THE INTERVENTIONIST COURT AND PROCEDURE*

THE HON MR JUSTICE K H MARKS
SUPREME COURT OF VICTORIA

INTRODUCTION

Delay and high costs are inevitable features of the adversarial system. It is unhelpful to isolate them as avoidable sins of the legal profession under the aegis of a compliant judiciary. High costs are impelled by the enormous overheads of a labour intensive profession and by every dispute being different, each demanding minute attention to detail.

Writing in 1905, Roscoe Pound said that it is

> 'a fundamental proposition that law exists for individuals, and hence is to deal with every question as a contest between individuals, is to decide it on its individual facts, not arbitrarily, but as like cases have been adjudged for others, and is to allow the parties to fight out the contest for themselves, and as much as possible in their own way.'[1]

Delays in the courts are inevitable and there are two main reasons. One is that each case must be considered separately and according to complex rules of law, procedure and evidence. The other is that there are thousands of them. In calendar year 1991, 10 196 originating processes were filed in the General and 450 in the Commercial List Registries of the Victorian Supreme Court, the figure for the General Registry representing an increase of 55.2% over that of 6 556 for 1988. Although a precise figure cannot be confidently stated, it is likely that the Court in 1991 entertained to judgment no more than some 600 or so contested cases.

No court system can entertain and decide all cases filed. Without settlements, improved procedure and case management the legal system is likely to founder. I do not mean that the system is to be discarded or that we should be other than cautious about reforms. If, however, we are to preserve treasured fundamentals, we must admit to shortcomings and make intelligent adjustments. We can do something about costs and delays, but we must concentrate on the right things. We can reduce delays only if we manage the lists so that they contain substantially those cases which must be fought and decided. And for those cases we must trim procedures to ensure that they do not take longer than necessary. It is the long case which is bringing the courts to crisis point. The record length of the last case seems to be regularly exceeded by the record length of the next.

I am a frank and unrepentant interventionist only because I see intervention, albeit benign, as necessary to achieve the purposes mentioned. The

* Monash Law School Foundation Lecture 15th September 1992.

[1] R Pound, 'Do We Need a Philosophy of Law?' (1905) 5 *Columbia Law Review* 339, 348–9.

court must manage its lists and the cases in them. If the court itself does not do it, the risk is that an outside body does and judicial independence is compromised. The safeguards provided by the judicial system will be put in jeopardy once the executive finds justification to take court administration away from the courts. And it has been often enough threatened. I mean by court intervention no more than early supervision by the court of the progress and conduct of contested proceedings. I do not include the morbid kind of which we are all from time to time accused and perhaps guilty of; that is, intervention in the actual conduct of the hearing which embarrasses the independent role of the judge and poses a threat to the rights of parties fully to be heard.

It is only in our system that 'intervention' by a judge has pejorative overtones. Professor John H Langbein, of the University of Chicago Law School, said of our adversary system, 'The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.'[2] The Supreme Court (Vic) conducts its Commercial List on a consensual interventionist basis and, in the main, I speak about my experience there. I also mention some negative aspects of the adversary system. We tend to be complacent about our system, assuring ourselves that it is the best in the world and that we have nothing to learn from the inquisitorial systems of Europe, about which we happen to know very little. We tend to associate the word 'inquisitorial' with the Star Chamber, but in fact the courts in Europe have nothing whatever in common with it.

Legal academics and some Judges do not share the disinterest of the profession in the inquisitorial systems as we shall see. Possibly without knowing it, the two systems have moved towards each other more than has been generally recognised. On 6 July 1981 Professor W Zeidler, speaking to the 21st Australian Legal Convention, said:

> 'There is in fact perhaps no clear-cut distinction between our processes in the context of "inquisitorial" as opposed to "adversary". Each system has features . . . which fall into both categories.'[3]

Commenting on what were then 'recent' procedural reforms in Germany, he said, 'It is therefore fair to ask whether our two systems are not moving towards or even meeting each other in some respects.'[4] Referring to Lord Denning's quotation of Bacon, L C that 'an over-speaking judge is no well-tuned cymbal'[5] Professor Zeidler said:

> '. . . but one should ask on the other hand how the urgent need existing in all modern societies to provide necessary and effective justice for the citizen can best be met without requiring judges to pursue a more active and dominant course in the interest of the litigant. One may ask whether, in the

[2] J H Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, 823.
[3] W Zeidler, 'Evaluation of the Adversary System: As Comparision, Some Remarks on the Investigatory System of Procedure' (1981) 55 ALJ 390, 400.
[4] Ibid.
[5] *Jones* v *National Coal Board* [1957] 2 QB 55, 64.

end, time, man-power and considerations of cost will not force the pace generally in that direction.'[6]

Nowhere is what Professor Zeidler said more apparent than in the United States where it is now common to speak of the 'managerial judge'. The 'Manual for Complex Litigation' published by the Federal Courts is infused with notions of judicial management of fact gathering for long causes. The case for intervention is clearly supported by what occurs under the inquisitorial system where the judge is fully dominant.

The English legal system developed in an entirely different way from those of continental Europe. It was not altogether uninfluenced by the Europeans, particularly after the Norman Conquest, but focused on what it considered was essentially a private contest to be decided according to rules. The rules increased in number and complexity as the system developed and expanded from an essentially tribal beginning. The rules, as may be expected, governed preparation for the battle as well as the battle itself. The sophistication of modern disputation tends to mask the essentially primitive concepts which remain deeply embedded in the law. Roscoe Pound said in a speech to the American Bar Association, 29th August 1906:

'A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play", as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But it is probably only a survival of the days when a law suit was a fight between two clans in which change of venue had been taken to be the forum. . . . Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record", rather than to dispose of the controversy finally upon its merits. It turns witnesses, and especially expert witnesses into partisans pure and simple. It leads to sensational cross-examinations "to affect credit", which have made the witness stand "the slaughter-house of reputations". It prevents the trial court from restraining the bullying of witnesses, and creates a general dislike, if not fear, of the witness function, which impairs the administration of justice. . . . It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. . . . The effect of our exaggerated contentious procedures is not only to irritate parties, witnesses and jurors, in particular

[6] Zeidler, loc cit.

> cases, but to give to the whole community a false notion of the purpose and end of law.'[7]

In his 1905 paper,[8] Pound suggested that the remedy was in training the rising generation of lawyers in a social, political and legal philosophy abreast of their time. In my opinion, it is the philosophy of the law, that is, its object and purpose, which we must question. As things stand, there is nothing to criticize in parties using the rules of procedure, as they do, as weapons merely to win their battle. They do not necessarily see them as aids for the just resolution of their dispute. As Sir Owen Dixon said, 'the object of the parties is always victory, not abstract truth'[9] This distinction, which is profound, between conduct directed to winning the case and conduct to achieve just resolution of the dispute is not sufficiently recognised. Its recognition is fundamental to the acceptance of reform which might make the distinction less pronounced. It is the hall-mark of the difference between our system and that of continental Europe.[10] Here we are concerned with procedure. It is proper that the rules prescribe procedure for trial and its preparation. But it would be a mistake to underestimate the extent to which rules may be manipulated for the mere purpose of winning or gaining tactical advantage.

We have seen in the past how the legal system fossilized under the Forms of Action. May we remind ourselves of Maitland's famous statement: 'The Forms of Action we have buried, but they still rule us from their graves.'[11] It was Maine who told us:

> 'So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.'[12]

We must resist the temptation to assume that rules with which we have become familiar have some extra-terrestrial sanction. The test is whether they work well for the community as a whole in a modern context.

PROCEDURE

The road blocks to the merits set up by the Forms of Action have to a degree been succeeded by others. Modern technology for one thing facilitates the generation of many documents and endless pursuit of pre-trial information in

[7] R Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 40 American Law Review 729, 738.

[8] R Pound, 'Do We Need a Philosophy of Law?' op cit.

[9] Sir Owen Dixon, *Jesting Pilate* (Law Book Co Ltd, 1965) p 16. See also: R W Fox, 'Expediency and Truth-finding in the Modern Law of Evidence' in E Campbell and L Waller (eds), *Well and Truly Tried* (Sydney, Law Book Co, 1982) 140, 150ff; Sir Richard Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 ALJ 428.

[10] See Lord Devlin, *The Judge* (Oxford University Press, 1979); R W Fox, op cit, 153.

[11] F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1962) p 2.

[12] H S Maine, *Dissertations on Early Law and Custom* (London, John Murray, 1883) p 389.

a system which, unlike the German and French, requires pre-trial disclosure for the entire case. Trials are made longer by the easy ability of modern litigants to resort to innumerable documents, by the extension of concepts of relevance, by increased availability of witnesses, growth of the legal profession and the expansion of legal remedies by statute and judicial decisions. Nor has the availability of full transcript shortened proceedings, but rather it has facilitated longer and more detailed submissions and arguments. It is the lengthy and complex case which makes it inevitable that the courts abandon its non-intervention tradition in its purest form. Langbein writes:

> 'The trend toward managerial judging is irreversible because the trend towards complexity in civil litigation that gave rise to managerial judging is irreversible.'[13]

There is, nevertheless, no good reason why the management of long cases should be markedly different from that of others. Langbein clearly thinks that German civil procedure has much to commend it and that it is in many respects superior to ours. Something of a reply has been published by John C Reitz.[14]

There are at least two valuable observations to be made about the inquisitorial systems of continental Europe. One is that the managerial judge is regarded there not as inimicial to, but as essential to, the dispensation of justice. The other is that many of the procedures under it are a great deal more sensible than ours and behind them is the philosophy that the aim of the law is discovery of the truth.

ADVANTAGES AND DISADVANTAGES OF COURT INTERVENTION IN THE ADVERSARIAL SYSTEM

Our perception of advantages and disadvantages of court intervention depends on our view of the purpose and object of the judicial system. I take them to include peaceful resolution of disputes as fairly, expeditiously and cost-effectively as the community would wish. This is simple enough but a tall order. Success can only be measured in relative terms.

There are advantages of leaving the litigants to themselves and therefore disadvantages of intervention. It has been said often enough that the court is best seen as impartial if it confines its role to adjudication. Interference may be seen as giving the appearance of pre-judgment or unfair advantage to one side. Also, court-managed cases can increase costs, a party on occasions being ordered to take steps it might not otherwise take. Orders for filing of documents, definition of issues, provision of particulars and the like can have a similar effect. Dictation of the pace of preparation for trial may advantage or disadvantage one side, tactically or otherwise. Intervention in some cases and

[13] Langbein, op cit 861–2.
[14] J C Reitz, 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure' (1990) 75 *Iowa Law Review* 987.

not others can provide priority to the parties in a managed case over those in unmanaged cases.

I am nevertheless persuaded that the managerial judge is essential to the administration of modern civil litigation, certainly of complex cases. The pace and quality of preparation for trial in that way may be controlled and the interests of all those in the queue better served. Procedure may be controlled to prevent its use for tactical advantage; directions can be tailored for the individual case to ensure that the parties do no more than is necessary for its preparation and that a hearing date is fixed as soon as they are ready.

WHAT HAS BEEN AND MAY YET BE ACHIEVED IN THE COMMERCIAL LIST IN THE SUPREME COURT OF VICTORIA

Issue into the List — Summons for Directions

Commercial cases automatically come before a judge shortly after Appearance. The rules require that a party which issues a proceeding in the Commercial List serve with it a summons for directions returnable before a List judge on a date estimated to be within reasonable time after service. List judges sit every Friday to hear directions. A full explanation of what occurs and what is expected at a directions hearing is set out in the Court's recently published 'Guide to Commercial List Practice'.[15] At the first directions hearing a time-table for pleadings and discovery is usually approved or laid down by a judge and the summons for directions adjourned to the next directions hearing as it is on each directions until the case is fixed for hearing. The number of directions hearings varies on average from two to four, and is sometimes six in more complex or badly-run cases. The object of regular directions is to ensure constant control of the proceeding by a judge so that the trial may be brought on as quickly as fairness permits. Practitioners have come to respect the requirement to attend directions hearings with the necessary knowledge of the progress of their case.

Expert Evidence

Generally speaking, no distinction is made between an expert witness and others. In some cases the Order 50 reference powers are invoked to seek the opinion and report of an expert on critical questions in a case. If consent is not obtained or the issues not sufficiently defined, the reference power is difficult to use with effect. In general, it is difficult to inhibit the traditional practice of each side relying on its chosen experts.

Langbein is strongly critical of the expert witness paid by the parties:

> 'The European jurist ... who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief

[15] See p 16ff.

when he discovers that we extend the sphere of partisan control to the selection and preparation of experts.'[16]

At the American Bar, he says, expert witnesses are known as 'saxophones', the lawyer playing the tune. 'The more measured and impartial an expert is', he adds, 'the less likely he is to be used by either side.'[17]

Under the German system (as also under the French and Italian), experts assist the court. They are chosen by it and not approached by or on behalf of the parties. The court consults the parties before making its choice and the parties may make suggestions and comments. The expert ordinarily submits a written opinion which is circulated to the litigants. They may file written comments to which the expert is asked to reply. The court may seek further opinion or the opinion of another expert. A litigant may engage his or her own expert to rebut the court-appointed expert and this may be treated by the court as a ground for engaging another expert. The system is preferable to ours under which a party may call an unlimited number of expert witnesses whose impartiality is adversely affected by the perceived need to avoid displeasing the party responsible for his or her fee and who relies on him or her for support.

Under our system, the court may be deprived of opinion which gives real assistance to it in deciding the question. In the personal injuries field we have witnessed many medical experts who are full time on hire as expert witnesses and who do not otherwise practice medicine.

Court intervention has the potential to move us in the direction of the German advantage in this area of the expert witness. Order 50 of the Rules of the Supreme Court allows appointment by the court of a referee to give an opinion on a question. It has been used often but not regularly. It is far more usual that parties call their own expert witnesses. It is expensive and capable of leading to a result which is not confidently accurate. In many cases, experts are merely called in large numbers to give 'weight'. The paid expert is rarely impartial and is often asked to give opinion on assumptions of facts which are disputed. Also, experts commonly take up the cause for which they have been enlisted and in their enthusiasm may trespass on areas in which they are not expert or which do not properly invite expertise rather than ordinary experience and knowledge. Many experts give evidence without having inspected the subject matter (if inanimate) or the subject party. The court takes no part in the questioning of experts; questions considered relevant by the court may be overlooked or deliberately not asked or not pursued.

The reference procedure also has its imperfections, although it is closer to the German idea. The effectiveness of a reference depends on the questions being the right ones to ask. If the parties do not consent to the reference or the identity of the referee or the form and content of the questions, the court necessarily is in a difficult position to achieve a satisfactory result. The court is not able as a rule to frame the right questions without the co-operation and

[16] Langbein, op cit 835.
[17] Ibid.

assistance of the parties, or without, in effect, hearing the case (which would destroy its utility).

The German system, I think, is fairer, less expensive and more likely to generate reliable opinions: that is, discover the truth. I see no reason why it could not be introduced into our system without requiring other fundamental change or changes to it. I envisage that expert opinion would be provided by experts appointed by the court after consultation with the parties. We could adopt the same safeguards for the litigants as does the German system, or agree about others. Langbein says:

> 'When . . . a litigant can persuade the court (German) that an expert's report has been sloppy or partial, that it rests upon a view of the field that is not generally shared, or that the question referred to the expert is exceptionally difficult, the court will commission further expertise.'[18]

Pre-trial Control

A senior lecturer at the University of Yaounde, Cameroon, says that the 'primary purpose of the pre-trial process is to enable the parties to prepare their respective cases for eventual trial'.[19] Ngwasiri tells us that in France it is the duty of the judge to help the parties to settle their disputes amicably. Langbein says the same about the role of the German judge. Under our system, judges are not well regarded if they encourage too much the parties to settle (although we often do it). I favour the European approach, although a judge must be careful about what he says if it is likely that he will hear the case. A judge can assist the parties to settle early rather than late only if the proceeding is under his control from an early stage. It cannot be emphasised too greatly that 95–98% of civil litigation comes in any case to be settled. The parties will be saved substantial costs if they settle early.

In French civil proceedings the judge, as does his German counterpart, exercises very extensive powers from the pre-trial stage to final judgment.[20] Ngwasiri compares the English judge who, he says, plays an inactive, passive and non-interventionist role. As a general rule, he says, his role is not to ascertain the truth but to decide the case on the basis of the pleadings. In France it is said that the judge first finds out the truth before deciding the case.

In my opinion, the position in Victoria is less rigid in the Commercial List and, to an extent, in all causes we have moved a little towards the French and German positions. The distance between the two systems remains considerable. They will, as I have suggested, become closer. In a recent address to the Foreign and Comparative Law Committee of the Association of the Bar of the City of New York, New York Attorney, James R Maxeiner concluded:

> 'Events in Europe are impelling Americans to give European civil law systems more attention. While commercial considerations are providing that

[18] Langbein, op cit 840.
[19] C N Ngwasiri, 'Pre-trial Civil Proceedings in England and France' (1991) 10 Civil Justice Quarterly 289.
[20] Id 292.

> catalyst, better U.S. law could be a by-product. Americans familiar with European systems will recognize, as Pound did, the extent to which the causes for dissatisfaction with the administration of justice in the United States lie in our peculiar legal system. With knowledge of civil law systems, we could work better for the future that Pound sought, one where our courts will be "swift and certain agents of justice" and the "sporting theory of justice" will be just a memory.'[21]

It is interesting that Lord Denning partly based his justification for the introduction of the Mareva injunction on the French process of *saisie-conservatoire*. Lord Denning said:

> 'We know, of course, that the practice on the continent of Europe is different. It seems to me that the time has come when we should revise our practice.'[22]

Thus there is precedent for recognition that some features of the inquisitorial system are worth adopting and can be adopted. No doubt they are limited but we will not know how far we can go without experiment. Under the managed system of the Victorian Commercial List, we have found that some cases can be heard almost immediately after issue and we have done it. This occurred in many of the take-over cases in the mid-1980's where complex questions of fact and law were prepared and litigated immediately.

Discovery of Documents

In the Commercial List, a list of documents ordinarily is exchanged to provide discovery instead of the more cumbersome and costly affidavits. Inspections and copying are done as a rule by agreement. Disputes have been reduced and discovery achieved, as a rule, expeditiously.

It is within my experience to have been asked by the parties to express informally my views as to the discoverability of documents on informal presentation of the contending views. I have done it at least on one occasion and much time and expense were saved. Often it has been possible to encourage parties to disclose documents where the only question is one of relevancy on the basis that there could be no ill consequences to any party in such a case.

In my address to the AIJA Joint National Conference on Evidence and Procedure in a Federation,[23] I said that voluminous discovery in complex causes can only be assisted by court intervention and the 'managerial judge'. I set out suggestions for such management and the changes in court administration that might be needed.

Control of discovery by the European judge involves the parties seeking it having the burden of identifying the documents they wish to see. Discovery is less a burden to the litigants in the French and German systems. But I do not think we are able to adapt their practice in this regard. We must devise our

[21] J R Maxeiner, '1992: High Time for American Lawyers to Learn from Europe or Roscoe Pound's 1906 Address Revisited' (1992) 15 Fordham International Law Journal 1.
[22] *Nippon Yusen Kaisha* v *Karageorgis* [1975] 1 WLR 1093, 1094–5.
[23] 'Voluminous, Limited and Multiple Action Discovery', 10th April 1992.

own methods for reducing the present burdens and costs of discovery in complex cases. The methods necessarily will vary with each case. My view is that subject to the supervision of a judge, discovery in complex cases should revert to Masters who develop discovery practice in consultation with the judges.

Where discovery involves or may involve voluminous documents, directions should be given by a Judge or Master after discussion with the parties about the documents which truly need to be identified, inspected and copied. Listing and inspection should be arranged at minimum cost and inconvenience to the parties. It may be that it should be done in stages, as it is in Europe, and documents relating to particular issues identified first and then in accordance with directions at successive stages of preparation.

The threat posed by discovery practice to sensible litigation should not be underestimated. In a recent lift-out survey published by *The Economist*,[24] we were told that in an IBM antitrust suit in the United States discovery took five years and produced 64 million pages of documents. It was said that discovery accounts for 60% of time and money spent on lawsuits. In a 1988 survey a big majority of litigators for both plaintiffs and defendants said that discovery is used as a weapon to increase a trial's cost and delay to the other side (nearly half said lawyers use it to drive up their own charges). It is to be accepted that documents often provide critical evidence and disclosure is a necessary part of any fair judicial system. But it must be kept within bounds.

Interrogatories

Interrogatories are of course a form of discovery. They are discouraged and generally speaking not allowed in the Commercial List. When they are, limits are placed on the number, times for service and provision of answers. Often they are restricted to particular topics. Lawyers are encouraged to seek information from each other by letter couched in ordinary language and it is now frequently obtained in that way. Interrogatories are seen as an unnecessary source of delay, a potential source of oppression and duplication of information obtained in other ways.

Settlement

I have already spoken of the opportunity which court intervention provides to assist early settlement.

In the adversarial context, the best lever to settlement is fixture of a trial date and keeping it. This can only be achieved under a managed system. The court door settlement is still the most common, but it means that all the interlocutory steps have been taken, many of which involved court time.

In a managed system, a judge may order at a very early stage after issue, preferably by consent, that the parties attend a mediation conference. A judge can assist the parties to understand the value of the process only if it is called up for directions. The success of this technique is still to be tested in Victoria. Its value will depend on early reference, the standard of mediation and

[24] 'On Trial: The Legal Profession', Vol 324 No 7768, 18th July 1992.

perhaps on factors which are too little discussed — such as cost-saving and benefits which a court decision may be unable to provide.

I have already observed that there is, for historical reasons, a degree of artificiality in the results provided by the adversarial system. The courts often do not resolve the real dispute between the parties nor decide according to the merits. Moreover, court decisions are commonly for one side entirely. The other side 'loses'. Most disputes call for a mid-path or adjustment which often only the parties themselves can achieve. Mediation can help litigants to re-arrange their affairs to suit their needs better than a court is able to do.

The courts can assist parties to mediate. Judges themselves cannot be and should not be mediators. The growth of mediation will assist management of court lists and court concentration on those cases which are not amenable to its process, that is, must be litigated. The Order 50 reference power also, as I have said, is capable in an appropriate case of reducing costs and assisting settlement.

Arbitration

We also have power now to refer cases to arbitration. This may reduce court lists, but may not reduce costs which, at arbitration, are not necessarily less. In the absence of consent, however, it is difficult to justify compulsory reference to arbitration as it amounts to denial of access to the courts, a right which it is not in the interests of the judicial system to remove.

Court Investigation of Facts

A judge in Victoria does not have the power, which the French or German judge has, to order investigatory measures of his or her own motion or on the application of a party (except to the extent permitted under the reference powers). There is no reason why we should not adopt such a practice but the time may not yet be ripe.

The Witness Statement

The elicitation of evidence by question and answer is long, tedious, costly and largely, if not wholly, unnecessary. This has been demonstrated by introduction of the witness statement adopted on oath by the witness who may then be cross-examined. The power to order trial by affidavit is long-standing, but has until recently been used in only limited classes of case. In the Commercial List it is usual to order that statements of witnesses, including those of the parties, be exchanged and filed before trial at which they are verified and treated as evidence-in-chief. The parties are discouraged from adding to them at trial, but add to them they normally do. Nevertheless, the reform greatly reduces the time and cost of hearing.

It is thought, I do not know how correctly, that in cases involving serious questions of credibility the witnesses should give their entire evidence *viva voce*. It may be debatable how evident the truthfulness of a witness is from the way he or she gives evidence-in-chief. Cross-examination, unaffected by the

filing of the witness statement, is much more helpful but not always determinant.

It must be conceded that witness statements tend to be more detailed and discursive than would be allowed in evidence-in-chief. Also, statements are often contaminated by inadmissible material. These things must be controlled. The parties themselves are commonly invited to erase inadmissible matter and submit only genuine admissibility points for decision. In this way the worst practices are much reduced.

Another obvious criticism of the witness statement is the opportunity it provides to doctor proofs. The only answer, insofar as it is an answer, is that there are risks for practitioners and witnesses who doctor proofs and that by and large cross-examination and the other tools of counter-proof are sufficiently potent to justify their use. The problems of witness statements, however, are inter-related with the problems generally of adversary domination of fact gathering.

Exchange of witness statements reduces time of hearing and costs. Interlocutory steps are reduced by the full supply of information which they give to the parties and this, among other things, improves the chances of settlement. They also assist judicial understanding of the issues at an early stage. Witness statements provide no answer to the German advantage in fact finding objectivities. They are merely a procedural innovation which assists better despatch of cases.

Langbein, as I have indicated, coined the expression 'German advantage' and applied it to witnesses belonging to the court rather than to the parties and their examination being conducted by the judge. He says

> 'The case against adversary domination of fact-gathering is so compelling that we have cause to wonder why our system tolerates it . . . There is nothing to be said in support of coached witnesses, and very little to be said in favor of litigation-biased experts. . . .'[25]

It must be accepted that we are not in a position to adopt this procedure in its purest form without other fundamental changes (which I think would not be acceptable) to our system. We have room, however, to adopt it in a limited way by use of a Master. In suitable cases it could be ordered that the parties identify critical witnesses to be examined by a Master and that the parties themselves do not interview them. Such witnesses would belong to the court and their testimony recorded and filed with it. At trial, counsel on each side might be permitted to cross-examine. This would be worth trying as an experiment and certainly would advance the credibility of our system. Professor Reitz concedes this point:

> 'The objections (to adoption of the German advantage) based on the numbers and structure of our current bench would not apply if the witness interrogation function were given to a parajudicial official like a master or magistrate, as Langbein suggests.'[26]

[25] Langbein, op cit 841.
[26] Reitz, op cit 1000.

He goes on to say:

> 'We thus probably cannot use the judges to take charge of witness interrogation because of the impact on the numbers, selection, and ultimately, function of our judiciary. . . . Langbein's suggestion that we might use magistrates or masters to implement the 'German advantage' cannot be dismissed on the basis that such a procedure would require unacceptable changes in the structure or function of our judiciary.'[27]

Reitz does not deny that the German system has advantages, as Langbein claims, that it is cost saving and leads to finding of facts which are nearer the truth. He disputes, however, that the American system (and I think the same could be said of ours in Victoria) can adopt the central aspect of German civil procedure, that is, judicially dominated fact finding, without changing many other fundamental characteristics of our procedure. For one thing judges are discretely trained in Germany, judgeship being a career and not a graduation from bar to bench. Also, the witness examination function is associated there with wide investigatory functions, which could not be performed by a judge here without further far reaching changes which it is not practicable to consider. It would also affect the appeal system. In France and Germany, appeal courts fully re-hear the cases so that the logistics of manning those judicial systems are radically different from ours.

In 1987, the English Court of Appeal recorded only 1 614 civil appeals, while the French Cours d'Appel recorded 148 441.[28] Germany has approximately three times as many judges per unit of population as the United States.[29]

Court Books

In the Commercial List and sometimes in the ordinary list the parties are required to prepare a court book. It is intended for the use of the judge as well as the parties and must include the pleadings and particulars as well as the proposed exhibits. The pleadings should be confined to the current pleadings and all pleadings before amendments should be omitted. Nor should any other interlocutory documents (orders, document lists etc) be included. They are in the court file if reference is made to them. The court book should not include every document discovered but those which the parties agree shall be referred to and relied on at the hearing. No document should be excluded merely because one party objects or may object to its admissibility. Any issue in that respect is for decision by the trial judge. Every court book is to be properly indexed with a table of contents at the beginning of each volume. Commercial List practice is set out in the guide to which I have referred.

The indexed court book is also capable of reducing costs and time of hearing. It overcomes the time-wasting practice of proving every document and making it a separate exhibit. It also requires parties to agree in the assembly of

[27] Id 1001.
[28] Ngwasiri, op cit 291.
[29] Reitz, op cit 997.

documents which they claim to be relevant. Rulings on admissibility tend to be reduced. The court book also enables easy reference to the pleadings in their final (if they ever have one) form. Needless to say the indexed court book enables easy reference to evidence (quite often critical) and enables the judge fully to familiarise himself with the case as it proceeds. Preparation of court books should be supervised to ensure that they have been properly compiled and do not duplicate material and that the parties have fully consulted each other and agreed in the contents.

Isolation of Issues for Early Determination

The 'managerial judge' is well placed to order early determination of issues which might shorten the litigation. It is common to hear and determine issues concerning liability alone. If the plaintiff succeeds, damages may be assessed (as in at least one case I ordered by consent) by a suitable referee. Langbein says that the German advantage includes the practice of multiple hearings before a Judge without distinction between trial and pre-trial hearings, so that an issue often is decided early and brings the whole case to an end. In this regard, we have, certainly in the interventionist Victorian Commercial List, a similar advantage with power to direct that an issue be determined early. It is infrequently exercised due to the philosophy of the adversary system. The parties rarely support it. The non-interventionist Court also has the power but exercises it only where a party applies for its exercise. The value of court control of cases, particularly long Causes, is that the parties may be assisted to avail themselves early of the power of the court to isolate issues for determination and to formulate issues which may be separately decided.

CONCLUSION

Interventionist policy of the Commercial List has shown that cases are heard more quickly. During 1991, 80% of its disposal were within nine months of admission to the list. Interlocutory steps are reduced to essentials, interrogatories are generally not allowed, discovery is usually informal and not prolonged, court books and witness statements cut through traditional time consuming practices, issues are often identified early and isolated for decision. Settlement, mediation, reference for expert opinion, and perhaps arbitration may be considered early after the issue of the proceeding.

There are, of course, blemishes and things do not always go smoothly. Moreover, there are still refinements to be made and reforms to be considered. We should, in my opinion, consider the German advantage in at least two ways. We should forsake the hired expert witness. Experts should be witnesses of the court. He or she should be selected after consultation with the parties and paid initially from the joint contribution of the parties (the losing party eventually to reimburse the winning party) and remain independent of the parties throughout. The expert may, where the court considers it appropriate, be questioned by the parties. The parties may submit to the court with

or without other expert opinion that a further expert or further opinion be obtained. But the parties should no longer be allowed to call experts paid by them. The German practice should be studied and implemented with the same or similar safeguards.

In appropriate cases where credibility of witnesses is critical, witnesses should be examined by a Master without prior interview by or on behalf of the parties. We are not geared for this in every case. But the procedure would greatly assist the credibility of fact finding. It should be tried. No complaint could be made about its fairness unless it is said that elicitation of the truth is not to be encouraged.

Finally, we should ask ourselves that very question, whether our legal system is to be merely an arena for the arid determination of disputes or whether it is to elevate the precepts of justice to include discovery of the truth and discouragement of the adversarial lust for conquest.