This is the transcript of a speech delivered by His Honour, the Chief Justice of the Federal Court of Australia (subsequently published in the Australian Bar Review), which warrants republication because of the importance of the issues raised. His Honour has kindly allowed us to republish his speech in Brief over two issues. The first portion addresses case management as a costs reduction measure; the second portion discusses the perils of case management and the responsibilities of practitioners.

INTRODUCTION

The problem of litigation costs and delays may be as old as law itself. That, however, is not a reason to give up the struggle; rather to reflect on the difficulty of the task. Writing in the late eighteenth century, Edward Gibbon had this to say about Roman advocates in the centuries following the foundation of Constantinople:

The splendid and popular class was composed of the advocates, who filled the forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described for the most part as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were almost exhausted.1

Later in his celebrated history, Gibbon returned to the pitfalls of litigation in a declining Empire:

The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure serves only to increase the influence of the rich, and to aggravate the misery of the poor. By these dilatory and expensive proceedings, the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of his judge.2

Two centuries later, Lord Woolf echoed these observations in his report on Britain’s civil justice system, in which it was concluded that costs were the most serious problem facing the British civil justice system:

The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant.3

Jeremy Bentham had been of the same view; he labelled costs “the grand instrument of mischief in English practice.”4

There is, plainly, an impulse to eliminate delay and expense in civil proceedings. Again, Gibbon’s observations in this connection are of more than mere historical interest for present purposes:

The experience of an abuse, from which our own age and country are not perfectly exempt, may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest, that such forms and delays are necessary to guard the person and property of the citizen; that the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry.5
This was once the perception: perhaps a false dichotomy between intricate rules, forms and procedures, with their associated costs and delays, or le déluge in the form of summary justice, based more on discretion than on rules. It is now our objective, enshrined in legislation, to have a sophisticated, but swift and inexpensive system. We aim to guard the person and property of the citizen without surrendering to summary discretion. Yet even the enshrinement of such worthy goals is not new. It is at least as old as Magna Carta, in which King John made the following promise:

To no one will we sell, to no one will we deny or delay right or justice.

As Professor Jolowicz observed in the 1970s, “[t]he essential question ... concerns the extent to which the powers of the court can be increased without thereby sacrificing other values which are held to be vital to the due administration of civil justice.”

CASE MANAGEMENT AS A SOLUTION TO THE COSTS PROBLEM

In the so-called bad old days, litigation was left entirely to the parties, with the court taking no interest in its progress unless an issue was put before it by the litigants. It was the perceived (and real) inadequacies of this rigidly adversarial system, with its aloof judges, that led to the Woolf reforms of procedure in England and Wales. Lord Woolf put the interrelated problems of cost, delay and complexity squarely at the feet of judges and the role they played in the litigation process:

These three [problems] are interrelated and stem from the uncontrolled nature of the litigation process. In particular, there is no clear judicial responsibility for managing individual cases or for the overall administration of the civil courts.

This is no mere truism or platitude. One may conceive of many reasons for the cost, delay and complexity of civil litigation. The intricacy of substantive laws, the conduct of the legal profession and the conduct of the courts are three distinct possible reasons. Yet Lord Woolf nominated the lack of judicial case management as the overriding concern. “Without effective judicial control”, he wrote,

the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.

It has been suggested that while cost and delay are problems of ancient lineage, the analysis that identifies excessive adversarialism as the source of these dual problems is more recent. Nevertheless, the call for a more active judiciary had been made in England as far back as 1953, when a committee chaired by Sir Raymond Evershed MR recommended that judges “should pursue a more active and dominant course in the interests of the litigant.” As long ago as 1906 Roscoe Pound identified one cause of dissatisfaction with the administration of justice as the “sporting theory of justice” and its behavioural manifestations.

The result of such diagnoses is case management. What do we mean by this? It emerged under the label of ‘caseflow management’ in the United States in the early 1970s. An early proponent was Maureen Solomon, whose recommendations led to the Australian Federal Court’s adoption of the docket system. She described ‘caseflow management’ as follows:

[A]s now generally accepted in the courts community, caseflow management connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition.

Where the principles of ‘caseflow management’ hold sway, law ceases to be imperative and distant. Sword and scales are put to one side and practitioners are engaged by the court. Plainly enough, though, this kind of management need not be carried out by a judge. Registrars or other court staff may provide the necessary form of supervision. Nevertheless, the trend has been to assign ultimate responsibility for case management to judges. Partly this is due to what may be described as the ‘clout’ of judicial officers; partly it is a function of the fact that matters, if they go to trial, will be heard by a judge rather than by anyone else. Partly it is seen, rightly so, as the judge becoming familiar with the case through its interlocutory processes.

The need for judicial management of individual cases is now the received wisdom across Australia. By the end of the 1990s, most Australian courts had implemented case management procedures, which take various guises.

In the court of which I am Chief Justice, a docket system has been in place since 1997. Like the concept of ‘caseflow management’ itself, the docket system is an American innovation. Space and time do not permit a detailed tribute to and comparison with the United States federal district court model upon which the Australian Federal Court’s initiative in the 1990s was based. Each judge is responsible for the matters in his or her docket. The system’s rationale is to “promote more active and effective judicial case management in order to streamline processing, encourage early settlement and, overall, to dispose of cases more efficiently.” ‘Efficiency’ in this context denotes the reduction of delays and costs. One of the promised benefits of the new system was cost savings brought about by judges’ familiarity with matters in their dockets. There would no longer be any need to explain the case afresh each time it came before a judge. There would also (so the theory goes) be fewer court events requiring appearances and thus outlay of fees.

Where case management is not only undertaken, but is the responsibility of a single judge in any given proceeding, another perceived benefit is the removal of the temptation to pass the judicial buck. As one judge said to researchers conducting an early study of the individual docket system, if you’ve got control of the case, you have to solve it because you’re not going to solve it as you could under the previous system by saying, ‘I haven’t seen this case before’. I’ll postpone it. Or, I won’t hear the matter. Someone else will. Let them worry about it.”

More generally, there are two broad ways in which case management is thought to put downward pressure on litigation costs. First, by ensuring that cases continue to progress in a timely fashion, the efficiency of their preparation should increase. Less time should be spent by lawyers and advocates refreshing their memory of any given matter after an unnecessary delay, while the necessity to adhere to a timetable should focus practitioners’ minds on the essential issues. Second, the length of litigation is supposed to be decreased by the encouragement of earlier and more frequent settlements, which in turn bring down litigants’ expenses.

DOES CASE MANAGEMENT REALLY REDUCE COSTS?

The relationship between the level of case management and litigation costs, however, is by no means linear. With
our spurning of the fierce adversarial procedures of yesteryear, there may be a tendency to think more case management by judges will necessarily reduce costs and delays. Empirical support for this hypothesis is shaky.

**RAND study**

A landmark study of the effects of judicial case management was undertaken by the RAND Corporation’s Institute for Civil Justice, published in 1996. It concerned the impacts of case management in several United States federal district courts. Unusually, the study was mandated by statute. The Civil Justice Reform Act of 1990 (which, incidentally, was the result of proposals of a taskforce initiated by then Senator Joseph Biden, leading to the eponymous appellation, the ‘Biden Act’) designated ten ‘pilot’ district courts, which were required to adopt certain case management principles, while ten others (what we might call the ‘control’ districts) were not so required.31

The pilot districts were mandated to implement the following principles:32

- Differential case management;
- Early judicial management;
- Monitoring and control of complex cases;
- Encouragement of cost-effective discovery through voluntary exchanges and cooperative discovery devices;
- Good-faith efforts to resolve discovery disputes before filing motions; and
- Referral of appropriate cases to alternative dispute resolution programmes.

It was left to the courts in question to formulate the precise manner in which these principles were put into practice.

One of the purposes of the RAND study was to assess how these principles, and the techniques used to implement them, affected litigants’ costs (measured by attorney work hours and fees).33 This was, in effect, a statutorily mandated controlled experiment on a large scale.

The findings of the study with respect to the effects of “early judicial management” are of considerable interest. The report’s authors defined ‘early judicial management’ as “any schedule, conference, status report, joint plan, or referral to ADR within 180 days of case filing.”34 This may be considered a very broad definition. Even so, the study found that ‘early judicial management’, so defined, had significant effects on both the length and cost of litigation:

> We estimate a 1.5 to 2 month reduction in median time to disposition for cases that last at least nine months, and an approximately 20-hour increase in lawyer work hours. Our data show that the costs to litigants are also higher in dollar terms and in litigant hours spent when cases are managed early. These results debunk the myth that reducing time to disposition will necessarily reduce litigation costs.35

In other words, for cases that lasted at least nine months, the additional costs run up by lawyers complying with early judicial case management instructions were not, across the board, offset by any savings in time that resulted from a quicker disposition. Similarly, although the study found that the early setting of a trial schedule was the “most important component of early management”, yielding “an additional reduction of 1.5 to 2 months in estimated time to disposition”, it had no effect on litigant costs.36 The authors explained the additional costs incurred as a result of early case management as follows:

> Lawyer work hours may increase as a result of early management because lawyers need to respond to a court’s instructions — for example, talking to the litigant and to the other lawyers in advance of a conference with the judge, travelling, and spending time waiting at the courthouse, meeting with the judge, and updating the file after the conference.37

Though we might put matters in slightly different terms, those observations appear transferable to Australian jurisdictions. Of course, caution is also necessary as a result of some of the idiosyncrasies of American procedure. One explanation the authors proffered for their findings related to the American system of discovery:

> Once judicial case management has begun, a discovery cutoff date has usually been established, and attorneys may feel an obligation to begin discovery. Doing so could shorten time to disposition, but it may also increase lawyer work hours on cases that were about to settle when the judge began early management.38

As has elsewhere been observed, the American form of ‘discovery’ is “a beast of an entirely different order of magnitude compared to the Australian procedure. In general terms, the American document discovery procedure is more complex and liable to be more contentious.”39

Accordingly, if one of the effects of early judicial management in the American context is to make the costly discovery procedure more likely, that needs to be borne in mind when assessing the extent to which the RAND study findings are applicable to other jurisdictions.

Nevertheless, the results of the study are uncomfortable for the more zealous proponents of judicial case management. It has been said that the report’s publication led to “much tearing out of hair and gnashing of teeth by the ‘case management faithful’.”40 Predictably, its methodology has been attacked.41 The authors of a study into our own Federal Court’s docket system labelled such

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“The problem of litigation costs and delays may be as old as law itself. That, however, is not a reason to give up the struggle; rather to reflect on the difficulty of the task.”
attacks ‘unwarranted’. Despite the unique features of American civil procedure, it would be unwise to dismiss the RAND findings out of hand as somehow inapplicable or irrelevant. That is partly so because the authors’ principal conclusion as to the effect of early judicial case management on litigant costs was largely borne out by a subsequent study conducted on the other side of the Atlantic, following implementation of the Woolf reforms to civil procedure in England and Wales.

**Study of the Woolf Reforms**

Despite the intuitive appeal of Lord Woolf’s conclusions about the best method to reduce costs, the empirical evidence gathered after implementation of the Woolf reforms does not bear those conclusions out. In a qualitative study conducted for the UK Department of Constitutional Affairs, Professors John Peysner and Mary Seneviratne concluded, on the basis of interviews with practitioners, judges and court officials:

- **case management** (which in this context includes pre-action protocols, the Fast Track and individual case control) is effective in cutting delay but it is ineffective in cutting costs or, indeed, may increase costs. Lord Woolf’s aspiration that case management would achieve his aims in relation to costs has not been achieved.43

The echoes of the RAND study findings are clear.

The authors’ conclusion was due in part to the pre-action protocols introduced under the Woolf reforms (including the requirement to file statements of case and the like) that required greater preparation than pleadings under the old system.44 Such pre-action protocols resulted in front-loading of costs, meaning that some proceedings that would have settled before the costs associated with a trial were incurred nonetheless required considerable resources to be expended. One solicitor described the process as follows:

> Once you do litigate you are front-loading, even in fast track claims. If you are going to be ready for trial, you would get in all your witnesses and everything lined-up, which in the old days you weren’t really doing until the eleventh hour because you’d think it’s going to settle. I’ve got a gut feeling it’s going to settle, if not we’ll run around at the end and get the witness evidence, so again we’ve been forced to be ready for trial, so you’ve got to get your good proofs of evidence in the right order, in the right format, done, sent to clients, and all this sort of stuff and make sure they’ve signed and done them, that’s bound to increase the cost.45

In other words, while it might sound desirable to have issues and evidence clarified at an early stage of litigation, the risk is that parties will be forced to bear costs with which they might not otherwise have been burdened. On the other hand, it appears this risk of front-loading led to a reduction in the number of matters filed in English courts after the Woolf reforms,46 since litigation was now seen truly as a last resort only to be launched when a case was in order.47 That may be a desirable by-product of an increased judicial propensity to take an active role in managing cases: litigation is less able to be used as a strategic bargaining chip.

Professors Peysner and Seneviratne observed that their findings in relation to the effect of the Woolf reforms conform to what is referred to in business as the ‘Quality Triangle’. The thesis is that “of the three objectives in a business — speed of delivery, cost of production and quality of production — it is possible to improve two out of three, but rarely all three.”48 In supposed conformity with this ‘iron law’, the study found “that the case managed court-based dispute resolution system is delivering quality (justice) at a much improved pace, but not any more cheaply, and possibly, at higher cost.”49

While this type of analysis may be taken for what it is worth, we ought to be careful, lest the use of corporate-babble lead us to misconceive of courts as businesses providing a dispute-resolution service. Justice and law are not ‘products’ or ‘services’ to be delivered at higher or lesser ‘quality’, depending on the priorities of the day. They are not to be reduced to mere variables in a management consultant’s matrix. Nor is justice somehow able to be analysed as a concept distinct from the speed or cost of its delivery. Justice delayed is justice denied; cannot the same be said of justice at an unreasonable cost?

**Law and Justice Foundation of NSW study**

Evidence from Australia as to the effects of judicial case management on litigation costs is somewhat more encouraging. On precisely the same day in 1996 — 1 January — the District Court of New South Wales and the County Court of Victoria instituted new case management regimes. Given the courts’ similarities (their places in the judicial hierarchy of their respective states, their jurisdiction, size and volume of work40), this was a naturally occurring experiment affording an opportunity to examine the efficacy of two different case management frameworks. The chief difference between the regimes adopted by the two courts was that the NSW system was ‘default-based’ and ‘rule driven’, while the Victorian County Court went down a path more akin to that of the Federal Court, with judges actively managing cases at directions hearings.51

A study of the impacts of the new regimes in the two courts was conducted under the aegis of the Law and Justice Foundation of NSW, the report being published in July 2003. On the question of costs, the authors of the study drew upon sample data from 1994 and 1997 (on either side of the commencement of the new regimes in each court). The source of data about litigant costs was a collection of surveys of solicitors.52

According to the report, litigant costs increased from 1994 to 1997 in NSW, but either decreased or remained steady in Victoria.53 One possible explanation was the presence, under the Victorian regime, but not that in NSW, of a requirement for leave to discover or interrogate.54 In addition, the Victorian County Court pursued an active policy of limiting the use of these procedures.55 By contrast, the New South Wales case management system confined the time within which the parties had to complete their interlocutory preparations but did not otherwise seek to control these activities.56

The authors concluded that, while the cost increases in NSW were due to factors unrelated to the new case management regime, it could be observed “that the court’s reforms have not contained litigation costs.”57 Case management reforms in Victoria, by contrast, had been successful in containing costs, because of the active role of judges in controlling the development of cases, particularly the use of discovery and interrogatories.58

**NOTES**

1. Edward Gibbon, Decline and Fall of the Roman Empire (Vol I, 1781), Ch 17 (available at: <http://www.ccel.org/g/gibbon/decline/volume1/chap17.html>.)
2. Edward Gibbon, Decline and Fall of the Roman Empire (Vol IV, 1788), Ch 44 (available at: <http://www.ccel.org/g/gibbon/decline/volume2/chap44.html>.)
5. Edward Gibbon, Decline and Fall of the Roman Empire (Vol IV, 1788), Ch 44 (available at: <http://www.ccel.org/g/gibbon/decline/volume2/chap44.html>.)
6. See, e.g., Civil Procedure Act 2005 (NSW), s56; Federal Court of Australia Act 1976, s37M.
7. Magna Carta (1215), Cap 39.
8. M Cappelletti and JA Jolowicz, Public Interest Parties and the Active Role of the Judge in Civil
11. ibid., at [4].
21. ibid., at 1.
23. ibid., at 48.
24. ibid., at 12.
25. ibid., at 12.
26. ibid., at 12.
27. ibid., at 78.
29. ibid., at 61.
30. ibid., at 61.
32. ibid., at 3.
33. ibid., at 5.
34. ibid., at 14.
35. ibid., at 14.
36. ibid., at 14.
37. ibid., at 14.
38. ibid., at 14.
44. ibid., at 58-59.
45. ibid., at 62.
46. ibid., at 6-9.
47. ibid., at 62.
48. ibid., at 72.
49. ibid., at 72.
51. ibid., at 17.
52. ibid., at 63.
53. ibid., at 71.
54. ibid., at 71.
55. ibid., at 71.
56. ibid., at 71.
57. ibid., at 75.
58. ibid., at 75.

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