

CASE MANAGEMENT IN NEW SOUTH WALES
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There are about 1,000 judicial officers in Australia. Approximately one third of them are in the New South Wales judicial system of which I am Chief Justice.

As is customary, the basic structure of the system is hierarchical with a Local Court, a District Court and a Supreme Court. There are also two specialist courts: the Land and Environment Court and the Industrial Court. A number of administrative tribunals are also involved in authoritative dispute resolution.

The Supreme Court has a trial division divided into two parts: the Common Law Division and the Equity Division. The former deals with cases involving personal injury, professional negligence, defamation and administrative law. The judges of this Division

also conduct criminal trials for the most serious indictable offences. Other indictable offences are tried in the District Court. The Equity Division of the Supreme Court hears cases involving commercial law, corporations law, equity, trusts, probate and the family provisions statute. This judicial structure enables the Court to take advantage of the specialist knowledge of members of the private bar, from which the overwhelming majority of appointees to the Court still come.

The Supreme Court also has two appellate divisions. The Court of Appeal consists of judges appointed as appellate judges who hear civil appeals. The Court of Criminal Appeal, which usually comprises one appellate judge and two judges of the Common Law Division, hears criminal appeals from the District Court, the Supreme Court and the Land and Environment Court.

Judges are appointed by the Governor of the State on the advice of Ministers. There is no independent judicial appointments commission. The desirability of such a commission has been raised in recent years as a possible development. This proposal has had little support in the past.

Judges can serve until the age of 72 and may be appointed as acting judges until the age of 75, or in some cases until 77. A significant majority of judges practised at the independent bar. However, a number of solicitors and a few legal academics have been appointed to the bench.

Judicial Management

Throughout the common law world, over recent decades, the judiciary has accepted a considerably expanded role in the management of the administration of justice, both with respect to the overall caseload of the court and in the management of individual proceedings. This appears to be virtually a universal phenomenon. Judges intervene in proceedings to a degree which was unheard of only two decades or so ago. Courts are no longer passive recipients of a caseload over which they exercise no control.

I should, at the outset, distinguish between individual case management and caseload or caseflow management. The latter does not focus on particular cases. Its concern is the overall caseload encompassing delays in the system for cases generally as well as costs which the system imposes on the parties to

particular proceedings. Managing individual cases efficiently is a necessary, but not a sufficient condition, for effective management of the caseload.

There is no inconsistency between the expanded managerial role for the judiciary and the essential requirements of an adversary system. Notwithstanding the historical hands off approach by the judges which allowed the legal profession to conduct cases in accordance with their own wishes and interests, such complete freedom is not an essential feature of an adversary system. What is essential is that the process result in fair outcomes arrived at by fair procedures and that the overriding test of judicial legitimacy – fidelity to the law – is served.

There is a public interest in ensuring that the limited resources available to every sphere of government are spent effectively and efficiently. That includes expenditure on the administration of justice. If judges want to retain control of the operations of their courts, then they must be prepared to be accountable for the resources entrusted to them.

Litigants who are dilatory in their preparation, or who otherwise take up too much of the court time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously. Experience in many common law countries has led to the conclusion that these responsibilities require active involvement by the judiciary in the progress of litigation. Such matters cannot be left to the discretion of members of the legal profession whose competence varies so much and whose client's interests or whose personal interests may not conform to the public interest in these respects.

One of the reasons why managerial judging has emerged is because of what economists would call market failure. In a market for legal services, where knowledge was perfect, clients would ensure that the cost of litigation would be minimised and reasonably proportionate to the value to them of success in the litigation. However, there is a substantial disparity in the knowledge of clients and that of their lawyers with respect to the process of litigation, a disparity which economists would call information asymmetry. The requirements of specialised skills and

the complexity of the process of litigation are such that clients are not able to assess the quality of, or even the need for, a legal service before it is purchased. Those difficulties persist even after the service has been purchased. This kind of market failure explains a number of aspects of the legal profession. Managerial judging offsets this form of market failure.

On the other hand, it must be acknowledged that case management imposes costs on the parties. For cases which would settle anyway, costs are front loaded. Case management must attempt to minimise the number of appearances in court and to restrict adjournments.

Our procedures prepare cases for a single continuous trial. This avoids the inefficiencies involved when judges and practitioners have to familiarise themselves with a case more than once.

I should note that pre-occupation with disposal of cases may lead to compromises in the quality of justice. It is of great significance for the judiciary not to give individual litigants the

impression that the case that really matters to the judge is the next one.

Some things take time. Justice is one of them. A focus on processing cases must not lead to the result that the quality of justice is compromised by the focus on quantity.

New South Wales Practice

New South Wales practice with respect to civil case management has been a story of gradual development over a long period of time. There has never been a dramatic rearrangement of practice and procedure of the character that followed Lord Woolf's Access to Justice report in the United Kingdom. In New South Wales what happened was that a particular kind of practice developed in one specific area and was adopted in other areas.

The principal driving force for case management – particularly caseload management – was the acceptance that delays in the system were too great. Justice delayed, as is often said, is justice denied. Of course, not all lapse of time can be called “delay”. In New South Wales we have now adopted, by statute, a formal objective of expedition which contains a definition

of delay as the time beyond that which is reasonably required for the fair and just determination of the case.

The New South Wales Courts do not have what the Americans call a “docket system” under which cases are assigned to the judge who will conduct the trial for management. Other courts in Australia use a docket system. There are arguments for and against the two approaches and what is right for one court is not right for another. In my opinion, if New South Wales were to adopt a docket system the productivity of our courts would significantly decline.

Not all judges are as capable, or as willing, to manage a list as one would wish. In our system, case management is done by judges with an interest in, and an aptitude for, organisation. Judicial time is wasted if the gaps caused by settlements and adjournments are not filled quickly.

Effective and efficient use of resources, in our experience, requires something more than managing individual cases for trial. It requires an overview which, in our experience, is best done by disaggregating the caseload into distinct categories which require

different treatment based, to a significant degree, on specialised law and specialization amongst legal practitioners. Most case management systems involve some system of differentiation, often called “tracks”. The New South Wales system involves a greater number of categories or “tracks”, but it works in our system because of our particular caseload. Each jurisdiction will differ in this respect.

The Act and Rules

The starting point for our caseload management and case management systems is comprehensive legislation and rules which enable the court to effectively manage its caseload. The rules have been progressively developed over the course of some two decades.

The relevant statutes and court rules have been consolidated and applied uniformly to all three New South Wales courts by the *Civil Procedure Act 2005 (NSW)* and *Uniform Civil Procedure Rules 2005*. After a process of collaboration amongst the three courts, under judicial leadership with considerable input from departmental officers, we have adopted a uniform Act and uniform set of Rules of Civil Procedure applicable to all courts. These

Rules are sufficiently flexible to allow for the differing requirements at the three levels of the hierarchy. The Act and Rules integrated existing practice. This did not involve significant change to past practice. The key reform was in the uniformity. This achievement would have been delayed if significant changes had been proposed.

The Rules are backed up by detailed Practice Notes with respect to the conduct of proceedings, particularly the conduct of proceedings in specialist lists. Although the basic rules are uniform, at the three levels of the court hierarchy practices differ, so that matters are treated with greater expedition in the Local Court than in the District Court and in the District Court than in the Supreme Court. Cases of greater legal or factual complexity are distributed upwards in the hierarchy of courts, with a view to ensuring that those which do not justify elaborate procedures are dealt with in a less elaborate way and vice versa. Obviously there remains considerable overlap and drawing a clear line is not always possible.

The first statutory provision to which I should refer is the *Legal Profession Act 2004*. That Act requires that a legal

practitioner, before filing a pleading – whether for a plaintiff or for a defendant – must certify that, “there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law” that the claim or the defence has “reasonable prospects of success”. This section reinforces the traditional professional obligation of legal practitioners that they must not permit the commencement or continuance of baseless proceedings.

The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules* confirm and re-enact the powers of courts to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. When exercising any power a court is required to give effect to the overriding purpose expressed in the Act, namely: to facilitate the “just, quick and cheap” resolution of the real issues in the proceedings.

Under our *Civil Procedure Act*, parties have a statutory duty to assist the court to further this overriding purpose and, therefore, to participate in the court’s processes and to comply with directions and orders. Furthermore, every legal practitioner has a statutory

duty not to conduct himself so as to cause his or her client to breach the client's duty to assist.

The Act and Uniform Rules, which distill in a coherent manner the principles that have been developed over many years of practical operation of the previous legislation and court Rules, identify the objects of case management as follows:

- The just determination of proceedings.
- The efficient disposal of the business of the court.
- The efficient use of available judicial and administrative resources.
- The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties.

The Act also requires the practice and procedure of the court to be implemented with the object of eliminating unnecessary delay, as defined. Furthermore, court practices and procedures are required by the Act to be implemented with the object of resolving issues, so that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

In order to serve the overriding purpose, and to meet the other objectives specified, the courts are given a comprehensive range of powers including:

- Power to direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed, with respect to discovery, admissions, inspection of documents or property, pleadings, particulars, cross-claims, affidavits or statements, time place and mode of hearing.
- Powers with respect to the conduct of the hearing, including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, limiting the time that may be taken by a party in presenting its case or in making submissions.
- The exercise of such powers may identify certain matters required to be taken into account including the subject matter, complexity or simplicity of the case, the costs of the proceedings compared with the quantum of the subject matter in dispute and the efficient administration of court lists.
- Powers have also been conferred to direct a solicitor or barrister for a party to provide to his or her client a

memorandum stating the estimated length of the trial and estimated costs of legal representation, including costs payable to the other party if the client was unsuccessful.

- Powers have also been conferred to order costs to be paid by a legal practitioner, where costs have been incurred by reason of some serious neglect in competence or impropriety.

In Australia, the second largest cost after legal fees is expert evidence. The rules make special provision for such evidence in an endeavour to control those costs and to regulate the delay caused by unnecessary disputation on such matters.

A code of conduct for expert witnesses has been adopted which each expert is required to acknowledge and follow. The code states that an expert witness's paramount duty is to the court. It requires full disclosure of relevant matters in reports. Each party is obliged to make timely disclosure of expert reports and, in the case of late disclosure, cannot use the evidence unless there are exceptional circumstances.

A number of techniques have been implemented to ensure that expert evidence is given more efficiently. Parties are encouraged to agree on the appointment of a single expert, especially for particular matters which are not genuinely in dispute, e.g. quantification issues. Directions are given to require conferences of experts in order to identify areas of agreement and disagreement and requiring the preparation of joint reports which sets out these matters. A court may direct that such conferences occur in the absence of the legal representatives of the parties.

Furthermore, increased use is being made of the technique of having experts on different sides give their evidence concurrently under the direction of the judge – sometimes called “hot-tubbing”. Provision exists for court appointed experts, but that is not often done.

The courts encourage the use of alternative dispute resolution to resolve a dispute as early as possible and make detailed provision for mediation and arbitration. Earlier provision for neutral evaluation was not much used and has been removed. There has been an increase in the number of legal practitioners who are skilled in mediation and arbitration. Registrars of the

Courts have been trained as mediators and conduct mediations in the court. Unlike some other courts, judicial officers do not conduct mediations in New South Wales.

The Court has for over two decades had provision in its Rules for referring the whole or part of proceedings to independent referees. They are sometimes experts, e.g. engineers. They are often retired judges. This technique has been of great significance in ensuring the timely disposition of Commercial List cases, especially Construction List disputes, particularly cases in which technical expertise is required. It is also of significance where only some parties, or only some issues, in a wider dispute are subject to an arbitration clause. A person can be both an arbitrator and a referee and therefore resolve the whole dispute. Many referees are retired commercial judges, who also engage in commercial arbitration.

Court Organisation of Management

Different techniques are adopted for case management in different courts in New South Wales.

The District Court, a high volume civil jurisdiction, significantly focused on matters involving personal injury, requires litigants not to commence an action unless they are ready to proceed with it, save in the case of a time limitation problem. Thereafter the court insists on strict compliance with a timetable lodged at the outset of proceedings, with a view to listing a matter for hearing within 12 months of its commencement.

In the Supreme Court, cases are of a higher level of complexity and are managed in a number of different ways. Each of the divisions of the court, namely the Court of Appeal, the Court of Criminal Appeal, the Common Law Division and the Equity Division have their own registrars responsible to judges for case management.

Building on our long experience with the success of our Commercial List, cases of similar character are grouped by subject category and specialised Practice Notes set out in detail the requirements of the particular field. Each of these lists is managed by a judge, in conjunction with a registrar. The specialist lists in the Common Law Division are the Administrative Law List, the Criminal List, the Defamation List, the General Case Management

List, the Possession List and the Professional Negligence List. In the Equity Division the specialist lists are the Admiralty List, Adoption List, Commercial List, Corporations List, Probate List, Protective List and Technology and Construction List.

The conduct of each of these lists is substantially assisted by the existence of user groups which are formed for consultation between the judges who administer the particular list and representatives of the profession who practice in the fields. The process of refinement of the Rules and Practice Notes is a continuing one, in which these user group consultations play a significant role.

A key objective of our case management is to ensure trial date certainty, so that litigants and their representatives know that if a trial matter is listed for trial it will be heard. Some over-listing is done in anticipation of settlements, and there are unfortunate occasions when matters have not been able to get on. We regard it as critical, however, that that does not become a regular event, so that practitioners refuse to settle on the basis that there is a real possibility that a trial date will be vacated.

The most important aspect of the ongoing management system is that it is conducted under judicial leadership with appropriate delegation to registrars. All cases are brought under court control at an early stage with an early return date. Most lists are managed by registrars who sit daily. Some specialist lists are managed primarily by judges who sit less frequently, generally weekly. Interlocutory matters requiring orders, rather than directions, are referred to judges, either those in charge of specialist lists or to the duty judge in each of the two Divisions of the court.

The Registrar of the Court of Appeal manages cases and generally allocates hearing dates upon being satisfied of the state of readiness of an appeal. Cases that are likely to occupy more than two days of hearing time are referred to a judge for case management before a hearing date is allocated.

The rules of Court specify the precise steps and timetables to be taken in the main categories of cases filed. Directions hearings are scheduled before the registrar to ensure compliance with and, where justified, any modification to those requirements.

Pursuant to the rules of Court, the registrar may exercise the powers of a single judge to determine motions, except in contested applications for a stay or injunctive orders and, in practice, applications for expedition.

Most proceedings determined by the registrar concern applications for extension of time, security for costs, challenges to the competency of proceedings, dismissal for want of prosecution and the giving of directions where default has occurred in compliance with the requirements of the rules or earlier directions. Motions where stays/injunctive orders are opposed and requests for expedition are sent to a referrals judge for determination.

The registrar confers with the President of the Court on a regular basis to discuss listings and the rostering of judges. Calendaring of sittings and the identification of specialized lists is planned on an annual basis, having regard to available judicial resources and the requirements of Judges to sit in the Court of Criminal Appeal.

The Registrar in Equity manages cases until they are ready for hearing and lists them for hearing before the judges of the Division. The judges usually hold a pre-trial directions hearing about five or six weeks before the trial to ensure that the parties are adhering to the real issues for trial.

Matters are referred to associate judges and judges in the following circumstances:

1. If a motion is beyond the delegated authority of the registrar it is referred to an associate judge, Duty Judge or Corporations Judge;
2. If an associate judge has the power to deal with a matter and it is ready for hearing it is allocated to the associate judge call-over for a hearing date to be set;
3. If a timetable has been breached on three previous occasions the matter is referred to the Duty Judge; and
4. If a matter has not been finalised after having been stood over on four or more occasions in order to allow the parties to have settlement discussions, the matter is referred to the Duty Judge.

The registrar and Chief Judge in Equity hold a weekly meeting to discuss case management issues and the general conduct of the lists.

In Common Law, except for the Professional Negligence List, the registrar manages cases in a similar way to the Equity Division. Similar criteria apply for referring matters to associate judges and judges of the Division.

In the Professional Negligence List the registrar case manages all cases until they are ready to be allocated a hearing date. All opposed applications are sent to the Referrals Judge. Recalcitrant matters are referred to the List Judge after three timetable defaults.

Caseload and case management is a matter that is regularly discussed in formal and informal meetings, including weekly meetings of the relevant list judges and by regular contact between the judge in charge of a particular list and the registrar administering the list under the judge's guidance. A considerable body of statistical information is available about the caseload and the progress of individual cases. Judges with administrative

responsibilities for Divisions and particular Lists are able to monitor the state of any part of the list, so that emerging problems can be anticipated and corrective action taken. Our present systems will be substantially enhanced when a new software system under development, called JusticeLink is fully deployed.

Commercial and Construction Lists

Our Practice Note for the Commercial List, and for the jointly administered Technology and Construction List, continues to adopt innovations which, I am confident, will be influential on practice in other areas of litigation.

Rules and practice for these two Lists reject traditional forms of pleading. They make provision for an initiating Statement by a plaintiff and a Response by a defendant. These documents are required to set out in summary form:

- The nature of the dispute.
- The issues which are likely to arise.
- The contentions and response to contentions.
- The questions that either party considers are appropriate to be referred to a referee for inquiry and report.
- Identification of all attempts to mediate.

Matters in each List are actively managed by the judge in charge of the List. The management includes:

- Review of suitability for mediation or reference out or the use of a single expert or court appointed expert.
- Timetables for preparation for matters for trial are set in considerable detail at the first Directions hearing including:
 - Filing of statements of agreed issues.
 - Making of admissions.
 - Appointment of single experts.
 - Exchange of expert reports and the holding of conferences of experts.
 - Filing of list of documents and provision of copies of documents.
 - The administration and answering of interrogatories.
 - Service and filing of affidavits or statements of evidence by specified dates.
 - Directions about the use of technology in accordance with the court's Practice Note encouraging such use.

Interlocutory motions and directions are heard in a running list on every Friday and otherwise as required. Use of technology

often enables cases to be managed without the costs of attendance at court.

The most recent development in the List is the formal provision of a technique for limiting the costs of a hearing by the adoption of the system of Stop Watch Hearings. This method of trial involves the identification by agreement of the parties, of the total amount of time that will be allocated to a trial. Blocks of time are allocated to the respective parties and some time to the court.

The usual court order will allocate blocks of time to different aspects of the case, in accordance with the parties' expectations but that is subject to variation as the trial continues. A party may allocate its time to whatever aspect it wishes, e.g. more time taken in cross-examination will leave less time for an opening or for oral submissions.

The objective of a Stop Watch Hearing is to achieve a more cost effective resolution of the real issues between the parties. It requires more intensive planning by counsel and solicitors prior to trial. The technique has been successfully used in commercial

arbitration and I have every reason to believe it will work in commercial litigation.

Backlog Reduction

Two to three decades ago backlogs in both the District Court and the Supreme Court were substantial. Delays of more than five years, often substantially more, were common. The backlog has been reduced dramatically in the District Court and more gradually in the Supreme Court.

The techniques for dealing with the substantial backlog were different from those required for ongoing case management. A range of techniques was required to achieve that position.

The first measure to clear the backlog was an increase in the jurisdiction of the lower courts and the transfer of significant numbers of matters from the Supreme Court into the District Court. The jurisdiction of the District Court was increased and, in motor vehicle cases, was made unlimited. A Supreme Court judge sat for many days reviewing all of the files, identifying a large number of matters in which no issue of complexity or legal difficulty arose so that they could be handled, appropriately, at a District Court

rather than a Supreme Court level. Hundreds of cases were transferred and were disposed of by the more expeditious procedures employed in the District Court. Getting the distribution of the caseload in the hierarchy of courts right is an important way of achieving the most effective use of limited resources.

The second measure to tackle the accumulated backlog, was the appointment of additional judges, both full time judges and acting judges. The latter included the secondment of senior barristers as acting judges for limited periods of time, such as a few months. Questions of judicial independence arise in the case of active practitioners serving as judges. Once the initial breakthrough was made, the practice changed. Only retired judges are now appointed as acting judges. They continue to play a significant role in assisting the court to further reduce delays. The ability to call up experienced former judges, at comparatively short notice, also enables the whole list to be operated at a higher pressure so that when, as does happen from time to time, expected settlements do not eventuate, we do not need to vacate trial dates. Nevertheless, in the future the use of acting judges in our system will progressively diminish.

Furthermore, a considerable number of personal injury cases were disposed of by referring out cases which did not raise complex issues to arbitrators, generally from the private bar, to determine the disputes. This arbitral determination by experienced practitioners may not have provided the quality of justice of a hearing by a judge, but the complaints were few. This mechanism helped clear the backlog but is now only employed to a limited extent.

Acting judges played an important role in a particular technique of backlog reduction, which we called a “blitz”, in which a large number of cases of a particular character, especially personal injury cases, were listed together.

Each “blitz” was preceded by a series of listing conferences designed to ensure that cases were prepared for hearing. Throughout this period the court imposed requirements for greater pre-trial disclosure and strictly enforced a no adjournments policy.

The “blitz” technique involved sitting a substantial number of judges, including on occasions virtually the entire court, including appeal judges, to hear hundreds of cases in a short period of time.

Cases were not listed for a particular day, but for a particular week, and were treated as a running list so that, whenever one case settled or was determined, the next case in the list was sent to the judge immediately. This approach provided considerable incentive for the profession to settle cases and enabled judges to dispose of substantial numbers of cases in a short period of time.

These days we only conduct “mini-blitzes” on particular kinds of cases when filings build-up. The technique of a “blitz” is used on particular matters, e.g. disputes under our *Family Provisions Act*, concerning alleged inadequacy of provision for family members in wills are conducive to the blitz treatment. For similar reasons, we tend to group cases on appeals which are concerned with the same legislative regime, e.g. our workers compensation legislation, so that judges can focus on the common issues that often arise in such a specialist area in a concentrated manner.

The combined effect of all these measures was such that, within a decade or so, the substantial delays of five years and more were reduced to a substantial degree. In the case of practitioners who genuinely want to get their cases on, there is no reason today why the case cannot be disposed of to final hearing

within 12 months in the District Court and within two years in the Supreme Court. However, many cases are still taking longer than they should and the task of disposing of older cases requires continuing attention.

Nevertheless, delay is no longer a significant concern for civil justice in New South Wales. Now the focus of our attention has shifted to reducing costs, both the cost to the court and the costs incurred by the parties. There is no doubt that case management, which was essential to overcome delay, can increase costs. Decisions have to be made about how much management a particular case, or a particular kind of case, requires. This is an ongoing process.

Conclusion

To summarise, the essential requirements for the efficient and expeditious administration of justice are now well known:

- (1) A court must monitor and manage both its caseload and individual cases.
- (2) Management cannot be successful without judicial leadership and commitment.

- (3) Procedures must be clearly established in legislation, court rules and written practices.
- (4) Cases must be brought under court management soon after their commencement.
- (5) Different kinds of cases require different kinds of management.
- (6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter.
- (7) The number of court appearances must be minimised.
- (8) Realistic but expeditious timetables must be set and, unless there is good reason, must be adhered to.
- (9) A key objective is to identify the issues really in dispute early in the proceedings.
- (10) Trial dates must be established as soon as practicable and must be definite, so as to ensure compliance with timetables.
- (11) Alternative dispute resolution should be encouraged and sometimes mandated.
- (12) Monitoring of the caseload must provide timely and comprehensive information to judges and court officers

involved in management. Time standards may be useful in focussing the attention of all those involved.

- (13) Communication and consultation within the court and with others involved in the litigation process is an ongoing process.

Of all the requirements, one is overriding. Unless there is judicial commitment to the process, it will not work.