1\frac{1}{2}$ hour period (8:30 a.m. to 10:00 a.m. for example). Allowing for a certain number of motions which are dropped, this is usually ample time in which to hear the motion. A critical question is usually whether the judge prefers to read the motions before the hearing. If the judge actually prepares the motions in advance, then it is well to adopt a rule which requires notice to the court at least two court days in advance of any request to either drop the motion or reschedule it. Where judges do not review the files prior to hearing, the allowance of agreed-upon continuances is of little consequence.

F. Trials

Trials should be set within a reasonable time period. Calendars in certain urban centers of the United States may involve delays of up to two years in selecting a trial date.

This type of delay is unconscionable, and should be avoided at all costs. The issue is ultimately one of resource allocation, and a determination of the importance of granting family law cases equal or

¹³⁹ This concept has been successfully utilized for general civil cases in San Diego County, California, which serves a population of approximately 2.5 million people.

better than equal status with other cases. In California, for example, the existence of criminal trials usually determines whether any civil or family matters will be assigned a courtroom. By statute, a felony criminal trial must be commenced 60 days from the date of filing the charging document in Superior Court. Absent a waiver by the defendant of the right to a speedy trial, the charges against the defendant must be dismissed if the court does not actually commence the trial within the mandatory time frames. In such cases, when a judge becomes available for the assignment of a case, the policy of the court should at least be that a family law case stands on equal footing with all other civil cases.

G. Modification of Judgments/Decrees

Family law courts in the U.S. are just now beginning to maintain statistics on the proportion of family law litigation which is generated after a final judgment has been entered. Because the nature of family law involves having to deal with the changing needs of families and children, post-judgment motions can comprise a significant amount of the work which is required of a family law court. These matters should be heard, when possible, on motion calendars.

VII. ALLOCATION OF SUFFICIENT COURT TIME TO HEAR CASES

Some twenty years ago, a justice on one of California's Courts of Appeal commented on the penurious allocation of time to family law cases. The opinion remains as a valid contemporary criticism as it was in 1977.

“While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field — the break up of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice

to all parties involved. The handling of this case, which involved the break up of a 25-year marriage, the custody of two teenage girls, the disposition of all of the property accumulated during that marriage, and the plotting of the fiscal future of the entire family, is illustrative. Judged by the brevity of the record, not more than 15 minutes of the court's time on a busy Friday afternoon short-cause calendar were involved. The wheels of justice will not come to a screeching halt if 2 years hence another 15 minutes of valuable court time is consumed in bringing the court up to date on the fiscal condition of the parties." Justice Gardner, writing for the majority in *In Re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 136 Cal.Rptr. 635, 638-639.

VIII. CONCLUSION

The nature of family law litigation requires that the court exercise some degree of administrative control over at least those cases which pose special problems for the parties, for children, and for the court. The use of various case management techniques which allow the court to actively intervene into family law litigation is growing in use. The combination of increasing family law caseloads coupled with shrinking governmental resources oblige those charged with the administration of the courts to carefully consider the benefits afforded by both case management and delay reduction.

CHAPTER 12

Case Management: A Consideration of the Australian Experience

Presentation by *The Honourable Mr. Justice Ronald Sackville, Federal Court of Australia*

INTRODUCTION

In Australia, as in other common law countries, there is considerable public concern about the fairness, cost and efficiency of the judicial system. This concern was recently reinforced by widely reported observations made by the Chief Justice of Australia, that “the system of administering justice is in crisis”.¹⁴⁰ The Chief Justice referred to a familiar, if intractable, list of culprits: a culture of rights expressed in litigation; the “loss of a moral consensus” which in earlier, perhaps more tranquil times, stilled controversies without the intervention of legal processes; laws of increasing breadth and complexity (despite the current enthusiasm for deregulation and the operation of market forces); the tendency for trials to increase in length and difficulty; and the obstacles confronting ordinary people wishing to enforce their rights, particularly when publicly-funded legal aid and services are facing cuts.

Undoubtedly the judicial system is seen as facing fundamental problems. In 1994, the Access to Justice Advisory Committee reported a widespread perception in Australia that

- litigation is prohibitively expensive for people on modest to middle incomes;
- litigation is procedurally complex and beset by delays; and
- courts find great difficulty in making inroads into the backlog of unresolved cases.¹⁴¹

¹⁴⁰ Sir Gerard Brennan, “Key Issues in Judicial Administration” (Paper delivered to 15th Annual Conference, Australian Institute of Judicial Administration, Wellington, New Zealand, 20th September 1996), at 4.

¹⁴¹ Access to Justice Advisory Committee. *Access to Justice, An Action Plan* (1994), para 17.1.

Yet there is something of a paradox here. As the Committee pointed out, at the same time as the criticism of the court system has reached a crescendo, what has been described as a “revolution” in court management has taken place.¹⁴² Courts have increasingly rejected many of the assumptions underlying the traditional theory of adversary litigation, whereby the parties and their legal representatives control the litigation and the judge acts as an impartial, but essentially passive adjudicator. In particular, courts have come to accept that a laissez-faire approach to litigation is bound to contribute to unacceptable delays, expense and misuse of scarce judicial resources, of which the most precious is the time of the judges. The transition from “judicial passivity”¹⁴³ to case management has been enthusiastically supported by courts themselves, with relatively little prompting from external agencies.

The acceptance of judicial case management has been by no means uniform throughout Australia. This reflects, in part, the diversity of the Australian judicial system, which operates within the complexities and mysteries of federalism. It also reflects differences on such matters as court governance, the nature of the court’s workload and the legal culture within particular States. Nonetheless, the movement has gathered considerable momentum and is strongly supported by most judges who have had experience with it, despite the additional management burdens imposed on them.

THE COURT SYSTEM

Any assessment of case management in Australia requires a brief survey of the manner in which the court system operates within the federal structure. As in Ireland, the Constitution provides for the separation of Commonwealth legislative, executive and judicial powers. The judicial power of the Commonwealth is vested in the High Court of Australia (which is the ultimate court of appeal) and such other federal courts as Parliament creates.¹⁴⁴ The Commonwealth Parliament also has power to invest State courts with “federal jurisdiction”, for example in matters arising under Commonwealth law.¹⁴⁵

¹⁴² P.A. Sallmann “Managing the Business of Australian Higher Courts” (1992) 2 *Journal of Judicial Administration* 80, at 80.

¹⁴³ C.W. Pincus, “Court Involvement in Pre-Trial Procedures” (1987) 61 *Australian Law Journal* 471, at p. 471.

¹⁴⁴ *Constitution* s.71.

¹⁴⁵ Section 77(iii). This is sometimes referred to (although not by ordinary Australians) as the “autochthonous expedient”: *The Queen v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, at 268.

For the first 75 years of federation, subject to limited exceptions, the Parliament was content to allow State courts to deal with disputes arising under Commonwealth law as well as those arising under State law. The position changed in the mid-1970's, when Parliament created two new federal courts, namely the Federal Court of Australia and the Family Court of Australia.¹⁴⁶ Both Courts have been active in case management. However, I shall refer in this paper in some detail to the approach taken by the Federal Court, because it has a wider jurisdiction and has recently reassessed its system of case management.

The primary jurisdiction of the Federal Court relates to matters arising under Commonwealth legislation. Accordingly, the Court determines cases involving intellectual property, trade practices,¹⁴⁷ corporations, bankruptcy, taxation, federal administrative law and immigration. For reasons that are unnecessary to explore, the Court's jurisdiction extends to matters governed by State law if they are associated with matters arising under Commonwealth legislation. For example, the Court can decide a common law contractual claim, if it is associated with a claim arising under Commonwealth law, such as one based on alleged misleading conduct in contravention of the *Trade Practices Act*. In addition, the Commonwealth and the States have enacted "cross-vesting" legislation.¹⁴⁸ This co-operative scheme, broadly speaking, permits federal courts to deal with matters arising under State law and State courts to deal with matters arising under federal law. With limited exceptions, the Federal Court does not exercise a criminal jurisdiction.

The Federal Court operates on a national basis. Judges of the Court are resident in each State except Tasmania and the Northern Territory. The Court has no separate appeal division, all Judges participating in appellate work, ordinarily in benches of three. In November 1996, 47 Judges held commissions to the Court, although because of commitments to other courts and Tribunals, only 41 were regularly sitting as members of the Court.

STATE COURTS

The Constitution contemplates the continued existence of State courts. Consequently, each of the six States has its own court structure, headed

¹⁴⁶ The Family Court deals with family disputes, such as divorce, custody and property claims, which are (broadly speaking) governed by Commonwealth Law.

¹⁴⁷ In practice, many claims heard by the Court are based on s.52 of the *Trade Practices Act 1974* (Cth), which provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

¹⁴⁸ See for example, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).

by its Supreme Court.¹⁴⁹ In general, the State court structure has three levels: a magistrates' court, exercising jurisdiction in both civil and criminal matters without a jury; an intermediate court conducting jury trials in criminal prosecutions and exercising jurisdiction in civil cases subject to a specified monetary limit (which the parties may be able to waive); and the Supreme Court, exercising jurisdiction in the most serious criminal cases and an unlimited civil jurisdiction.

New South Wales, the most populous of the Australian States,¹⁵⁰ can be taken as an illustration. The Supreme Court of New South Wales, the oldest continuing Australian court, hears the most serious criminal cases, usually with juries, and exercises a civil jurisdiction unlimited as to amount and, subject to certain statutory exceptions, unlimited as to subject matter. The Court is divided into divisions, including the Common Law Division (which deals with first instance criminal work, as well as common law personal injury claims), and the Equity and Commercial Divisions. The Court also includes a Court of Appeal, comprising the Chief Justice, the President and eight Judges of Appeal.¹⁵¹ In December 1995, the Court comprised a total of 44 Judges and two acting Judges.

The District Court of New South Wales is the intermediate Court in the hierarchy of the New South Wales court system. It is primarily a trial court, but exercises an appellate jurisdiction in relation to Local Courts. In its criminal jurisdiction the Court deals with all indictable criminal offences, except murder, treason and piracy, and thus is responsible for the conduct of most jury trials in the State. The Court's civil jurisdiction is limited to \$250,000,¹⁵² but that limit may be extended if the parties consent. Consent is frequently given, for example, in personal injury cases, and in those cases the Court can make damages awards unaffected by any limit. In December, 1995, the Court comprised 56 Judges. However, in recent times it has relied extensively on acting Judges, who are appointed for limited periods and are usually selected from practising barristers and solicitors.

Local Courts, presided over by magistrates, exercise jurisdiction in civil and criminal matters. Magistrates also exercise jurisdiction in a number of specific areas, such as children's criminal and care proceedings and coronial inquiries. The civil jurisdiction of the Local

¹⁴⁹ An appeal by leave lies to the High Court from the Supreme Court, of each State and Territory, on matters arising under both Commonwealth and State law.

¹⁵⁰ In the March quarter of 1996, New South Wales had a population of 6.2 million, out of a total Australian population of about 18.2 million.

¹⁵¹ The Chief Judges of the Common Law, Equity and Commercial Division are *ex officio* members of the Court of Appeal.

¹⁵² In November, 1996 \$AI = approximately £0.49 and USD 0.79.

Court comprises a Small Claims Division (up to \$3,000) and the General Division, which deals with claims up to \$40,000). The Small Claims Division employs simplified procedures, and applies a lower scale of costs, which is intended to encourage litigants to conduct their own cases. A very large proportion of criminal prosecutions in New South Wales are disposed of by magistrates, who sit without juries. At the end of 1995, there were approximately 120 magistrates in New South Wales.

SELF-GOVERNANCE AND CASE MANAGEMENT

The adoption by Australian courts of case management has not taken place in a vacuum. It has been encouraged, particularly in the federal courts, by the introduction of judicial self-governance.¹⁵³ In Australia, judicial self-governance commenced when the *High Court of Australia Act 1979* (Cth) removed administrative responsibility for the High Court from the Commonwealth Attorney-General's Department and conferred both administrative and financial autonomy (within a one line budget) upon the Court itself. A decade later, the *Courts and Tribunals Administration (Amendment) Act 1989* (Cth) transferred responsibility for supervising financial management and administration from the Attorney-General's Department to each of the Federal Court, Family Court and the Administrative Appeals Tribunal.¹⁵⁴ In the case of the Federal Court and the Family Court, the chief judicial officer is the judicial and administrative head of the Court. The Chief Justice of the Federal Court, for example, is responsible for administering the Court's budget, which totalled approximately \$A35 million in 1994-1995.¹⁵⁵

Other Australian jurisdictions have adopted different models of Court governance. South Australia, for example, has an autonomous court administration. Unlike the federal model, the South Australian legislation¹⁵⁶ provides for a single administration of the whole court system, under the control of the State Courts Administrative Council. The Council's voting members are the heads of each court, with the Chief Justice of the Supreme Court having a power of veto. This model is similar to that recently proposed for Ireland, although the Irish

¹⁵³ A detailed account of court governance in Australia is provided in T.W. Church and P.A. Sallmann, *Governing Australia's Courts* (Australian Institute of Judicial Administration, 1991). The authors analyse three models: the "traditional" Attorney-General's department model; the "separate department" model; and the "autonomous" model. The brief description that follows is taken from R. Sackville, "The Access to Justice Report: Change and Accountability in the Justice System" (1994) 4 *Journal of Judicial Administration* 65, at 73.

¹⁵⁴ The Tribunal reviews the merits of administrative decisions made under Commonwealth legislation. It is technically not a court.

¹⁵⁵ Federal Court of Australia. *Annual Report 1994-1995*, at 91.

¹⁵⁶ *Courts Administration Act 1993* (SA).

proposal contemplates a larger controlling body (the Court Services Board) which is to include non-judicial members.¹⁵⁷ In New South Wales, by contrast, the courts are not self-governing, but are administered through a separate Department of Court Administration.

As the Irish Working Group recognised, judicial self-governance implies a greater degree of institutional accountability for courts. It is very difficult to enjoy administrative and financial autonomy, in one form or another, yet claim that the expense, delays and inefficiency associated with the conduct of litigation is a problem for others to solve. In Australia, case management has by no means been confined to self-governing courts.¹⁵⁸ But it is fair to say that those courts have had a powerful incentive to reassess the traditional adversary approach to litigation and to address actively the problems that have aroused such intense community concern. It is therefore not surprising that they have been at the forefront in adopting case management.

A BROADER CONTEXT

Self-governance has not been the only factor encouraging Australian courts to revise their approach to the management of litigation. Dissatisfaction with the legal system has produced important legislative and policy initiatives. These have created a climate at once more critical of traditional practices and more responsive to proposals for change. Among the most important changes are these:¹⁵⁹

- Governments have applied competition policy to the rules and “ethical” principles governing legal practitioners, leading to the abolition or modification of many traditional constraints on the grounds that they are anti-competitive;¹⁶⁰
- legislation has introduced a system of mutual recognition of legal qualifications among the States and Territories,¹⁶¹ thus encouraging a national market for legal services and a less parochial attitude to the conduct of litigation;
- some States, led by New South Wales, have introduced or proposed disclosure requirements, obliging lawyers to inform

¹⁵⁷ Working Group on a Courts Commission. *First Report: Management and Financing of the Courts* (1996).

¹⁵⁸ In particular, the Supreme Court of New South Wales has played an important role in implementing differential case management.

¹⁵⁹ More detail can be found in the Access to Justice Report, note 2 above.

¹⁶⁰ For example, restrictions on advertising and the prohibition on barristers accepting briefs directly from clients.

¹⁶¹ *Mutual Recognition Act* 1992 (Cth) and cognate State legislation.

clients at the outset of the basis for calculating fees and the likely cost of legal services;

- some States have also implemented or proposed a regime of costs agreements, whereby lawyers are limited to standard fees unless the client specifically agrees in writing to a higher level of fees; and
- courts themselves, influenced by self-governance, have reported more extensively and openly on their work and, in some cases, have formulated standards against which to measure performance, including time limits for the delivery of judgments.

ALTERNATIVE DISPUTE RESOLUTION

Perhaps the most important development, from the perspective of case management, has been the emergence of a large group of enthusiastic and (for the most part) skilled proponents of mediation and other forms of alternative (or additional) dispute resolution ("ADR"). Despite the express mention of conciliation in the Australian Constitution,¹⁶² dispute resolution as a discrete movement in Australia is remarkably recent. The commencement of the modern movement can be traced to about 1980, when legislation in New South Wales created a statutory framework for Community Justice Centres to offer mediation services by trained personnel.¹⁶³

Since then ADR has developed extraordinarily rapidly as a discipline. Bodies within and outside the legal profession offer sophisticated training programs for mediators and promoted ADR among lawyers and the wider community.¹⁶⁴ High profile mediators, such as a former Chief Justice of New South Wales, have increased awareness of ADR, particularly among the commercial community. Theoretical perspectives have been developed by text writers and practical information systematically presented to legal practitioners and others interested in ADR.¹⁶⁵

The Commonwealth and all States and Territories, to varying degrees, have enacted legislation designed to encourage resort to mediation and

¹⁶² The Constitution s.51 (xxxv) empowers the Commonwealth parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of interstate industrial disputes.

¹⁶³ *Community Justice Centres (Pilot Projects) Act 1980* (NSW).

¹⁶⁴ One such body is LEADR (Lawyers Engaged in Alternative Dispute Resolution).

¹⁶⁵ See, for example, H.Astor and C.M. Chinkin, *Dispute Resolution in Australia* (1992); S. Duncombe and J. Heap, *Australasian Dispute Resolution* (1995).

other forms of ADR. For example, Commonwealth legislation provides for federal courts to refer matters to mediation and preserves the confidentiality of anything said at a mediation conference.¹⁶⁶ The Courts themselves have promulgated rules and practice directions designed to facilitate mediation or other forms of ADR, such as early neutral evaluation. Some courts, such as the Federal Court, provide court-annexed mediation services through staff trained in mediation skills.

The widespread adoption of case management in Australia has coincided with the emergence of ADR as an organised discipline, with its own body of skilled practitioners. The coincidence of these developments has not been accidental. Courts plainly have a strong interest in encouraging early settlement of disputes; this is one of the principal objectives of case management. Many litigants, especially large corporations and governments, have come to realise that their interests are not usually served by prolonged, expensive and uncertain litigation. Sections of the legal profession have joined non-lawyers in enthusiastically embracing ADR, doubtless recognising that mediation skills are important attributes in an increasingly competitive professional environment. The commonality of interest among all participants in the litigious process has been reinforced by legislation conferring power on courts to refer matters to mediation or to other forms of ADR. There is therefore a symbiotic relationship between ADR and case management.

THE OBJECTIVES OF CASE MANAGEMENT

Those Australian courts which have adopted case management accept generally the goals formulated by commentators in the United States. These goals are well-known. The United States Federal Judicial Center has summarised the philosophy underlying case management this way:¹⁶⁷

“[to] improve the quality of civil justice; to help parties to civil disputes obtain a fair resolution (often by other than adversary procedures) at a cost commensurate with what is at stake. Seeking perfect justice at a cost litigants and the judicial system cannot afford is self-defeating. Case management must be directed at tailoring dispute resolution procedures and techniques to the available resources and the needs of the case”.

¹⁶⁶ *Courts (Mediation and Arbitration) Act 1991 (Cth)*.

¹⁶⁷ Federal Judicial Center, *Manual for Litigation and Cost and Delay Reduction* (1992), 1.

Two leading commentators have identified the goals as follows:¹⁶⁸

“Court management of case progress as part of an organized, predictable system should assure:

1. equal treatment of all litigants by the court;
2. timely disposition consistent with the circumstances of the individual case;
3. enhancement of the quality of the litigation process; and
4. public confidence in the court as an institution.”

The same authors have identified seven fundamental elements of the system:¹⁶⁹

- judicial commitment and leadership;
- court consultation with the legal profession;
- court supervision of case progress;
- the use of standards and goals;
- a monitoring and information system;
- listing for credible trial dates; and
- control of court adjournments.

THE INTRODUCTION OF CASE MANAGEMENT IN AUSTRALIA

While these objectives are widely accepted, the introduction of case management in Australia has not been the product of a comprehensive analysis of the deficiencies of “Judicial passivity” nor of a detailed set of proposals by an external agency such as Lord Woolf’s report on *Access to Justice*.¹⁷⁰ Case management has rather emerged, in the tradition of the common law, as a case by case response to the problems faced by individual courts. Because the problems vary, the solutions have also varied. Some courts, such as the Common Law Division of the Supreme Court of New South Wales, deal with high volume litigation, such as personal injury cases. Others, such as the Federal Court, dispose of a wide range of cases, many of which may not be amenable to a standard approach to management. In some instances, case management has been introduced as a response to a

¹⁶⁸ M. Solomon and D.K. Somerlot. *Caseflow Management in the Trial Court: Now and for the Future* (ABA, 1987), 5.

¹⁶⁹ *Id.*, 7-8.

¹⁷⁰ Lord Woolf, *Access to Justice: Final Report* (HMSO, July 1996), (the “Woolf Report”).

crisis appearing to admit of no solution other than court control over the burgeoning lists. In others, it represents a carefully formulated strategy for the long term functioning of the court. The result is that, in Australia, case management has taken different forms and has not proceeded at a uniform pace.

This rather fragmented approach has both advantages and disadvantages. It means that individual courts have been able to fashion solutions that meet their most pressing needs. Sometimes, although not always, they have done so in close consultation with interest groups, such as legal practitioners, repeat litigants and governments. Sometimes, but again not always, they have had the benefit of expert reports or studies analysing their procedures and proposing solutions to the difficulties presented by backlogs and delays. Usually, they have been able to avoid the dislocation of an externally imposed solution. They have also readily enough accepted the responsibility for supervising the implementation of the new system. This includes, as the Woolf Report recognises (although perhaps not sufficiently),¹⁷¹ the need to bring about the necessary change in legal culture to ensure that the new system works reasonably effectively.

This piecemeal approach also has considerable disadvantages. The wheel has had to be reinvented on a number of occasions, although bodies such as the Australian Institute of Judicial Administration have played an important part in disseminating information about new approaches to judicial administration, including case management.¹⁷² There is a paucity of standardised statistical information, exacerbated by the failure of most courts to articulate a clear philosophy to govern the compilation of court statistics.¹⁷³ *Consequently, there have been few attempts rigorously to evaluate and compare various approaches to case management.*

HIGH VOLUME COURTS

Case management has had the greatest measurable impact in Australia on Courts required to dispose of high volume litigation, such as personal injury cases. The apparent success of case management in these areas reflects the manifest failures of the traditional adversary system, which

¹⁷¹ Woolf Report, paras 38-39.

¹⁷² The AIJA is an incorporated association affiliated with the University of Melbourne. Its functions include conducting professional skills courses and undertaking research and collecting information on judicial administration. The AIJA's membership include judges, magistrates, judicial administrators, legal practitioners and academics. It publishes the *Journal of Judicial Administration*.

¹⁷³ The subject is usefully analysed by P.M. Lane. *Court Management Information (AIJA, 1992)*.

did little or nothing to encourage matters to be brought on for trial and maintained no supervision over litigants or legal representatives who chose delay rather than active preparation for disposition or settlement of cases. It also reflects the fact that it is *easier to make rapid and measurable inroads into backlogs and delays associated with high volume litigation, than in relation to more diverse caseloads.*

*Typically, the introduction of case management has been precipitated by a recognition that ever lengthening delays and blatant waste of judicial resources suggest a "system verging on breakdown".*¹⁷⁴ In those circumstances, the courts have been faced with a choice between allowing the lists to fall further into disarray or to take active steps to correct the decline. This can be illustrated by the experience of three courts with high volume case loads: the Supreme Court of New South Wales, the County Court of Victoria and the District Court of New South Wales.

THE SUPREME COURT OF NEW SOUTH WALES

The position prevailing on the Common Law Division of the Supreme Court in late 1988 has been described as follows:¹⁷⁵

"The Supreme Court faced the question of case management and delay reduction in late 1988, at a time when there was no effective statistical information on the state of the lists, or the age of the case load. There was no appreciation within the Court or the profession of any need for time standards, and there was no judge or group of judges responsible for the monitoring of the lists, or the avoidance of delays. In short, there was no management plan, and there was little by way of information. More importantly, it had been assumed, that judges should judge cases when presented to them by the parties as ready for hearing, and should leave it to the profession to set the pace of litigation, and to determine what pre-trial steps should be taken."

This state of affairs prompted the court to take the initiative by establishing a Delay Reduction Committee. The Committee, which included representatives from Government and the profession, put forward a package of proposals designed to implement a more efficient system of case management and disposition.

¹⁷⁴ Justice JRT Wood, "Case Management in the Common Law Division of the Supreme Court of New South Wales" (1991) 1 *Journal of Judicial Administration* 71.

¹⁷⁵ *Ibid.*

The strategies adopted by the Court included

- appointing a list Judge to give directions, deal with adjournment applications and monitor cases;
- establishing a system for the collection of monthly statistics;
- creating specialist lists to monitor particular categories of cases, such as motor accident claims, and
- implementing a policy of giving certain dates for hearing and generating a firm expectation that the dates would be kept, and
- introducing pre-trial supervision of cases by registrars, with a view to ensuring that prospects for settlement were explored.

After two years, the new listing system was reported as having led to a substantial increase in dispositions, a reduction in the age of cases and inroads into the backlog.¹⁷⁶

Since those relatively modest beginnings, the approach to case management has become more sophisticated. In 1993 the Common Law Division introduced differential case management (“DCM”), which differentiates among various types of cases, depending on their complexity and the need for pre-trial activity.¹⁷⁷ The introduction of DCM was attended with considerable controversy. Critics within the profession expressed concern, in particular, that the proposed time limits for conducting personal injury litigation were too tight to enable injuries to stabilise and that closer judicial supervision would tend to increase costs. The criticism did not, however, deter the Court and the system has since been further revised.¹⁷⁸ The following is a sketch of the current system.

DCM provides for cases to be allocated to an Individual Track or Special Track, unless the plaintiff elects to proceed on the Standard Case Management Track. Cases within the Individual Track are managed according to directions appropriate to the specific case. The objective is to ensure that cases are ready for a Final Conference within 290 sitting days after they have been allocated to the Individual Track. The Special Track covers proceedings that are urgent, or involve such intrinsic complexity that they are unlikely to be brought to a Final Conference within the 290 sitting day limit. If the plaintiff elects to proceed on the Standard Track, the Court issues a notice containing uniform directions and assigns to each a date for compliance. Otherwise

¹⁷⁶ *Id.* at 74.

¹⁷⁷ Practice Note 81. *Differential Case Management Sydney* (1993) 32 NSWLR 243.

¹⁷⁸ Practice Note 88. *Common Law Division Differential Case Management* (1995) 37 NSWLR 609.

a Status Conference is held, normally within 65 sitting days after filing of the plaintiff's documents.

The Status Conference is conducted by a Judge, Master or Registrar. It is designed, *inter alia*, to define the matters in dispute, explore the prospects for settlement or ADR, allocate proceedings to the appropriate track, and give directions for interlocutory steps and impose time limits for applications for interlocutory orders. The forms of ADR to be considered include mediation, neutral evaluation and arbitration, each of which is provided for in legislation and rules.¹⁷⁹ A Status Conference may be reopened if the parties fail to comply with orders.

The plaintiff is required to file a certificate of compliance within the time specified for compliance with directions. When the certificate is filed, the Court appoints a Final Conference. If no certificate is filed, the proceedings are listed for a Compliance Conference, where further directions and costs orders may be made.

The parties are expected to attend the Final Conference. The Court explores further the prospects for settlement or ADR. Offers of compromise in accordance with the *Supreme Court Rules* may be made.¹⁸⁰ The Court confirms compliance with directions, attempts to narrow the issues for trial and gives directions for the trial.¹⁸¹ If satisfied that the proceedings are ready for hearing, or will be ready by compliance with directions, the Court sets them down for trial. The Practice Note explaining DCM states that proceedings fixed for trial will not normally be adjourned unless special circumstances have arisen which could not have been foreseen.

It is perhaps too soon for a thorough evaluation of DCM in the Supreme Court. Writing recently, a Judge and Registrar of the Court expressed the view that the system is working well, as reflected by the willingness of practitioners to place matters on the Individual Track, rather than the Standard Track.¹⁸² The authors record their impression that cases have been very much better prepared than under the old system. They accept that some procedures may require modification (for example, timetables have been found to be too stringent), but consider that the fears of some opponents of DCM have not been borne out.

¹⁷⁹ *Supreme Court Act 1970* (NSW), Part 7B; *Supreme Court Rules*, Parts 72B, 72C.

¹⁸⁰ *Supreme Court Rules*, Part 22. If the party making the offer achieves a better result at the trial than if the offer had been accepted, the other party ordinarily must pay costs incurred after the date of the offer.

¹⁸¹ The directions include orders under the *Evidence Act 1995* (NSW), for example, for the giving of evidence of the contents of a document in the form of a summary.

¹⁸² Justice J Badgery-Parker and Registrar J Harrison. "A Short Way Down The Track: Differential Case Management in the Supreme Court" [1995] *Law Society Journal* (June) 34.

COUNTY COURT OF VICTORIA

Just as necessity was the mother of invention for the Supreme Court of New South Wales, so it has proved for the County Court of Victoria.¹⁸³

The jurisdiction of that Court is very similar to that of the District Court of New South Wales, to which I have already referred. It also has a similar complement of Judges. In November 1996, the Court comprised a Chief Judge, 48 Judges, 7 Reserve Judges and a Master. In recent years, about 12,000 civil proceedings have been commenced in the County Court annually, most of which are personal injury claims. In 1995, the Court recognised that there was widespread dissatisfaction with delays and inefficiency in the disposition of civil litigation. By 30 June 1995, the average waiting time from the filing of a certificate of readiness until trial was 16 to 21 months, and was increasing. Interlocutory applications were common; discovery and interrogatories were overused and misused; the settlement rate had declined and some proceedings had been on foot for more than 10 years.

Faced with these difficulties, the Court decided to adopt a system of individual case management under the control of Judges, rather than Masters or Registrars. The stated objectives included:

- removing unnecessary interlocutory proceedings;
- encouraging early settlement, with effective use of ADR;
- providing expeditious hearings of contested matters; and
- preventing overservicing and other influences increasing the costs of litigation unnecessarily.

The process of court control commenced in July 1995 with call-overs of all commercial cases, with a view to fixing early trial dates and encouraging mediation. By February 1996, all commercial cases set down for trial by December 1995 had either been resolved or had been allocated a fixed date for trial.

Emboldened by this experience, the Court promulgated Order 34A, providing for case management of all civil matters.¹⁸⁴ Order 34A establishes four Court Lists: the Damages List, the Business List, the Workcover List,¹⁸⁵ and the Long Cases List. Each case is placed in the appropriate list at the commencement of the proceedings by means of

¹⁸³ The material in this section is largely taken from a presentation at a recent conference entitled "Reinventing the Courts", held in Sydney in November 1996 as part of the New South Wales Legal Convention: Judge D. Jones, "Civil Litigation in the Country Court: The Court Takes Control".

¹⁸⁴ *County Court Rules*. Order 34A. Order 34A commenced on 1 January 1996.

¹⁸⁵ Involving claims arising out of work-related injuries or illnesses.

a case abstract prepared by the plaintiff, which specifies the relief sought and the cause of action relied on. Cases are allocated to the Long Cases List only by Court order, either because the hearing is expected to exceed 10 days or because the litigation is especially complex.

An early directions hearing by the List Judge is a central feature of the system. Thereafter, subject to any contrary order, the List Judge is in control of the matter and conducts any directions hearing and determines any interlocutory application. Unless the List Judge otherwise orders, no party is required to make discovery or permitted to serve interrogatories.

The List Judge reserves the case at the directions hearing and, where possible, fixes a trial date and makes orders designed to ensure that the issues in dispute are identified and that the steps required for a trial are completed in a timely fashion. The List Judge has power to refer matters to mediation or other forms of ADR, whether or not the parties consent. In personal injury cases, mediations are usually conducted about two to three months before the date fixed for trial. The parties are ordinarily required to attend the mediation (which is conducted by an outside mediator). If there is an insurer, a representative of the insurer who has authority to settle the case is required to attend.

According to the Damages List Judge, by November 1996, some 18,000 pre-1996 cases had been subjected to directions hearings. By November 1996, the "great majority" of pre-1996 damages cases had been disposed of by settlement or had hearing dates allocated in the first 8 months of 1997. The Court overlists cases in the sense that about three cases per available trial Judge are listed. About one in 20 cases listed for a particular day is unable to proceed, but this is regarded as an acceptable proportion, since the listing practices encourage resolution of the cases and ensure efficient utilisation of court time.

THE DISTRICT COURT OF NEW SOUTH WALES

In the 1980's and early 1990's, the District Court of New South Wales faced what a Judge of that Court has described as "desperate times".¹⁸⁶ These were characterised by inordinate delays, cases remaining for many years in the list without apparent movement and a high proportion of cases not being reached or not being ready, on the dates allocated for hearing. In February 1994, the median delay in civil matters, between

¹⁸⁶ The material in this section has been drawn from a paper presented to the "Reinventing the Courts" Conference: Judge A.F. Garling, "Litigation Reform — The New South Wales Experience".

the filing of a "Praecipe for Trial" and disposition by a judge, was four years and three months.

A limited form of case management was introduced in 1992. A Motor Accidents List was established and placed under the control of three judges, who managed their own calendar. The judges were therefore able to allocate dates for hearing and manage the cases so as to ensure that they were ready for trial. Since each judge was managing his or her own list, fewer cases were not reached on the dates allocated for hearing.

The Motor Accidents List did not address the problem created by a very substantial backlog of personal injury cases, most of which had been in the District Court system for at least seven years. Accordingly, the Court established a project in 1994 to review long-standing cases and to allocate them hearing dates. A decision was taken to grant adjournments only if one of the three reviewing judges was prepared to accede to an application. The result of this active intervention was that, of the 4,204 cases included in the project, 4,021 were disposed of within about one year of the project commencing.

Despite these initiatives, it is fair to say that the District Court has not adopted any sophisticated form of case management for civil litigation generally. The main change from the previous practice appears to have been the assignment of a larger group of judges to civil litigation, thereby providing greater certainty with hearing dates. Consequently, the parties and their legal advisers are aware that a case set down for a particular day is very likely to be reached on that day. Even so, recent experience shows that about ten per cent of civil cases in the District Court are not reached on the date they are first listed. Despite this difficulty, it appears that the court has largely eliminated its backlog. All cases which were commenced prior to 1 January 1996, and in which a Praecipe for Trial has been filed, have either been heard or have been found not to be ready for hearing, for example, because the infant plaintiff's injuries have not been stabilised.

CASE MANAGEMENT IN THE FEDERAL COURT

The work of the Federal Court varies considerably in complexity and in its demands on court resources. Some cases generate only very brief evidence and require a short hearing (although the legal issues may be far from easy to resolve). An example is the typical application for judicial review of administrative action, which can be heard in under one day of hearing time. On the other hand, some cases are not only

complex, but require, potentially at least, weeks or months of court time. Examples of this kind of case include large-scale, multi-party commercial disputes and claims based on alleged abuse of market power in contravention of the pro-competition provisions of the *Trade Practises Act*.

Although it is often clear from the outset whether a particular case will raise complex issues or require substantial hearing time, this is not always so. Certainly, the fact that cases are of a particular kind does not necessarily mean that they can be treated in an identical fashion. For example, claims based on misleading and deceptive conduct may be relatively straightforward, as where a purchaser of a small business complains that the vendor misrepresented the takings and seeks rescission of the purchase agreement and damages. Cases based on misleading and deceptive conduct can, however, involve extremely difficult factual and legal questions, and require the Court to evaluate the conflicting evidence of many lay and expert witnesses.¹⁸⁷

From the Court's establishment in 1977, it has adopted a system of individual case management. The system was designed to allow judges to supervise the management of a case from its commencement until the trial or other disposition by means of directions hearings. Although the details of the system have changed over the intervening two decades, for example, to accommodate the advent of court annexed mediators, it has remained largely intact. In part, this is because the judgments of the Court have repeatedly emphasised the importance of case management to the conduct of litigation.

For example, the Full Court said this in 1990:¹⁸⁸

“That the Court follows the case management approach is well known to the legal profession. The practice was adopted immediately upon the establishment of the Court in 1977. It was, at that time, a radical innovation in Australian superior courts; and was recognised as such. It is reasonable to suppose that all litigious solicitors and all barristers are aware that if they choose this Court for the litigation of a claim . . . they go to a Court which seeks to minimise the delays of litigation by issuing procedural directions to the parties which they are expected to observe. In return, the Court does its best to provide to the parties an early hearing date”.

¹⁸⁷ Assessment of damages, a topic elucidated or complicated by recent High Court decisions (depending on one's point of view), frequently produces a great volume of evidence, including conflicting evidence from accountants, valuers and other experts.

¹⁸⁸ *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388, at 395 (Full Court of the Federal Court).

Decisions of the Court and, indeed of other Australian courts, have strongly endorsed not only the philosophy of individual case management, but the desirability of appellate courts exercising particular caution about reviewing the management decisions made by individual judges. The following statement by Kirby P. of the New South Wales Court of Appeal is often cited:¹⁸⁹

“There are special reasons in the present case to exercise such restraint. The litigation between the parties is self-evidently most complex. The desirability of a measure of judicial case management is self-evident. . . . Necessarily, the time that can be devoted by a busy appellate court to mastering the detail of such complex litigation is more limited than that available to a trial judge who bears responsibility for conducting its management and, perhaps, its trial. . . . This Court should conserve its intervention in interlocutory orders made in such cases to instances where legal principle or the urgent demands of justice require intervention. Otherwise, the Court of Appeal will become an obstacle to proper management of such litigation and its determination according to law.”

Moreover, appellate courts tend to support trial Judges who decline to permit amendments or adjournments if to allow them would cause significant delays or involve waste of the Court’s hearing time.¹⁹⁰

THE CURRENT SYSTEM

Case Management, as currently operating in the Federal Court, depends heavily on directions hearings.¹⁹¹ Once an application is filed,¹⁹² the matter is allocated to a Judge for a directions hearing. The *Federal Court Rules* confer extensive powers on the Court to give directions for the conduct of the proceedings.¹⁹³ These include powers to

- make orders with respect to the defining of issues and admissions of facts and documents;

¹⁸⁹ *Bank of New Zealand v Spedley Securities Ltd (In Liq)* (1992) 27 NSWLR 91, at 95, applied most recently in *State of Queensland v J.L. Holdings Pty Ltd*, Full Court of the Federal Court, 29 October 1996, unreported.

¹⁹⁰ *Sali v SPC Ltd* (1993) 67 ALJR 841, at 849 (High Court). Compare *Ketteman v Hansel Properties Ltd* [1987] AC 189.

¹⁹¹ As will be seen, the system is about to change.

¹⁹² Proceedings are instituted in the Federal Court by an application, which states the nature of the relief sought and the source of jurisdiction.

¹⁹³ *Federal Court Rules*, Order 10, r.1.

- make orders for the giving of evidence, including whether evidence should be given on affidavit or orally, or both;
- order evidence to be taken by video link or telephone (a power frequently used in cases involving interstate or overseas witnesses, especially where their evidence is relatively short or non-contentious);
- order exchanges of expert reports, appoint a court expert or limit the number of expert witnesses to be called;
- refer the matter to a mediator or arbitrator;
- to order the parties to attend before a Registrar with a view to satisfying the Registrar that reasonable steps have been taken to achieve a negotiated outcome or to clarify the real issues in dispute; and
- direct the parties to attend a case management conference to consider the most economic and efficient means of bringing the proceedings to trial.

If a matter has not settled, it is allocated a hearing date when it has reached the stage of readiness or near-readiness for a hearing. Although registry practices are not uniform throughout Australia, in general cases are divided into long matters (three days or more) and short matters. Call overs are held for long matters and a listing Judge allocates the cases. Another listing Judge allocates short matters. The allocations depend in large measure on the availability of Judge time, having regard to other commitments (notably time required for hearing Full Court appeals) and, to a limited extent, on the preferences of the Judge. The Judge conducting directions hearing in a matter will not necessarily hear it. Indeed, in general the Judge who has managed the case will *not* hear it.

ADVANTAGES OF CASE MANAGEMENT

In practice, in a number of registries, the Court has developed specialist lists.¹⁹⁴ In these registries, the directions hearings in cases involving what have been classified as “specialist” fields, such as intellectual property, taxation and admiralty, have been conducted by Judges who have specialist expertise in those areas. One advantage of this practice is that the parties to litigation within the specialist lists (who tend to

¹⁹⁴ Because the Court is national, there are separate registries in the various States and Territories.

be “repeat players”, such as the Commissioner of Taxation) and their specialist legal representatives can expect uniformity of approach by the managing Judge. It also means that an experienced judge formulates standard directions that are generally well suited to the particular form of litigation, but can be adapted where necessary. For example, in taxation matters, pleadings in the traditional sense are not used, but the parties are directed at an early stage to prepare statements of facts and issues in contention, so as to clarify the matters genuinely in dispute.

I have referred to one of the principal objectives of case management as being to provide settlement at the earliest opportunity. There is little doubt that the case management as applied in the Federal Court has advanced that objective, although how far it has done so is a matter for debate. The Court has power to refer matters to mediation or other forms of ADR, but only with the consent of the parties. Most Judges actively explore the prospects of settlement in the course of directions hearings and ascertain whether the parties would be prepared, for example, to refer the dispute to mediation. In this respect, the parties have a further choice to make. Since 1987, the Court has offered its own mediation facilities and makes available the services of Registrars, trained in mediation skills, to conduct the mediation. Until recently, this service attracted no court fees,¹⁹⁵ and therefore had a cost advantage over privately conducted mediations. However, the parties may elect to have the matter referred to a private mediator, selected by them. While referrals can be made only with the consent of the parties, many Judges will strongly advise parties to explore settlement through mediation and that advice often bears fruit.

As is often the case, the available statistics are not unequivocal. Nonetheless, they suggest that court-annexed mediation services have played an important role in achieving settlement of disputes already in the court system. Over the period 1987 to 1995, a total of 1,109 matters were referred by Judges to court registrars for mediation. Of the 938 matters completed during that time, 736 (78.5%) were settled at or after the mediation.¹⁹⁶ These figures do not, of course, take into account the substantial but unrecorded number of cases referred by Judges or the parties themselves to private mediators. Such referrals are especially common with complex, multi-party litigation that typically consumes inordinate amounts of court time and resources. There are many

¹⁹⁵ Fees were introduced in consequence of the 1996 Federal Budget. The fees, of course, are paid to the Commonwealth and do not benefit the Court.

¹⁹⁶ See M.E.J. Black, “The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia” (1996) 7 *Australian Dispute Resolution Journal*, 138, at 151.

examples of large and complex commercial cases settling at or shortly after mediation.¹⁹⁷

The system of case management as applied in the Federal Court has many other important advantages when compared with the more traditional approach. The list that follows is not intended to be exhaustive, but it indicates why few informed observers would wish the Court to return to a system which allows the parties free rein to determine the pace of litigation.

First, since the Court has adopted a policy of not adjourning matters indefinitely, cases do not languish in the Court's lists without judicial supervision. It is therefore not possible for cases simply to remain untouched in the Court's lists for long periods. The Judge has the means available to require a case to be prepared for trial and, in default of compliance, to take appropriate action including costs orders against the parties or the legal representative personally and, as a last resort, dismissal of the proceedings.

Secondly, the Court has the opportunity to supervise interlocutory steps in the proceedings, and to prevent unnecessary use of procedures such as discovery and interrogatories. In practice, interrogatories have largely disappeared, since the almost universal experience of Judges is that they are unnecessary, wasteful and productive of both disputation and expense.¹⁹⁸ The experience with discovery is more mixed, but it is increasingly common for Judges to impose limits on the scope of discovery, even where the parties agree between themselves that full discovery should be provided. Orders are frequently made, for example, modifying the *Peruvian Guano*¹⁹⁹ test, so as to eliminate the requirement to produce documents which may lead to a train of inquiry enabling the other party to advance his or her case or damage that of his or her opponent. It is also common for orders to be made limiting discovery to specific classes of documents that are plainly relevant to the issues in dispute.

Thirdly, judicial case management allows directions to be made for the orderly conduct of the trial. It is standard practice in the Federal Court for the case to proceed on affidavit evidence, although there are some matters, for example where credit is in issue, where evidence in chief is given *viva voce*. Directions are designed to ensure that a case,

¹⁹⁷ A recent example is a case arising out of a large corporate collapse, involving 73 parties divided into 17 groups, which was expected to consume at least nine months of hearing time.

¹⁹⁸ Since 1986 leave has been required to administer interrogatories and it is rarely given: *Federal Court Rules*, Order 16, r.1(1).

¹⁹⁹ *Compagnie Financiere du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55; Woolf Report, 124-126.

once set down for trial, is ready for hearing and that the issues in dispute are clearly defined. It is therefore rare for hearing dates to be vacated because the matter is not ready to proceed, particularly as legal representatives are well aware that the trial Judge is unlikely to respond sympathetically to an adjournment application save in the most exceptional circumstances.

In all but the simplest cases, directions for trial are likely to make provisions for the filing of a chronology, and an outline of submissions (unless the case involves purely factual issues) and the preparation of an agreed tender bundle of documents. If the matter has proceeded on affidavit evidence, as is customary, the parties will usually be required to exchange objections to the admissibility of affidavit evidence, so as to minimise the court time spent on disputed evidentiary questions. Where evidence is to be given by videolink, as frequently occurs in commercial litigation involving witnesses from overseas and interstate, directions can be given for the necessary administrative steps to be taken.

Fourthly, directions hearings provide the opportunity for individual Judges to make more detailed and innovative directions to avoid delay and to encourage settlement. Orders are frequently made, for example, requiring expert witnesses to confer in advance of the trial, with a view to reaching common ground and, failing agreement, to preparing a document specifying the points of difference between them. Less frequently, orders have been made, with the consent of the parties, for experts to give their evidence at the same time in a “round-table” fashion. This provides the opportunity for the Judge to ask questions of the witnesses and for the experts to ask questions of each other. The anecdotal evidence suggests that this technique can drastically reduce the amount of time spent hearing expert evidence and clarify difficult technical questions for the Judge.

Individual Judges have made innovative orders for the conduct of the trial designed, in part, to improve the prospects for settlement. For example, where a case depends largely on competing versions of events given by two principal witnesses, orders have been made for those witnesses to give their evidence (including cross-examination) sequentially, in advance of all other evidence in the case. Again, anecdotal evidence suggests that this technique can be very effective in promoting resolution of the dispute, thereby avoiding the need for a prolonged hearing on other aspects of the case.

A REASSESSMENT

Despite the advantages of case management, the Judges of the Court have recognised that the system has deficiencies and requires improvement. For this reason, in 1995 and 1996 the Judges of the Federal Court undertook a detailed reassessment of the Court's procedures.²⁰⁰ The Court has been assisted by Ms. Maureen Solomon, a well-known expert in case management, whose brief has included drafting proposals for an improved system in the light of deficiencies identified by the Judges. The process of reassessment does not imply that the Court's system of case flow management has failed. Rather, the object is to improve the Court's procedures further, by taking account of the kinds of issues addressed by the Woolf Report. Five principal difficulties have been identified.

First, a significant and increasing percentage of General Division matters remain incomplete two years after commencement of proceedings. (General Division matters include all matters, such as corporations, intellectual property, trade practices, admiralty and judicial review cases, except bankruptcy.) The trend is shown by the following table:²⁰¹

Age of matters	No. of matters as at 30 Jun '92	No. of matters as at 30 Jun '93	No. of matters as at 30 Jun '94	No. of matters as at 30 Jun '95
Less than 1 year	1,446 (67.4)	1,943 (66.1)	1,804 (59.7)	2,223 (60.3)
1-2 years	380 (17.7)	702 (23.9)	818 (27.1)	752 (20.4)
Less than 2 years	1,826 (85.1)	2,645 (90.0)	2,622 (86.8)	2,975 (80.7)
2-3 years	165 (7.7)	198 (6.7)	297 (9.8)	479 (13.0)
3-4 years	74 (3.4)	60 (2.0)	78 (2.6)	182 (4.9)
4-5 years	80 (3.7)	33 (1.1)	21 (0.7)	49 (1.3)
More than 2 years	319 (14.9)	291 (9.9)	396 (13.1)	710 (19.2)
Total current matters	2,145	2,936	3,018	3,685

²⁰⁰ The work has mainly been undertaken by the Practice and Procedure Committee, comprising 12 Judges, together with administrative support from the Registry. The project has the active endorsement of Chief Justice Michael Black.

²⁰¹ Federal Court of Australia, *Annual Report 1994-1995*, at 43.

Secondly, a significant minority of cases generates a large number of directions hearings, often without any apparent benefit to the parties or to the efficient and timely resolution of the litigation. These cases frequently involve one or more parties repeatedly breaching agreed timetables or Court directions. They also tend to be characterised by repeated interlocutory applications. It is clearly unsatisfactory if a system intended to bring matters to a speedy and inexpensive conclusion has the effect of increasing costs incurred en route to a hearing.

Thirdly, although the worst excesses of untrammelled discovery have generally been curtailed, there is a widespread view that firmer action is required to limit discovery, especially in complex commercial litigation. There is a discernible tendency for some parties to resist efforts to limit discovery to specified classes of documents or to depart from the *Peruvian Guano* test. Accordingly, there are still cases in which very considerable costs are being incurred in relation to discovery, where there is good reason to think that, at least in part, the costs are unnecessary.

Fourthly, despite the various approaches designed to limit the time and resources devoted to expert evidence, further measures are required to ensure that experts are fully aware of their responsibilities to the Court and to ensure that the critical issues are addressed expeditiously and without duplication. As Lord Woolf has reported, this is a controversial area.²⁰² For example, the *Federal Court Rules* permit the Court to appoint an expert to inquire into and report on the relevant questions, but the rule is rarely utilised precisely because of the difficulties to which Lord Woolf refers.²⁰³ Nonetheless, there is considerable support for proposals designed to limit the number of expert witnesses in any given case, to improve their understanding of their responsibilities and to encourage a more co-operative approach.

Fifthly, the view has been taken that the Court's powers to control the conduct of the hearing itself should be expanded, and existing powers should be exercised more vigorously. There is no doubt that the Court's usual pre-trial directions eliminate the most wasteful aspects of an unsupervised adversary system and contribute to the expeditious and orderly conduct of trials. However, there is room for more stringent directions in appropriate cases, including time limits for giving evidence and making submissions and restrictions on the numbers of expert and lay witnesses.

²⁰² Woolf Report, Chapter 13.

²⁰³ *Federal Court Rules*. Order 34.

FUTURE DIRECTIONS

There is no single solution to the difficulties confronting a court attempting to manage a large and diverse workload. However, the reassessment by the Federal Court of its case management system has identified two particular characteristics of the present case management system that have detracted from the Court's ability to meet its objectives. These are that

- the Judge responsible for conducting directions hearings is usually not the trial Judge;
- no trial date is allocated until a case is ready or nearly ready for trial.

The principal consequences of the first characteristic is that continuity is lacking at a critical point, namely, the transition from directions hearings to trial. The Judge responsible for managing the case may be tempted to leave unresolved some issues best dealt with at the pre-trial directions stage, since to do otherwise is likely to involve duplication of judicial effort. Conversely, the trial Judge may find that, if he or she had had the opportunity to formulate detailed directions, the trial might have followed a different course or the chances of settlement improved. In any event, the need for the directions Judge to become familiar with the case inevitably means that at least two Judges must understand the issues in the case, rather than one. This can be particularly wasteful where the directions Judge has to resolve interlocutory disputes that require detailed analysis of the pleadings or evidence.

The second characteristic means that the parties and their legal representatives lack the enforced discipline of a fixed hearing date to govern their preparation for trial and to provide an incentive to achieve settlement. The temptation to depart from an agreed or court-imposed timetable often proves irresistible, notwithstanding the possible imposition of a costs sanction. Similarly, the absence of a fixed hearing date tends to encourage interlocutory disputes, since there is no outer time limit within which the parties must operate or face the risk of being deprived of the opportunity to present their respective cases adequately. Unless what has been described as "trial date credibility" is preserved the objectives sought by case management are often difficult to achieve. Certainly the absence of a set hearing date at an early stage of the case management process has contributed to the proliferation of directions hearings in some cases and the gradual increase in the proportion of cases not resolved within two years of commencement.

In order to address these problems, the Court has resolved to implement as from July 1997 an Individual Docket System as the basis for the listing and management of cases. Under this system, which is in force in many jurisdictions in the United States, a case is allocated to a Judge as soon as it is commenced. In general, cases are to be allocated on a random basis, although Judges may elect whether they wish to be allocated "specialist" matters, such as intellectual property or admiralty cases. The Judge to whom a case is allocated manages the case from commencement to disposition. A key element in the system is that trial dates are allocated by the trial judge at an early stage and key events take place by reference to those dates. The principal objective of the Individual Docket System is to ensure that all cases commenced in the Court are disposed of at first instance within 18 months of commencement, including delivery of a reserved judgment, if required.

The scheme envisages that there will be three, or possibly four, "macro" events before trial. These are:

- a first directions hearing, to take place within two months of the commencement of proceedings;
- a case management conference, to take place within four months of commencement;
- an evaluation conference, to take place within 10 months of commencement;
- if required, a trial management conference, to take place 6 to 8 weeks before trial, but no later than 13 months from commencement.

The hearing is to take place no later than 15 months from commencement and continue until completion. The time lines are shown on the chart attached to this paper.

Under the Individual Docket System the initiating process is to include information relevant to the management of the case. This includes the source of the Court's jurisdiction, whether ADR has been explored and, if not, why not; whether any other court has jurisdiction; whether the case is linked to any other litigation; and a quantification, where appropriate, of the value of the claim. This information is important, *inter alia*, in allocating cases, identifying matters requiring urgent or special attention and identifying cases which might be transferred out of the Court.

The first directions hearing is designed to explore the prospects of settlement or ADR and to consider whether the case should be

transferred to another court. If these options are inappropriate, or settlement cannot be achieved, directions are to be given for the case management conference. The directions, which may follow a standard form for particular categories of cases, will include provision for a pleading timetable, amendments to pleadings and the joinder of additional parties. The directions will also address a timetable for disclosure of documents and names of witnesses, the preparation of affidavit evidence and, if appropriate, a regime for the preparation of experts' reports. In preparation for the case management conference, the parties will be directed to prepare a "joint status report", to be filed at least 14 days prior to the case management conference.

The joint status report is to be prepared by the parties' legal representatives. The principal purpose of the report is to indicate the level of compliance with directions and to provide details of discussions between the parties in relation to case preparation. It will also record the parties' suggestions for the further progress of the case.

The case management conference is to be attended by the parties, solicitors and counsel. The participants will review the contents of the joint status report and the prospects for settlement or ADR. Additional directions will be made to deal with such issues as further amendments to pleadings, preparation of witness statements or affidavits and exchange of experts' reports. Attention will also be given, if necessary, to questions such as applications for security for costs and whether there should be a separate trial of any issue. Most importantly, the Judge will allocate a trial date within a specified range and will appoint a time for an evaluation conference.

Prior to the evaluation conference, the parties will file a case progress report, notifying the court what needs to be done to dispose of the matter. The report is to include an estimate of costs for the remainder of the proceedings and confirmation that the client has been informed of costs already incurred as well as the estimate of costs likely to be incurred. The evaluation conference will focus on the state of preparation of the case and the possibility of disposition without trial. If the matter cannot be resolved, a firm trial date will be set and an estimate made of its expected length (having regard to any directions designed to shorten its duration). Directions will be given for the conduct of the trial. These will normally include the preparation of a Judge's Book of copy documents, a timetable for the giving of evidence, a chronology and, where appropriate, written submissions.

A trial management conference is to be held only if regarded as necessary by the trial Judge. If it is necessary, for example, because of

the complexity or length of the case, it will be held about six weeks prior to the trial. This, however, would not be the final contact between the Court and the parties prior to trial. The Judge's staff would contact the legal representatives regularly by telephone to monitor preparation for the hearing and ensure compliance with directions.

Of course, there are many other aspects of the new system that have required and will require detailed planning. The issues to be addressed include record-keeping; information systems; training of Judges and their staff; transitional arrangements; and the need to accommodate urgent matters and unexpected absence of Judges. Plainly these are important and difficult topics. But it is clear that there is a commitment to ensuring that case management in the Federal Court addresses the broader issues of access to justice so fundamental to the rule of law.

CONCLUSION

Access to justice is a universal catchcry in common law countries. The principal lesson to be derived from the Australian experience is that, in an age when courts are increasingly under critical scrutiny of their contribution to improving access to justice, the traditional laissez-faire approach to adversary litigation is unsustainable.

The precise solutions fashioned by each court will depend on many factors including the nature of the workload, the perceived urgency of remedial action, the local legal culture and the available resources. Any solutions implemented must be regularly evaluated and reassessed as the occasion demands. Some organisational principles, such as continuity in judicial management and early fixing of trial dates, are clearly important. On other issues there is considerable room for debate and experimentation. Moreover, it must be remembered that case management is only one aspect of access to justice. Procedural reforms cannot, of themselves, overcome all the problems threatening to overwhelm the administration of justice. But putting the judicial house in order is a very good start.

CHAPTER 13

Case Management: The Judiciary and Change

Presentation by *The Honourable Sir Anthony Mason AC KBE*, Chief Justice of Australia 1987-1994, currently the Arthur Goodhart Visiting Professor in Legal Science, Faculty of Law, University of Cambridge, England

The principle relevance of the Australian experience of case management not mentioned by Justice Sackville is that most members of the Australian Bar appear to be of Irish ancestry, hence the need for case management. So if you hear criticism of case management in Australia, attributed to the Australian Bar, you must make due allowance for who it is that is talking! Australian judges, as Justice Sackville said, were generally supportive of case management. Many of them are also of Irish ancestry. When I was appointed Chief Justice of Australia the Irish Ambassador called upon me to offer his congratulations. I pointed out to him, much to his evident delight, that six of the seven justices of the High Court of Australia were of Irish ancestry. Just as he was about to leave I asked him if he would mind keeping that intelligence confidential lest disclosure might provoke a massive loss of confidence! He said he could well understand my apprehensions! Now that I have left the Court I can make the frank admission that I was one of the six justices to whom I was referring, a lineage that I have managed surreptitiously and successfully to conceal under what is a very English surname.

My discussion of this subject begins with an agreement with all that Justice Sackville has said, subject to one qualification, and that qualification relates to a matter that really is not the subject of discussion at today's conference. Justice Sackville said, and it's true, that Federal Courts in Australia, including the High Court of Australia, have their own budget autonomy and that does mean, for all practical purposes, that they have to undertake the responsibility for the administration of the court from within the resources that Government provides for them. But it is vitally important that Government provides an adequate financial budget for all Courts. The point is now being reached in Australia where

that question does arise because of cutbacks. I think that the Courts, even the Federal Courts, may ultimately be faced with the responsibility of administering the courts from their own resources within the framework of an inadequate budget provided by the executive and approved by Parliament. So that is a major question for the future.

As for the topic we have been discussing, I do not intend to speak about the mechanics of case management. Other speakers have spoken on that topic. At the outset I want to identify myself as a supporter of the case management approach. I can say, confirming what Justice Sackville has said, that limited experience of it in Australia and New Zealand has indicated that it is a worthwhile invention, though as yet we do not have the benefit of detailed and thoroughgoing research to establish that point.

Case management, even in its most simple form, is an obvious response to the problem presented by an inaccessible court system that is pervaded with delays and in which the costs to litigants are excessive. I must say, and I will deal with this point later, that I have some doubt as to whether case management is going to solve the problem of excessive costs. But the shortcomings to which case management are addressed and have been addressed are not only unacceptable in a justice system, they naturally lead to an erosion of public confidence in the administration of justice. More specifically they lead to a loss of confidence in the judicial process because the public is simply not in a position to apportion blame and it therefore assumes that the courts and the judges are at least partly at fault in relation to what has happened. Having identified myself as a general supporter of case management I intend to offer some cautionary comments which I think it is necessary to bear firmly in mind. First, it is important that we do not claim too much for case management. It is, as Professor Zander said, not a magic wand in itself.

Secondly, we must recognise that it calls for a very different approach on the part of judges and on the part of the profession. That means that there are and will be problems in adjusting to it and it means that there will be some resistance to it from lawyers, including judges, because both lawyers and judges are generally not in favour of change or comfortable with change.

That leads me to my third point, that we should look at case management as an evolutionary redevelopment in which we can refine the concept with experience and, as we go along, with the benefits of consultation with the professions, other interested bodies, and for that matter, with users and interest groups. In this respect it may be that

the New Zealand pilot program on case management, which is being undertaken at two centers in New Zealand at the present time, Auckland and Napier, may be of some assistance to the Republic of Ireland.

New Zealand is a country with a very similar population to Ireland. Its activities are very similar to the activities in which the Republic engages. It's predominantly a farming, agricultural community. It has one major city and a number of smaller towns. In New Zealand the pilot program of case management is being undertaken in close association with the profession and other interest groups and it incorporates a continuing evaluation of the system itself as it unfolds, so that improvements to it can be incorporated in the system at fairly short notice.

The fourth point I wanted to make was that although case management has the potential, undoubted potential, to deliver an improved justice system, unless it is carefully handled it also has the potential to cause dissatisfaction and criticism on the part of lawyers and on the part of the community. So if it is to succeed we must ensure that it is implemented in such a way that it commands professional acceptance and community acceptance and that, as I said earlier, involves continuing consultation.

My fifth and final point in relation to this is that successful case management requires additional facilities and resources as well as training for judges and the profession. I cannot emphasize too much the essentially of the Government providing the court system with adequate resources. In that respect I am constantly astonished at the failure of Governments in this part of the world to provide judges with the assistance that judges have in North America, Australia and, to a much lesser extent, in New Zealand. Justice Sackville referred to the fact that we had generous assistance in the High Court. In fact judges of the High Court have two associates who are always, generally speaking, first class honours graduates from the universities. In addition to that we have a well equipped library with two research librarians and a reference librarian. In relation to work of the kind that is involved in case management, the assistance that our associates can give is absolutely invaluable.

I just wanted to review the advantages that I think in a preliminary way have been established by the case management experience in Australia. There are five points that can be made.

Case management does result in a reduction of time for the disposition of the case. It results also in greater predictability of the date of hearing and of the future course of the case. Thirdly, it results in something that I think is very important indeed and something to which

attention is not often directed and that is the enhanced quality of service and professional performance that almost certainly arises from earlier preparation of a case and in particular earlier identification of the issues. Case management should result, although this isn't clearly established in Australia or New Zealand at the present time, in facilitating early settlement and in facilitating an early decision to go by way of ADR. But, as I say, that's not been clearly established.

As for costs, there is no evidence, clear evidence, in Australia or New Zealand at the present time, that case management reduces cost to the litigants. No doubt that news will be welcomed by members of the profession. I think it is very difficult to establish that case management does have that result. Particular aspects of case management like Lord Woolf's proposed "fast-track" proposal may well have that result. But one has to bear in mind that although the time taken in disposition of the case, the time taken in the hearing of a case may be reduced, there is more effort, more professional effort, put in to the earlier stages of a case and preliminary conferences. Therefore, it is very important indeed to ensure in effective case management that it's not structured in such a way that unnecessary preliminary conferences and other work is undertaken before the hearing. I think the views that have been expressed that are unfavourable in the totem pole in the costs situation as a result of case management are largely based in Australia, and to some extent in New Zealand, on the view that some efforts on this field, that the judges have unnecessarily scheduled preliminary conferences and just built up costs in that way.

One very important development that is taking place in relation to the cost issue, and it's taking place in the commercial field above all, is that the time has now been reached when senior company executives and company directors are becoming very concerned about the mountain of legal costs incurred in connection with litigation and that has resulted, undoubtedly, in major long running cases. Two of them were referred to by Justice Sackville. From what I understand, talking to business people, it is the concern about continuing liability for costs in a very long case that more than anything else drives the litigants to accept the services of the mediator.

We need to remember, of course, that one of the reasons for undertaking case management is that there is a belief in Government circles that case management is going to reduce the costs of the court system to Government. It's basically a managerialist approach. If you make the courts more efficient then the courts will be able to deal with

a greater throughput of cases and there won't be the same demand for additional court facilities and the appointment of additional judges.

Indeed, this point of view was taken to such an extent in Australia on one occasion, some five years ago, that the bizarre suggestion was made that judges should be paid in a way that was directly linked to their productivity. Fortunately, as a result of opposition, including opposition from myself, wiser counsel came to prevail. But it does indicate how far the managerialist will go in his view of what is an ideal paradise of justice.

As I said earlier, we need to ensure that there is confidence in case management. Unless there is confidence in it the exercise will be in vain because essentially we are trying to create a better court system in which the public will have confidence and for which it will have respect. I think that entails identifying quite clearly what are the procedural changes that are involved. I won't go through them. By and large they have been mentioned by a number of speakers. Most of the procedural changes are optional and therefore it's a matter of what procedural changes you consider to be appropriate to your own system. But unless those procedural changes are clearly identified I think there will be a degree of doubt in the minds of practitioners and the community as to what case management actually involves.

Identification will convey a clearer picture. It will give us an idea, a clear idea, of what is expected of the judge. One of the problems of course is that the more managerial the judge becomes the more profound will be the impact on the community's assessment of the justice system. The individual litigant may well feel that to the extent that decisions are taken out of his hands and out of the hands of his legal advisors and placed in the hands of the judge, justice may suffer. He may feel in that particular case, had a relevant decision been left with his legal advisor and himself, the outcome may have been otherwise. And there is a risk that over-emphasis on case management and efficiency may overwhelm the judge's paramount concern with justice.

When I first heard the zealots of case management preaching to a congregation of judges in Australia I thought that even the rules of justice might be sacrificed on the altar of efficiency. A stern and unyielding refusal to grant adjournments might conceivably be an example. Speakers here have insisted on how the courts must toe the line in relation to refusal of adjournments, but that does not mean that the discretion is eliminated entirely. It should not be.

However, my anxiety on the score of justice has dissipated. Judges, at least the Australian species, have a stronger instinct for justice than

for efficiency. That isn't a reflection on Justice Sackville by the way. But we should be alert to remember that there is an internal tension between the goal of greater efficiency and the pursuit of justice and we must rely on the judge in the future, as in the past, to ensure that the pursuit of efficiency does not compromise the integrity of the curial process. That is of crucial importance.

Other speakers have spoken about the need for a change in culture and I won't repeat that either in relation to the judges or the profession. But one point I did want to make is that case management does impose an additional burden on the judges and that is one reason why the courts must be provided with additional and adequate resources.

Case management does take time and effort, particularly in complex cases. For example, the New Zealand judge who heard the Equity Corp case, the hearing of which took over a year and involved very complex issues of fact and issues of equity and restitution law, estimates that he spent 20% of his judicial time in the preceding two years in preliminary hearings and conferences directed to preparing the case for trial. In that time he delivered more than twenty interlocutory judgments in connection with the case.

My own experience in the High Court of Australia in settling the issues in complex constitutional cases and setting the future course of proceedings indicates that the burden of reading and understanding extensive materials, not only the pleadings and the proposed issues and case summaries, but other materials as well, can be time consuming and depressing, particularly when the judge is heavily engaged in hearing cases and writing judgments.

So we need to be careful not to subject judges who are already under considerable pressures of work to an already greater burden by increasing their responsibility, unless we are giving them appropriate assistance. And as I said, here consideration should be given to giving the judges the kind of assistance which they are provided with in North America and Australia. Surprisingly, the results of an early survey of professional reaction in New Zealand to their pilot case management experience is that members of the profession have considered that the judges are not sufficiently proactive in case management. Their reaction has been that the judges have not taken sufficient control of the litigation. They feel that the judges ought to provide a greater leeway, particularly in encouraging settlement and exploring the possibility of resorting to ADR. Now, I think that's a very interesting development.

Likewise, the survey in New Zealand conducted in the course of the pilot program, at a fairly early stage, indicated that the respondents were in favour of single judge case management.

They thought that that was by far the most efficient and fairest way of managing the case. You have a judge, the one judge from beginning to end. Of course from the Court's point of view it is a much more efficient use of resources than bringing in an outside judge at a later stage in the preliminary work when that outside judge has to master the case for the first time. I will not say much about the profession but I do think that particularly at the Bar there needs to be a very significant culture change. Going back to my own days when I was at the bar, I firmly believed in last minute preparation because I thought that preparation that was undertaken at a much earlier stage of the case was basically preparation that was wasted later. Therefore you did all you could to ensure that the major preparation of a case was undertaken towards the end. Now, somehow we have got to shift that culture and that is not going to be easy.

There is also an apprehension on the part of solicitors who are sole practitioners or solicitors in small firms that case management is going to put them at a disadvantage. That apprehension, the reality or otherwise of it, may be very significant in Ireland because I understand here there is a high proportion of sole practitioners or practitioners in small firms. I think the same situation prevails in New Zealand. But, as I understand the New Zealand survey so far, by and large the solicitors have been supportive of case management and they are supportive of case management in one of the areas where it's been undertaken, that is Napier in Hawksbay, which is the centre, the courts centre of an area which is well-known as a farming and agricultural community and I am sure in Hawksbay there are not large firms of solicitors. So that's some indication that the apprehensions may not be as substantial and may not be as well-founded as have been suggested by some.

At the same time it causes us to keep steadily in mind the need to ensure that case management of cases that are not complex is structured in such a way that preliminary conference and activities are kept to a minimum so as to not impose too much of a burden on the small practice.

My conclusion, therefore, is that I support case management but it must be handled with care. That is because it does have this potential to convey the impression to the litigants and the public that the court house has been converted into a production line.

One of the complaints made against the existing system in the past was that the courts were run to suit the judges who had the most important stake in it. These days that complaint is giving way to another complaint, that basically the court system is run by the lawyers because the judges have not exercised their authority sufficiently over the lawyers.

It is vitally important that we recognize that neither of those perspectives is correct. We must recognize that the courts belong to the people and that the judicial process is conducted in the interests of the people, not in the interests of the judges nor in the interests of the profession. Case management can be employed to serve that objective.

On the other hand if it is misused case management can contribute to a sentiment that the courts are just another bureaucratic constitution and that the judges are not genuinely interested in the hearing and resolution of problems that are very important human problems to the parties to the litigation.

Of course it is not possible to satisfy all the litigants who resort to the courts but our paramount objective is, and I hope always has been, to ensure that the courts offer a fair and understanding, if not sympathetic, hearing to the litigants and those who appear in court. That means that the judges should endeavour as best they can to ensure that the litigant's case is adequately presented or is as adequately presented as it can be. Case management, if properly handled, should assist us in reaching that goal but we must make sure that it is properly handled.

CHAPTER 14

Concluding Remarks by the Chairman of the Conference

The Honourable Mr. Justice Declan Costello, President of the High Court of Ireland

Ladies and gentlemen, I think you will all agree that we have been privileged to attend today's conference. I, and I am sure most of you here, have attended many legal conferences in the past. I am not exaggerating when I say that I have never attended one in which we have had such stimulating, exciting and informative speeches as we had today. On your behalf may I thank all our nine speakers for the wealth of knowledge that they have given to us, for the stimulating way in which they have presented it and to thank them for what I think will be regarded in retrospect as a conference of some historical importance.

I do not exaggerate when I say that it is an important conference. I do think that we are at a time of change now in the Irish legal system. We all know quite dramatic changes are going to take place in the very near future in the management of our court system. That in itself is important.

Allied with that I think is the growing realization that there are problems in our courts, problems associated with lack of resources, problems associated also with the legal procedures which we have had handed down to us over the years, which we have accepted but which nowadays people realize are not adequate. Those problems in our neighbouring jurisdiction have been identified by Lord Woolf in paragraph two of his Report and outlined by him again today. They are remarkably similar to those we have, as anybody with any knowledge of our legal system would understand and appreciate.

I am not exaggerating when I say that every week, at least once a week, I come across injustice in our court system, injustice arising from lack of resources because there have not been judges to try the cases and injustice arising from the procedures which we have adopted because of inordinate and unacceptable delays that occur in the courts before a case comes to trial. These have got to be addressed and I think

people are now accepting this. This conference, I think, is an important milestone on the road towards reform.

Justice Sackville is right to speak about the necessity for the courts themselves to be included in the reforms. What is not realized is that we can do it. We have a Rules Committee. The Minister can refuse to sign the Rules that are drafted by the Rules Committee but she or he will never do so. We could bring in a system of case management, if that was the right answer, in three months time if we got around to drafting it. It lies with us, with the Rules Committee upon which the judges are represented and on which the solicitors profession is represented and on which the Bar Council is represented. We can do it. I think it has to be tackled.

The report of Judge Denham's committee was properly and deliberately reserved in any decision that was to be taken in relation to it. The committee indicated that they wanted more information and that this was the first step. It is the first step that counts and this has been a significant one. Learning from what we heard today, I am sure, certainly for me and I am sure for a lot of us here, whilst we knew that problems were common we did not appreciate how these problems have been faced up to and tackled in a remarkably similar way in such differing jurisdictions as New South Wales, California and Northern Ireland. So it does seem to me that we have not only had a stimulating day but we have had a challenging day because we have been told what has been and can be done and what is being done in other jurisdictions.

There will be other views, and I am certainly not expressing any judgment on them, such as those propounded by Professor Zander earlier today, and I am sure it is correct that we have to adapt our particular circumstance to experience in other countries, but the Denham Commission is going to consider these views and come up with a solution.

All I can say is, I think I can speak for my colleagues on the Bench, that we will be glad to cooperate with her in the work that she is undertaking. I am sure, and I can speak with confidence, that the members of the legal profession see, as we do, the need for reform. So this, I say, with perhaps some but only slight exaggeration, I think is a historical day and thank you, our nine speakers, for making it such.

CHAPTER 15

Attendance at Conference on Case Management Saturday 16th November, 1996

- (1) Agnew, Terence
Courts Training Manager
- (2) Ahern, Mairead,
County Registrar
- (3) Allen, Breda
County Registrar
- (4) Barr, The Hon. Mr. Justice Robert
Judge of the High Court
- (5) Barrett, Richard
Member of Working Group on a Courts Commission
- (6) Barrington, The Hon. Mr. Justice Donal
Judge of the Supreme Court
- (7) Beresford, Marcus
Solicitor, Law Society Litigation Committee Member
- (8) Blake, Bruce St. John
Solicitor, Law Society Litigation Committee Member
- (9) Blayney, The Hon. Mr. Justice John
Judge of the Supreme Court
- (10) Brady, Rory
Senior Counsel
- (11) Branigan, Imelda
Solicitor
- (12) Breslin, Colm
Member of Working Group on a Courts Commission
- (13) Buckley, His Honour John F.
Judge of the Circuit Court

Conference on Case Management

- (14) Buckley, Lorcan
Solicitor
- (15) Budd, The Hon. Mr. Justice Declan
Judge of the High Court
- (16) Byrne, David
Senior Counsel
- (17) Cahill, James E.
County Registrar
- (18) Cantillon, Ernst J.
Solicitor, Law Society Council Member
- (19) Carney, The Hon. Mr. Justice Paul
Judge of the High Court
- (20) Carroll, Michael
Solicitor, Law Society Council Member
- (21) Comerford, James
Registrar of the Supreme Court
- (22) Condon, Alecoque
Examiner
- (23) Connellan, Judge Murrough B.
Judge of the District Court
- (24) Connolly, Roisin
Solicitor
- (25) Costello, The Hon. Mr. Justice Declan
President of the High Court
Chairman of the Conference
- (26) Coughlan, Eithne
Solicitor
- (27) Cullen, Augustus J.
Solicitor
- (28) Deane, Joseph T.
Solicitor, Law Society Litigation Committee Member
- (29) Dempsey, Brian
Senior Counsel

Attendance

- (30) Denham, The Hon. Mrs. Justice Susan
Chairperson of the Working Group on a Courts Commission
- (31) Devally, His Honour Judge Liam
Judge of the Circuit Court
- (32) Devlin, Mary
County Registrar
- (33) Donnell, O’Niamh
Secretariat, Working Group on a Courts Commission
- (34) Dowling, John
Director of the Bar Council.
- (35) Duff, Sheila
Solicitor
- (36) Duffy, Kevin
Member of Working Group on a Courts Commission
- (37) Duffy, Josephine
County Registrar
- (38) Dunne, Her Honour Elizabeth
Judge of the Circuit Court
- (39) Elder, Shaun
Solicitor
- (40) Feeney, Kevin
Senior Counsel
- (41) Fennelly, The Hon Mr. Nial
Advocate General of the Court of Justice of the European
Communities
- (42) Finn, James
Branch Secretary, Association of Higher Civil Servants
- (43) Flood, The Hon. Mr. Justice Feergus
Judge of the High Court
- (44) Fry, Edmund
Solicitor
- (45) Gallagher, Paul
Senior Counsel

Conference on Case Management

- (46) Garbolino, Hon. Judge James D.
Superior Court Judge of Placer County, California
- (47) Geoghegan, The Hon. Mr. Justice Hugh
Judge of the High Court
- (48) Gleeson, Dermot
Attorney General
- (49) Hamill, Judge William
Judge of the District Court
- (50) Hamilton, The Hon. Mr. Justice Liam
Chief Justice of Ireland
- (51) Haughton, Judge Gerard J.
Judge of the District Court
- (52) Hederman, The Hon. Mr. Anthony
Member of Working Group on a Courts Commission and
President of the Law Reform Commission
- (53) Hennessy, Mary
Secretary, Mrs. Justice Susan Denham
- (54) Hickey, Eanna
Judicial Research Assistant.
- (55) Hill, Harry
Master of the High Court
- (56) Hussey, Rachael
Solicitor
- (57) Johnson, The Hon. Mr. Justice Richard
Judge of the High Court
- (58) Kavanagh, Peter
Secretary, Committee of Courts Practice and Procedure
- (59) Keane, The Hon. Mr. Justice Ronan
Judge of the Supreme Court
- (60) Keane, Mary
Barrister-at-Law, Law Society Director of Policy
- (61) Kearns, Patricia
Secretary, Mrs. Justice Susan Denham

Attendance

- (62) Kelly, The Hon. Mr. Justice Peter
Judge of the High Court
- (63) Kelly, Tommy
Chief Clerk, Circuit Court
- (64) Kennedy, His Honour Judge Anthony
Judge of the Circuit Court
- (65) Kenny, His Honour Judge Harvey
Judge of the Circuit Court
- (66) Kerr, The Hon. Mr. Justice Brian
Judge of the High Court, Northern Ireland
- (67) Kiely, Eamon
Chief Clerk, Cork Circuit Court
- (68) Kinirons, Tom
IMPACT Representative
- (69) Laffoy, The Hon. Miss Justice Mary
Judge of the High Court
- (70) Lavan, The Hon. Mr. Justice Vivian
Judge of the High Court
- (71) Liddy, Michael
Senior Law Officer, Office of the Director of Public Prosecutions
- (72) Lynch, His Honour Judge Dominic
Judge of the Circuit Court
- (73) Lynch, The Hon. Mr. Justice Kevin
Judge of the Supreme Court
- (74) Lynch, Elma
Solicitor, Law Society Council Member
- (75) Lyne, Elizabeth
IMPACT Representative
- (76) MacDiarmada, Diarmaid
Chief Clerk of the District Court
- (77) Margetson, Stuart
Solicitor
- (78) Martin, Richard
Solicitor

Conference on Case Management

- (79) Mason, Sir Anthony
Chief Justice of Australia 1987-1994
Arthur Goodhart Visiting Professor
in Legal Science, Univeristy of Cambridge, England
- (80) McCarthy, Patrick J.
Barrister-at-Law
- (81) McCormack, James
Secretary, District Court Rules Committee
- (82) McCormack, Patrick J.
County Registrar
- (83) McCormack, Anthony F.
County Registrar
- (84) McDonagh, Louise
County Registrar
- (85) McDonnell, Conor
Solicitor
- (86) McDonnell, Judge James Paul
Chairman of the Association of Judges of the District Court
- (87) McCracken, The Hon. Mr. Justice Brian
Judge of the High Court
- (88) McDowell, Michael
Senior Counsel
- (89) McGuill, James
Solicitor, Law Society Council Member
- (90) McGuinness, The Hon. Mrs Justice Catherine
Judge of the High Court
- (91) Meenan, Charles
Barrister-at-Law
- (92) Ment, Hon. Judge Aaron
Chief Court Administrator, Connecticut Superior Court
- (93) Monaghan, Raymond T.
Solicitor, Law Society Council Member
- (94) Moran, Charles A.
Taxing Master

Attendance

- (95) Morris, The Hon. Mr. Justice Frederick
Judge of the High Court
- (96) Murphy, Peter F.
Solicitor, Law Society Council Member
- (97) Murphy, The Hon. Mr. Justice Francis
Judge of the Supreme Court
- (98) Murphy, Ken
Member of Working Group on a Courts Commission and
Director General of the Law Society
- (99) Murphy, Fintan J
County Registrar
- (99) Nic Mhurchu, Sorcha
Solicitor
- (100) Nolan, Ursula
Courts Representative C.P.S.U.
- (101) Nugent, James
Member of Working Group on a Courts Commission and
Chairman of the Bar Council
- (102) O'Brien, Jacqueline
Barrister-at-Law
- (103) O'Caomh, Aindrias
Senior Counsel
- (104) O'Connor, Tony
Barrister-at-Law
- (105) O'Domhnaill, Sean
County Registrar
- (106) O'Donnell, His Honour Judge Frank
Judge of the Circuit Court
- (107) O'Donovan, The Hon. Mr. Justice Dairmuid
Judge of the High Court
- (108) O'Flaherty, The Hon. Mr. Justice Hugh
Judge of the Supreme Court
- (109) O'Gadhra, P.B.
County Registrar

Conference on Case Management

- (110) O’Gorman, Patrick
County Registrar
- (111) O’Hanlon, Cormac R.
Solicitor
- (112) O hOisin, Colm
Barrister-at-Law
- (113) O’hUiginn, Caoimhin
Member of Working Group on a Courts Commission
- (114) O’Mahony, Michael V.
Solicitor, Law Society Council Member
- (115) O’Mahony, Deirdre
County Registrar
- (116) O’Malley, Iseult
Barrister-at-Law
- (117) O’Sullivan, Eugene
Solicitor, Law Society Litigation Committee Member
- (118) O’Toole, Mary
Barrister-at-Law
- (119) Owens, Thomas P.
County Registrar
- (120) Peart, Michael
Solicitor, Law Society Council Member
- (121) Phelan, Maurice
County Registrar
- (122) Quinlan, Moya
Solicitor, Law Society Council Member
- (123) Quinlan, Michael
County Registrar
- (124) Quirke, John M.T.
Senior Counsel
- (125) Rattigan, Laura
Judicial Research Assistant
- (126) Regan, Ursula
Solicitor

Attendance

- (127) Ring, Mary Ellen
Barrister-at-Law
- (128) Rogers, John
Member of Working Group on a Courts Commission
- (129) Rubotham, Noel
Official Assignee
- (130) Sackville, The Hon. Mr. Justice Ronald
Judge of the Federal Court of Australia
- (131) Sheridan, Brian
Solicitor, Cork Legal Aid Board
- (132) Shortt, John P.
Barrister-at-Law
- (133) Smithwick, His Honour Judge Peter
Member of the Working Group on a Courts Commission
and President of the District Court
- (134) Smyth, Andrew F.
Solicitor, President of the Law Society
- (135) Smyth, The Hon. Mr. Justice Thomas
Judge of the High Court
- (136) Steelman, Mr. David C.
Senior Staff Attorney, National Center for State Courts,
United States of America
- (137) Stewart, Ercus
Senior Counsel
- (138) Synnott, Noel
Secretary, Working Group on a Courts Commission
- (139) Teehan, Thomas F.
Barrister-at-Law
- (140) Tehan, Maire
County Registrar
- (141) White, His Honour Judge Michael
Judge of the Circuit Court
- (142) Williams, Oran
Solicitor

Conference on Case Management

- (143) Windle, Mrs. Julia
Solicitor
- (144) Woolf, The Right Hon. The Lord
Master of the Rolls, England and Wales
- (145) Wright, Ken
Member of Working Group on a Courts Commission
- (146) Zander, Professor Michael
Professor of Law, The London School of Economics

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