Too expensive, too slow and too complex

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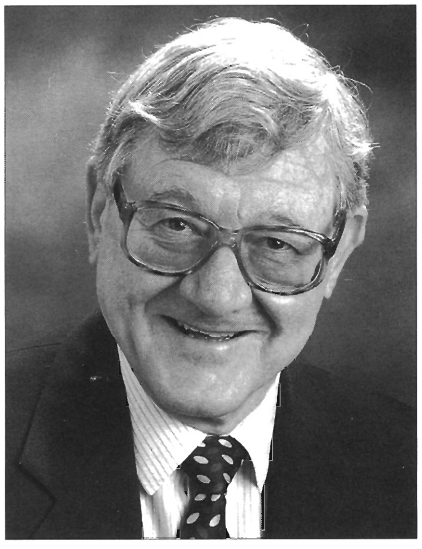

IN *Department of Transport v Smaller Transport (Ltd)* [19891 1 All ER 897 (HL) Lord Griffiths (at 903) said:

> "I for my part recommend a radical overhaul of the whole civil procedural process and the introduction of controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a timetable as prescribed by rules of court or as modified by a judge."

In March 1994, the Lord Chancellor appointed a one-man commission in the person of Lord Woolf to review the current rules and procedures of the civil courts with a view to improving access to justice and reducing the costs of litigation as well as the complexity of the rules. Lord Woolf was assisted by a large team of experts and a huge support staff. His team included, *inter alia,* an academic consultant, a consultant for information technology and a draftsman of new rules. After the submission of an Interim Report *(Access to Justice. Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales,* by the Right Honourable Lord Woolf, June 1995) various Working Groups were set up to work out detailed procedures to meet the outline proposals in the report. The report elicited considerable comment, including a volume of essays by distinguished lawyers *(Reform of Civil Procedure – Essays on "Access to Justice"* edited by AAS Zuckermann and Ross Cranston, Oxford 1995). Sean Overend concluded a review of this book as follows:

> "It is clear... that Lord Woolf's Interim Report has attracted wide-spread admiration from the essayists, while even his sternest critics are hard-pressed to put up any realistic alternatives." ((1996) 15 *Civil Justice Quarterly* 174-176).

In his report, Lord Woolf says that the "key problems" facing civil justice today are "cost, delay and complexity". These problems are interrelated and stem from "the uncontrolled nature of the litigation process" (at p 7). This lack of control has given rise to an "unrestrained adversarial culture" (p 18) which is likely to cause the adversarial process

> "to degenerate into an environment in which the litigation process is 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" (p 7).

It is, therefore, not surprising that the first (of 124) and principal recommendation of the Interim Report is:

> "There should be a fundamental transfer in the management of civil litigation from litigants and their legal advisers to the courts."

A change of this nature, Lord Wolf says, will affect not only the way cases are progressed within the system, but will also "require a radical change of culture" for all concerned (p 18). Such a change of culture would be in accordance with the aims of the Practice Direction issued by the Lord Chief Justice on 24 January 1995 (see (1995) 1 WLR 262). In announcing it the Lord Chief Justice said: >

PRACTICE: CONTENTS

> "The aim is to try and change the whole culture, the ethos applying in the field of civil litigation. We have over the years been too ready to allow those who are litigating to dictate the pace at which cases proceed."

Case management, where the control of every case is taken out of the hands of the parties and placed in the hands of the court, has in recent years found increasing application in many common law jurisdictions. In the Federal Courts of the United States, the courts have, with the rapid growth in the volume, complexity and expense of civil litigation, taken complete control of litigation (see William W Schwarzer "Case Management in the Federal Courts" (1996) 15 *Civil Justice Quarterly* 141-149). Case management is also applied in the Australian courts – the "expedited list" of Western Australia was discussed in this journal by Ipp J (see "The Expedited List of Western Australia" 1992 *Consultus* 61-68). In his opening address to the 1995 Annual General Meeting of the Law Society of the Cape of Good Hope, Friedman JP referred to the "efficient system of case management in Malaysia". The examples can be multiplied.

Case management systems show many variables in two respects:

(i) each system has its own characteristic features and idiosyncrasies, adapted to the needs, and to the custom and practice (the "culture") of the community concerned; and

(ii) within a particular system the approach of individual judges may differ, depending upon the scope of the discretion which the system allows the judge in the management of cases.

While case management techniques take various forms, most models provide for some form of routine and structural control of a case from its inception to judgment. In the Federal Courts of the United States, for example, a so-called "individual assignment system" prevails; that is, a system under which a case is assigned to a particular judge when first filed and remains that judge's responsibility until it is terminated. Other elements of most case management systems are:

(i) the early identification, formulation and simplification of issues, including the identification of issues which may be disposed of prior to trial by way of interlocutory motions or otherwise;

(ii) the setting of firm (immutable) dates and deadlines, including the date of the trial (which in some jurisdictions must be a date within a set period after the issue of summons);

(iii) the regulation and control of discovery;

(iv) the listing of witnesses, including expert witnesses, to be called. This latter step may take place at a final pretrial conference which takes the form of a "planning session" or "dress rehearsal" for the trial.

Witnesses: significant developments

In regard to witnesses there have in recent years been two significant developments.

The first is the exchange of witness statements which has become an established feature of civil litigation in Australia, England, New Zealand and the United States. It has also become increasingly common in international and in English domestic arbitrations. The practice was introduced in England in 1986. In 1992 the practice of treating witness statements as evidence in chief was sanctioned, and the Practice Direction of the Lord Chief Justice of 24 January 1995 provides that unless otherwise ordered, "every witness statement shall stand as the evidence in chief of the witness concerned." Ipp J has estimated that the trial is shortened by at least 25% of its ordinary length if statements of witnesses are utilised as evidence in chief.

The second development relates to expert evidence. There is, in many common law jurisdictions, a growing sense that expert evidence is being overused and is often argumentative rather than helpful. There is, therefore, an increasing inclination, as part of the system of case management, towards the civil law approach in which the expert is the "court's witness" and not a partisan combatant on behalf of a party. Thus it is recommended in the Woolf Report that "the calling of expert evidence should be subject to the complete control of the court" and that the court "should have the discretion with or without the agreement of the parties, to appoint an expert to report or give evidence to the court" (p 192, 231).

A system of case management may also entail increased judicial intervention in the trial itself. Such intervention may take the form of, for example, the examination of witnesses by the court, the limitation of the length of cross-examination and the imposition of limits on the length of trials. One of the "working objectives" of the system proposed in the Woolf Report is that the maximum length of any trial shall be predetermined" (p 20).

Infrastructural requirements

The infrastructural requirements of a system of case management are twofold:

- *Information technology*

Information about the current status of each case is essential to effective case management, In most jurisdictions where case management systems are in use, court files are on computer data bases which are accessible to judges from their chambers by personal computer. It is not without reason that, as indicated above, Lord Woolf's team included a consultant for information technology.

- *Personnel*

Lack of sufficient personnel is often cited as a factor which militates against the introduction of case management. A system of court management undoubtedly has its requirements in respect of court personnel and support staff for judges. South African judges are less well-endowed with support staff than some of their counterparts elsewhere.And yet, in Australia and in the United States, it was precisely such factors, inadequate staff and facilities, which induced the judiciary to take the initiative in the introduction of case management techniques. Ideally, effective case management should lead to more efficient use of time which, in turn, should lead to more efficient use of personnel.

Case management: How effective?

Studies carried out by the Federal Judicial Center in Washington DC concluded that by early judicial intervention, the setting of firm dates and deadlines, and the regulation and control of discovery, the average time for the disposition of cases in Federal Courts has been cut in half *(Case Management and Court Management in United States District Courts,* Federal Judicial Center 1977). William W Schwarzer has recently pointed out that in the Federal Courts the "median time nationally for all civil cases from filing to disposition is only eight months" ("Case Management in the Federal Courts" (1996) 15 *Civil Justice Quarterly* 141-149 at 144). One of the most successful case management systems is the so-called "rocket docket" procedure of the Eastern Virginia District Court which enables the court, despite an extremely heavy load of complex commercial litigation, consistently to remain one of the fastest courts in the federal system. In Western Australia, during the period 1 March 1990 to 30 June 1991, 80% of the cases admitted to the "expedited list" were completed within four months from the time they were started (DA Ipp "The Expedited List of Western Australia" 1992 *Consultus* 61-68 at 66).

The introduction of case management into South African practice will require careful study. (A good starting point is the comprehensive study of DA Ipp "Reforms in the Adversarial Process in Litigation" (1995) 69 *The Australian Law Joumal* 705-730, 790-821). Drawing on the experience of other countries will be most valuable. Both the Federal Judicial Center in Washington DC and the National Center for State Courts in Williamsburg VA offer judicial education programs in case management. The latter Center, through its highly sophisticated Court Technology Laboratory, also offers a full range of court technology services.

The purpose of case management is not "to take the case away from the lawyers". The successful implementation of a system of case management is dependent upon the support of both the judiciary and practitioners.

William W Schwarzer has stressed that case management gives –

> "direction to the activities of the lawyers and (sets) limits where necessary; the advocates' zeal and initiative in the adversary process are kept within reasonable bounds but not stifled. The judge must continue to look to the lawyers to prepare and present the case, to provide the information needed for proper rulings, and to help initiate as well as implement effective case management. And, when case management works, good lawyers see it as beneficial to their interests and support it." ("Case Management in the Federal Courts" (1996) 15 Civil Justice Quarterly 141-149 at 141).