

Civil case management: can lessons be learned from Wales and England?

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Sitting in Judgment – The Working Lives of Judges (Hart 2011), nominated for the 2015 Inner Temple book prize.

“Judicial Case Management in Ten Crown Courts” [2014] Crim. L.R. 30.

I also spent several years in magistrates’ courts observing justices’ legal advisers, for my first book. I welcome contact from judges. p.darbyshire@kingston.ac.uk

Thank you for inviting me to speak. I am very happy to be here!

What do I know?

I have written and lectured on English legal system for decades. This includes civil procedure. In 2002-2010, I work-shadowed 40 judges at all levels of the ELS, including all types of criminal, family and civil judge. Civil judges included district and circuit judges in the county court, including chancery and technology and construction court (TCC) judges, 8 High Court judges, one of whom was a chancery judge, with whom I travelled on circuit, a number of Court of Appeal judges, and two UKSC Justices. I interviewed 77 judges and met hundreds more. I observed judicial training of 50 Technology and Construction Court judges. In 2013, I was the guest speaker at the designated (managing) civil judges’ annual conference, on case management. In 2012, I conducted empirical research on 10 Crown Courts on the management of criminal cases. Both my research on judges and my new research on criminal case management were repeatedly quoted in Lord Justice Leveson’s *Review of Efficiency in Criminal Proceedings* 2015.

Aim

To consider whether lessons can be learned in Scotland, for rules and practice, during its current reforms, from the “Woolf reforms” to English civil procedure, the ongoing “Jackson reforms” to civil costs management, and from my empirical research into the work of all types of judge, and my research on criminal case management.

Introductory Comment

The SJI is commendable in investigating other jurisdictions. Well done Scottish judges! All aspects of legal reform and judicial training can benefit from comparative research. Why reinvent the wheel? The **importance of case management** cannot be underestimated. Civil procedure *is* case management because most cases do not get to trial (95% in Wales and England). In most cases, there is a massive **imbalance of power between the parties**. Therefore, to ensure speed and fairness, the court must manage cases strictly and speedily, and not leave it to the powerful party to exploit the weaker party by failing to cooperate, using delaying tactics, and racking up costs. Most litigants in Wales and England are litigants in person (LIPs) and their proportion will increase. There is **nothing new** in case management. Every judge has an inherent **power** to manage her court and her cases. The novelty in English law, in force from 1999 in civil cases and in force in criminal cases from 2005, was to make case management a **duty**. From my general research with judges and from my research on criminal case management, I very strongly feel that **judges should have a duty to manage cases and should be robust** in case management, in order to save time,

stress and money for the parties and money for the taxpayer and stress and time for others, such as witnesses.

The Woolf Reforms (explained in Darbyshire, textbook, ch. 10)

Lord Woolf's report *Access to Justice* (1996) resulted in The Civil Procedure Act 1997 and the Civil Procedure Rules 1998, in force 1999. **Reform had started** after the Heilbron-Hodge report 1993 (by the legal profession), with practice directions from **1994**. 60 prior reports had criticised the ELS as Dickensian, technical and incomprehensible, with two sets of rules. Research showed that most people wanted their dispute resolved, not their day in court. Fear of cost deterred people from using courts. The **legal profession**, represented by Heilbron-Hodge, **wanted** interventionist judges, encouragement of early settlement, improved facilities, one set of rules, plain English, promotion of ADR and an extension of the small claims limit. Woolf copied all of this in 1995 and his final report in 1996 but **proactive case management started in 1994**. Woolf's aims were **to stop delay, cost and complexity**. Incidentally, as a result of 1991 legislation, the bulk of cases were already shifted down to the county court and managed by district judges because the High Court was restricted to high value claims, cases with complex law or facts, and cases of public interest, and test cases.

What did Scotland do that was the same?

For example, **emphasising settlement/ADR**: s. 75 of the Courts Reform (Scotland) Act 2014 prescribes that the rules must provide for facilitating negotiation and effecting a settlement. Section 104 says the Court of Session can make rules about procedure in the sheriff court and sheriff appeal court. This includes power to encourage settlement and "other aspects of conduct and management" including the use of IT.

What could Scotland copy from the Civil Procedure Rules (CPR) 1998?

1. **ONE set of rules for all civil actions.** Why? It cuts complexity and enhances access to justice because it stops confusion, and makes life much easier for judges and lawyers. Anyone can Google "civil procedure rules" and find the home page with links to all rules and practice directions. It allows everyone to find out what is expected of them. The litigant does not need to worry about using the correct procedure because it is the judge's job to allocate defended cases to an appropriate track (small claims/fast track/multi-track). It also permits flexibility in the deployment of judges. For instance, a typical case would be managed by a district judge then, if multitrack, heard at trial by a circuit judge. Most provincial High Court cases in Wales and England are heard by circuit judges in the county court. They do not need to learn any special procedure. Similarly, complex High Court or TCC cases are subject to the same rules but the judge will manage them in the appropriate way.
2. **Plain language.** Why? This should be obvious. It enhances access to justice and recognises that most litigants are unrepresented. Lord Mackay, Thatcher's Lord Chancellor, was given the crystal award by the Plain English Campaign for simplifying court forms in the 1980s, and the 1998 CPR are drafted in simple language. Lord Woolf was so obsessed with plain language that he even ran a competition to find a replacement for "pro bono"! By contrast, while s.104 of the Courts Reform (Scotland) Act **2014** permits rules "simplifying language", very depressingly, the Act includes arcane language including Latin, such as "actions of multipointing", "actions of forthcoming", "actions ad factum praestandum". What the *heck* are they?
3. **The overriding objective of the Civil Procedure Rules.** Why? Because it informs everyone – the judges, lawyers, litigants and expert witnesses what is expected of

them. Fascinatingly, the OO is not a mere wish-list or statement of ideology. Within months of its coming into force, the Court of Appeal took me by surprise by using it as a benchmark against which to measure the fairness and appropriateness of behaviour. For instance, an expert witness who behaved in an adversarial manner was castigated. The overriding objective is set out in r.1.1. I have emboldened recent amendments resulting from the Jackson reforms:

“These Rules are a new procedural code with the overriding objective of enabling the court to deal with a case justly **and at proportionate cost** (2)...

- a. ensuring the parties are on an equal footing;
- b. saving expense;
- c. dealing with the case in a way which is proportionate:
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues;
 - (iv) to the financial position of each party;
- d. ensuring that it is dealt with expeditiously and fairly; and
- e. allotting to it an appropriate share of the court’s resources, **while taking account of the need to allot resources to other cases; and**
- f. enforcing compliance with rules, directions and orders.”**

4. **Strict timetabling and tight deadlines.** For instance, the defendant has to respond to a claim within 14 days. A fast track case must be scheduled within 30 days.
5. **The duty on the court to manage cases.** Why? Because it ought to promote consistency and make judges more pro-active in managing cases. It also legitimises proactive and robust case management. For example, the judge can say “I *will* fix a timetable because it is my duty to do so. You *will* comply with my time limits and orders or risk a penalty because I am obliged to enforce it.” The **parties have a duty to help the court further the Overriding Objective.** The judicial duty to manage cases had already been introduced, as a matter of good practice (rather than law), from 1994 in Practice Directions. It then included timetabling, the requirement for skeleton arguments and limitation of oral argument. In the CPR, the duty to actively manage cases now includes:

- encouraging parties to co-operate;
- identifying issues at an early stage;
- deciding promptly which issues can be disposed of summarily;
- deciding the order of issues;
- encouraging ADR;
- helping parties settle;
- fixing timetables;
- considering cost benefit;
- grouping issues;
- dealing with a case in the absence of one or more parties;
- making use of IT; and
- directing the trial process quickly and efficiently.

Sanctions for failure to comply with CM orders include striking out, debaring part of a case or evidence, and costs penalties. Trials will only be postponed as a last resort.

6. **Promote and develop pre-action protocols.** Why? Because most civil disputes do not result in a claim so parties need to be told how to behave fairly in negotiation or

risk a penalty if the case comes to court and they have not behaved fairly. This is necessary because parties are not equally matched in terms of power or resources. In Wales and England, there is a general pre-action protocol and 21 specialist protocols. While they are criticised for front-loading costs, experienced judges, such as Lightman J, said they rightly reduced the number of claims. In personal injury cases, 85% settle at the protocol stage. Practitioners complained that judges did not penalise breaches so a 2009 practice direction introduced a more robust stance on pre-action behaviour.

7. **A higher small claims limit.** Now £10k in England. Going up to £5k in Scotland. Why raise it? Because it reflects inflation and recognises that most litigants are litigants in person and that they want a cheap procedure with fixed, low, *predictable* costs. It enhances access to justice by encouraging people to bring claims. Incidentally, since 1973 in E&W, when small claims were absorbed into the mainstream courts, judges were given statutory flexibility to deal with small claims by an appropriate procedure and to be interventionist if necessary. An interventionist and “problem solving” approach was recommended in the simplified procedure by the Scottish Civil Courts Review 2009.
8. **Fixed fees in the fast track (medium serious cases).** Why? This was recommended by Woolf in 1995-6, then Jackson in 2009 but was not enacted. This is a great pity. It could have helped to stop the disproportionate costs still complained of. Woolf said it would enhance access to justice by encouraging people to bring and defend claims when they knew what costs they were in for.

What worked in the Woolf Reforms?

There is very little research and a lot of practitioner comment. There was praise for the pre-action protocols and summary orders for costs, which reduced the number of claims. The number of **claims** has **reduced** since 1990. (3.3 million in 1990; 1.8 million by 2009). **Delay** was said to have been reduced by giving the court full case management powers. Small claims were said to have provided a public service. Experts had been transformed from hired guns to assistants with a duty to the court. This was said to be invaluable. The fast track (between small claims and £25,000) was also much praised because trials are limited to one day. **The culture of adversarialism was squashed.** There was a *big* change in lawyers’ behaviour. See the quotations from judges, below.

What was not achieved was a reduction in cost, because of front-loading of preparation and the exchange of information, plus the satellite insurance costs and success fees of no-win no-fee agreements which replaced most of civil legal aid. There were many examples of disproportionate costs. Sadly, the rules did not include Woolf’s plan for fixed costs in the fast track. Lord Justice Jackson said in 2011 that the English and Welsh costs regime was “the laughing stock of the world” so **I think some of these problems are peculiar to England.** Jackson recommending abolishing the costly devices surrounding the no-win no fee contracts and copying the Scottish system of contingency fees, and this was done in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Jackson Review of Costs *Review of Civil Litigation Costs: Final Report 2009*

(on the E&W judiciary website, with all related material)

Jackson was provoked by presiding over the Wembley Stadium case where the copying bill alone was £1.5 million! He recommended:

A re-emphasis of proportionality. Outcome: in all multi-track cases (complex or over £25k), the judge must approve each party's planned budget. Some trained costs-managing judges now manage costs in all cases in their courts. Below £25k some injury claims have fixed costs.

A **Costs Council**, to review fixed costs and lawyers' hourly rates annually.

Re-promoting ADR, so Jackson commissioned a book, which was given to all judges.

Hot-tubbing (concurrent cross-examination of experts).

Controlling disclosure and generating a "culture change" towards strict compliance with the rules and judges' orders. Outcome: judges have become ferocious in compliance with timetables and orders, as in the Andrew Mitchell case ("Plebgate").

The rules and the Overriding Objective were amended accordingly. Most of the outcomes were reflected in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. At the same time, the Minister initiated **raising the small claims limit to £10,000** in April 2014.

Docketing. This is also recommended in Scotland.

What can we learn from PD's research?

1. Research findings – *Sitting in Judgment – the working lives of judges (2011 Hart)*

- **DJs spent most of their days on CM**, with conference calls every morning at 10, then working through paper case files all day. The software was a disaster area but they read everything on paper, then emailed their orders. They could deal with a case and make an order within a few minutes.
- **All judges took a robust approach**, in line with the CPR, speeding cases along, reducing the issues and preventing parties "keeping their cards close to their chest".
- In one court group, the DJs asked all parties to attend CM conferences in multi-track trials, because their stats showed that this caused most cases to settle but this was banned nationally by practice direction, which required that they should all be conducted by telephone conference.
- Most research time with the circuit judges was spent in crime because of the overwhelming demands on their time and the fact that **most scheduled civil trials collapsed**. In the High Court I was similarly frustrated by the settlement rate. One Monday in the Royal Courts of Justice all 17 scheduled trials collapsed.
- **Most HC work in the provinces was handled by circuit judges** because HC judges on circuit did not stay long enough. I expect that almost no lawyer realises this.
- **Last minute collapse of trials was a waste of judicial preparation.** I gave examples of this with DJs, CJs, High Court judges and CA judges. I think there should be dedicated case management officers, as in the Crown Court for serious crime, where there are "case progression officers". They should be in constant, proactive contact with solicitors, even the night before a trial. Civil listing was tricky. 75% of trials collapsed on the day so the schedules were deliberately overbooked at some courts

but if parties were not heard where a trial did not collapse, the parties could claim compensation.

- **Litigants in person took up a lot of judicial time, even in the CA.** Big chunks of the book are about LIPs. I had not predicted this and lawyers are unaware of the massive numbers of LIPs, since they do not see cases where both sides are unrepresented. In one TCC case between two builders, two judges kept passing the case to one another because both sides were LIPs (“and thick”). They would not obey orders. One judge trumped the other by retiring. The clerks in the Royal Courts of Justice told me of LIPs who live in the building. They come trundling in, early in the morning, with multiple carrier bags and bottles of water. Some are obsessive. One had spent £20,000 on a 6 month dispute. The judge pleaded with him, reminding him that he had just £17,000 equity left in the disputed property, “You’re ruining your life!” There were so many LIPs in the High Court Chancery Division that a notice below the judge read “Please address the judge as My Lord and please keep your voice up”. There were so many applications in the CA by hopeless LIPs or vexatious litigants that the rules were changed to permit rejection of an application on paper, on the grounds that it was “totally without merit”. 2003 stats had shown that 40% of applications were from LIPs and 90% were unsuccessful.
- **The judge is in a tricky position with an LIP in an adversarial system** where parties are expected to prepare unaided by the court. Judges would catch themselves lapsing into giving advice, since most DJs were former solicitors. **Judges were generally sympathetic with LIPs and good at explaining things to them simply.** **They complained that legal aid had been cut** by Labour in 1999 causing an increase in LIPs and, at the same time, court advice facilities had dwindled. Things are much worse now, since 2013-14, when there were radical LA cuts.
- Most **DJs were critical** of the solicitors and trainees appearing before them, because **of their ignorance of procedure and lack of courtesy.** CJs made the same complaint about barristers and I observed lots of incompetence. The errors in form-filling by solicitors’ employees were shocking. All this wasted judicial and court time, money and postage, because the forms had to be sent back to the solicitors. This could waste a whole morning of judicial time.
- **NB Most DJs and half of CJs were enthusiastic supporters of the Woolf reforms.** 11 of the 12 DJs rated them as a success, “brilliant” (twice), “amazing” and “incredibly successful”.

“Absolutely brilliant...they have transformed civil justice...it has brought an end to the endless sniping...extraordinarily tedious and a waste of money”.

“An amazing change...There was some worry that judges were going to become very draconian and try and dictate things...I think there is a good working relationship and that is to the advantage to the people who litigate” (p. 255).
- I was surprised that, despite their obligation under the rules, **DJs very seldom mentioned ADR.** Some considered it inappropriate to refer a small claimant to ADR but as ex-solicitors, they did expect litigants to negotiate prior to coming to court.

Interestingly, however, Baldwin, in his research on small claims, found that some small claimants assumed that it would be forbidden to approach the other side! In 1995 I met a DJ who would not allow anyone into his courtroom who had not spoken to the other side.

- One striking finding of the research, especially in the HC and CA, was that **civil cases did not always get managed according to the timetables in the rules and practice directions because of lawyers' sloppiness**, such as delivering supplementary bundles on the morning of trial, or bureaucratic mess, such as the time taken to deliver bundles and skeleton arguments from post-room to judge within the Royal Courts of Justice. Lawyers caused another problem in the CA – wasting judges' time by withdrawing arguments after the judges had read them, “messaging us about”. Lawyers also exasperate the CA continually by overloading them with authorities, as can be seen by the case law where the CA regularly castigates them.
- Weirdly, **cases are not managed at all in the UKSC** by the Justices. I am currently writing about that. The parties have to agree a time estimate for the case but not for each party. There is far too much recitation of legislation and so on, in the courtroom.
- While civil case management, in the county court, the HC and the CA generally ran smoothly, the same could not be said for criminal cases in the Crown Court or the CA. In the Crown Court, no observed trial started on time and went along uninterrupted. As a tax-payer and lawyer I was often disgusted by lawyers' incompetence and judges' laissez-faire attitudes. In the CA, I suggested to CA judges that they could save a lot of time and money by copying the strict case management of the Commercial Court (and many of them were Commercial Court judges) but they said the lawyers were not up to it (and not paid enough!).

“Judicial Case management in Ten Crown Courts” article, 2014

10 Crown Courts on 5 circuits. Observed 1 or 2 judges each, in 2012; interviewed 10 resident (managing) judges + 7 others.

Why? In 2011, I noticed very different regimes and approaches in court. **Aims:** to examine case management regimes and the effects of the Criminal Procedure Rules 2005 (in force 2006), which introduced a judicial *duty* to manage criminal cases, like their civil case management duty.

Headlines (there are many other findings)

- **Court regimes differed.** e.g. Gold Court had a pre-trial review (PTR) in every case. Some judges or courts were notorious, e.g. ‘Mad Harry’s “slash ‘n burn”’.
- **Judges differed.** At each court there was a difference in court style between judges. Judges generally disagreed on principle, e.g. on defence statements, and tactics, such as on the usefulness of *Goodyear* guilty plea deals (which caused debate between all judges at Orange court); Judges Indigo 2 and 3 were trying to import practices from their former courts “we were much more robust in the Midlands”. Judges changed their views over time: Resident Violet changed his plea and case management (PCMH) approach and listing regime radically, in 2007, after a “road to Damascus” moment. Some judges were on a mission: Judge Gold 3, from a civil background, was

on a frolic of his own, to the CA, repeatedly, because, unusually, he imposed costs penalties and this upset lawyers.

- **The Criminal Procedure Rules were ‘irrelevant’** in some courts. Judges said they had instilled strict case management years well before the 2005 Rules, using their case management *powers*. Incidentally, the Rules did *not* introduce case management in 2006, contra to the understanding of most academics and some judges, because judges already had case management *powers*. Interesting question: what activities are appropriate for a rule and what should be left to practice?
- Did the Rules effect a **complete culture change?** 1 x yes, 14 x no, 2 x “starting”.
- **Culture had changed everywhere but maybe not because of the Rules.**
- **Cracked** trials (last-minute guilty pleas) had not reduced since 2006 *but* judges did not see this as a bad thing.
- There were no **virtual plea and case management hearings**, unlike in civil proceedings. The defendant was always present, sometimes via video link from prison.
- The Plea and Case Management **form was criticised as too long**, Resident Yellow: “frightening waste of public money”, Black used their own checklist, Orange court their used own electronic template, Judges Indigo 3 and Gold 3 asked for an electronic template. Some courts used additional forms.
- **Defence statements** had markedly improved since my research for my book. Some were formulaic, demanding information.
- **Costs** were very seldom imposed. Some courts were notorious, e.g. Kingston. Judge Gold 3 favoured them but didn’t understand their effects on lawyers.
- Crown Courts which had tried enforcement courts, often at 4.00 on Fridays, found they were strikingly successful and rapidly rendered themselves redundant, as they had an educative effect on the local lawyers.
- 13 of 17 judges noted **no culture change in prosecution disclosure. Judges were very concerned**: Resident Yellow, “CPS depresses me”; Resident Silver, “CPS driving me to suicide”. Judge Indigo 2, an ex-CPS manager, CPS “frightens me”. Judge Gold 2, “we’ve gone backwards”.
- **North-South divide**. Northern judges perceived SE circuit judges as poor managers. Judges at Orange, Yellow and Green, the Northern and NE courts, said “We’re suffering because of their inefficiency”.
- **The new “early guilty plea”** scheme was criticised as delaying proceedings in some courts, e.g. at Yellow, Green (Northern) and Blue (Midlands). The procedure was underused.
- **The Training DVD**, depicting very robust judicial case management was criticised: “not real life”, “people were shocked”, “unrealistic”.

Conclusions from this research

- **Judges could learn great lessons from one another**, especially from the oldest regimes, e.g. Yellow Court. Resident Yellow had documented how he had changed the culture. This information has not been captured. He retired in 2013. Also, nobody captured/copied the previous successful electronic “traffic light” case management scheme at Orange court.
- Judges could use an **internet portal to exchange notes on good practice**. See the Advocates’ Gateway by Professor Penny Cooper – Kingston University. County court district judges have invented and circulated civil electronic case management

templates since pre-2000. (3 circuit judges in my book used to be civil district judges – they could be useful in developing such a portal and in monitoring practice).

- Non-resident (non-managing) judges should be included in discussion about case management Rules and practice, as well as former civil district judges. **Some “anorack”-judges have good ideas**, eg Judges Indigo 2 (management expert) and Orange 3. Judges Violet 2 and 3 had been given case management responsibilities for their courts.
- **Crucially, the Criminal Procedure Rules played a minor role in those courts which already had strict case management regimes before 2005.**

Conclusion

I have spent much of my time since 2002 sitting beside all types of judge, civil, criminal and family, throughout the six circuits of England and Wales, from DJ to UKSC. I'm convinced that strict case management by the judge benefits everyone, by speeding the case through the court, narrowing the issues, cutting private and public costs, encouraging negotiated settlements and ADR and minimising stress to the parties. I feel there has to be a statutory duty on the judge to proactively manage the case, an overriding objective and a duty on the parties to uphold the overriding objective and support the judge. The statutory duty legitimises the judge in taking a robust stance. This statutory change, coupled with robust strict practice *will* educate lawyers (and expert witnesses), eventually, and change the culture. There is no theoretical reason why the parties should be left to run a case. It does not derogate from the adversarial system one jot if the judge runs the case. We must distinguish between an adversarial system which is good, and required by Art 6 of the European Convention, and *adversarialism*, which is corrosive and detrimental to weaker parties. It is hard work, being a hands-on strict case manager, educating lawyers about your expectations and probably educating some of your colleagues too but it will pay off. You will change the culture. You will do more justice.

Summary of Supporting Recommendations and Other Points

- Develop one set of Civil Procedure Rules, in plain English, because this enhances access to justice, which is essential for the rule of law. Most litigants do not have lawyers. Lawyers and judges should not be allowed to aggrandise themselves by hiding behind legal Latin! (and wigs and gowns).
- Develop pre-action protocols. They encourage settlement. Punish parties who ignore them, especially powerful parties, as this protects the small party and enforces *fair* settlement, or a fair trial, rather than settlement.
- Raise your small claims limit. This benefits litigants because most are unrepresented. This enhances access to justice by making legal costs predictable, if the costs are fixed and low. It also allows the judge to be interventionist, recognising that unrepresented parties need the judge's help to put their case.
- Place a duty on the judge to raise the question of ADR then educate judges in ADR and get them to discuss it with the parties and encourage it.
- Develop civil case progression officers whose job it is to repeatedly contact parties in the lead-up to the trial, tracking case progression to try and obviate the waste of

judicial preparation caused by last-minute case collapse. These officers should also check that skeletons and bundles are delivered in time.

- Recognising that most litigants are unrepresented, train judges in judgecraft . Ensure that support mechanisms are in place so do not do what the English did, and close court counters and court based support systems at the same time as decimating legal aid! Recognise the demands on judges' time and energy and court time caused by litigants in person. Put in place not only support mechanisms but strict filter systems to filter out pointless applications.