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MANAGING INTERLOCUTORY PROCEDURE:
Address to the Queensland Chapter of the Institute of Arbitrators & Mediators of Australia - 3 May 2001.

There is now a significant volume of published articles and booklets on the theory and practice of case management. For the purposes of preparing this address I have not consulted any of them. What I intend is to explain my own views and practices with respect to managing relatively complex litigation in the hope that you find something helpful in what I say. I give you clear notice that my attitudes may be idiosyncratic, and even unorthodox. Judges are accustomed to give a warning to juries when we comment on the facts of a case in a summing up. We say something like this:

> "Pay as much or as little attention to my views as you think they deserve. My comments are intended to be helpful but if you do not find them so, or if you disagree with them, please disregard them."

With a similar disclaimer I outline my own approach to case management.

I am, of course, conscious that I am addressing the Institute of Arbitrators, so I hope you will forgive me if I speak of the role of judges and courts. I do so for convenience. There is less effort involved in saying "judge" than in saying "judge or arbitrator" and because my own perspective is that of the judge. For present purposes I see no difference in the role and functions of judges and arbitrators. That is, we are both trying to achieve the same thing by much the same means.

What we are trying to achieve is the just, efficient and economical resolution of disputes involving legal rights and obligations. Although I listed three adjectives qualifying the resolution of disputes they really fall into two categories: the dispute should be resolved (1) justly and (2) efficiently. If the second criterion is achieved it should bring with it a saving in money.

Of the two criteria the first is paramount. Those of us who are given the responsibility of adjudicating upon the rights of others should take justice seriously, and strive always

to arrive at the result that does justice according to law. That, of course, involves making honest and sensible findings of fact and conscientiously applying the law to the facts. This process is immeasurably assisted if the litigation is conducted efficiently, because then one can identify early, and so concentrate upon, the real points in dispute. The attention of the advocates can be focussed on those issues and so provide assistance to the judge where it is most needed. Obviously, as well, time, effort and money are saved when false or irrelevant issues are seen for what they are, and disregarded.

Efficiency is to be prized greatly but it cannot be compared to justice. In a contest between justice and efficiency, there is no contest. This is, in my opinion, the overriding principle to apply in case management.

I do not regard management of litigation as something which ends when the trial begins. The function of management is not just to bring a dispute quickly to the point where it is ready for trial. Management continues into the hearing as the judge seeks to understand what the case is about, what are the critical documents, what are the fights on credibility, what is the nature of the differences between experts and how are those differences to be resolved, whether by preferring one opinion over another, or by determining facts which will then lead to the acceptance of one or other of the expert opinions. These things really emerge only at the hearing. It is, I think, a mistake to try to sort too many of them out in detail beforehand.

This is very different from the usual concept of case management but I think it is equally important. A judge can do much to shorten a trial and reach a just result by the early identification of the real issues in dispute, and by concentrating attention on those.

I must at once express a loud note of caution. This kind of management must be conducted with great circumspection. It is a conceit to think that when a proceeding starts a judge knows much about it. If you listen attentively and follow the evidence conscientiously by the time the hearing is over you should know almost as much about it as counsel do. Therefore it is a danger to the attainment of justice that a judge should

decide too early where the merits lie, or what the issues really are. His task is to sit patiently and to listen. Having said that there are obvious advantages in sitting aloof from the arena. It is often possible to see things more clearly than the combatants, who can be distracted by the din and confusion of battle. It is sometimes possible to discern when a point is going nowhere, or when an issue of fact, which may be giving rise to great enjoyment to the parties, is not likely to be critical to the outcome. A polite indication can lead to a redirection of focus with consequent benefit.

I am a firm believer in the value of asking questions so as to be able to understand what is the relevance of particular evidence, what point it goes to, and how the various parts of a case, fact and law, are meant to be tied together. It is important not to ask more than is necessary for that purpose.

As I say, one has to be very careful that one does not make premature judgments or prevent the development of points that do have substance and may be important to the outcome. Some years ago there was a judge, now retired, who was both very intelligent and well meaning, but a dreadful meddler. It was quite unpleasant to appear before him. He had opinions on all points which were vocally expressed even before arguments were developed. He knew everything. This is a model to be avoided, but a great deal can be done to move a trial along by paying intelligent attention to each development and by politely but not frequently, questioning when appropriate where particular pieces of evidence are leading, or where they fit into the overall pattern of the dispute. It is a process akin to what mediators call “reality testing”. When the process is engaged in it should be on the basis that it is meant to elicit a genuine answer. It should not be a means of indicating an opinion formed on incomplete materials. The answer should indicate whether a point or issue has to be developed further or whether it can be left quiescent. In either case judicial triumphalism should be avoided.

It may not be possible, and it is certainly not wise, to make fixed rules about the extent and kind of management that the preparation of litigation should be subjected to. Much, if not all, depends upon the nature of the dispute and the capacity of the legal

representatives. My own preference is for the minimalist approach. That is, one should make the least number of directions, and conduct the smallest number of pre-trial hearings that one can, consistent with the objective of moving the action along to trial. At the risk of being over-simplistic let me generalise. There are two kinds of clients and two kinds of legal representation. How they combine determine the extent to which one has to supervise the management of pre-trial preparation.

The two kinds of clients are these: those who can give a realistic account of their version of a dispute and rationally put together the arguments and evidence to support it. The second category are those who see only their own point of view and overlook or disregard arguments, evidence and documents which might cast doubt upon their case.

The two categories of legal representatives are similar. In the first category are those who approach the dispute with professional detachment and objectivity, conscious that every case has two sides. In the other category are those who burn with zeal for their client's cause, and are persuaded that the other side and its representatives are at best delaying their client's inevitable success and, at worst, deliberately frustrating it.

If both parties to the dispute and their lawyers fall into the first of their respective categories the case will manage itself. The judge will have very little to do. It will be prepared with a minimum of fuss and will be presented neatly to the court for adjudication. If both sets of lawyers are in category one, then, even if the clients are in category two things should proceed relatively smoothly though there may be problems, usually with disclosure. Real problems begin when one set of lawyers is in category two. They will be worse if the client is also in category two. If all participants are in category two the case is virtually unmanageable. It will require constant attention, frequent directions and a great deal of patience.

The initial approach to be adopted towards the management of a case depends upon the assessment you make of the combination of litigants and lawyers. You will not always get it right and it may be necessary to adjust the level of supervision according to your

experience in a particular dispute. It is important to observe what is happening and to react accordingly. It can be a costly mistake to let people in category two prepare for trial without proper supervision, because you think they are in the other category. Things can go badly wrong.

My own approach to supervision is to take things step by step. I do not at an early stage attempt to set down a timetable for all steps which will or might be necessary to prepare an action for trial. I understand it may be different for arbitrators who may routinely make comprehensive directions at an early stage. You, of course, do not have the benefit of rules of court which prescribe the parties' obligations and give a time for compliance. All the same, if a dispute is complicated I expect it is not possible to foresee early on precisely what steps will have to be taken and how long each procedure will require. I favour a step by step approach, which is to give directions only for the next immediate step or steps, and then allow the parties to come back when they have taken those steps, or cannot do so and require assistance, or when they cannot agree upon what next should be done. That way you can monitor how an action is progressing. It also avoids making directions that turn out to be unnecessary or unhelpful.

As a general rule it is best to keep active supervision to a minimum. One should do no more than is judged necessary to keep the action moving towards being ready for trial. Parties should be required to appear only when there is a breakdown in preparation which requires direction or censure. Remember the more the court or arbitrator intervenes and the more directions that are given the greater the cost to the parties and the more time will be required to get the action ready. Parties should be encouraged to get to that stage by themselves.

One thing that is important is to maintain a clear record of exactly what was directed to be done by each party at all directions hearings. I was once asked to manage and try a case. It had already been set down for trial twice and been adjourned both times. It had been reviewed on about twenty occasions. Directions were given every time. Some of the appearances were necessary because the parties could not agree about what had been

ordered on previous occasions. There was, needless to say, absolutely no good will. From it I have developed the practice of having my associate compile a document which sets out exactly what was ordered. I have a copy sent to all parties shortly after the hearing. It may not result in the parties doing what they were told to, but it has eliminated any argument about what they had to do.

It is not important to verify that every deadline has been met, but it is important to keep an overall check on the progress of an action, particularly where one is working towards trial dates that have been allocated. It is probably preferable not to set an action down for trial until it is ready, but given the manner in which dates are made available and the long lead time to obtain those dates, it often happens that trial dates are set, sometimes months in advance, when the action is still in the process of being prepared. It is not uncommon for parties who promised to move with expedition in return for the allocation of dates to then let the action fall asleep. If one is busy it is easy to overlook the fact that nothing may be happening. It is important at least to keep in touch with the parties by correspondence so you can be sure that the action will be got ready. You cannot assume that, because you hear nothing, the action is progressing satisfactorily. It may not be progressing at all.

If you have a case which is in the unmanageable class there is not much you can do about it. I was once to try a building case in which the solicitors for a large national company adamantly refused to take a small sub-contractor's claim seriously. They refused to comply with directions because they believed there was no merit in the claim against their client. The case reviews were like a chapter from a *Kafka* novel. There were endless repetitions of the same scene in which the same actors spoke the same words but nothing ever happened.

I have already indicated that my own approach is to try to get to the heart of a problem as soon as possible; or at least to understand what the heart of the problem is. That task is often made harder these days by the length and complexity of pleadings. According to the preface to the 12th edition of *Bullen & Leake* and *Jacob's Precedents of Pleading*:

> "Accurate, clear and intelligible pleadings, stating the material facts relied on briefly and to the point and sufficient to raise the legal claim, defence or reply, as the case may be, are as essential today as they have ever been, and nonetheless so because the legal results of those facts need not and indeed should not be pleaded".

In paragraph 1 of the work the authors say:

> "(Pleadings) are the means by which the parties are enabled to state and frame the issues which are in dispute between them . . . The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purpose of informing each party what is the case of the opposite party which you will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

That is the ideal. For most of my years at the Bar it was adhered to. In recent years the reality has become rather different. There are, no doubt a number of reasons for this. One, I suspect, is the advent of the *Trade Practices Act* which has seduced practitioners into believing that every case must have somewhere buried in it an allegation of deceptive and misleading conduct in one guise or another. Quite straight forward cases of contractual dispute become bedevilled with allegations of representation, reliance and detriment which take on astonishing degrees of artificiality and contrivance.

The second is the potential exposure of barristers for negligence in their formulation of claims. Not only has the law become more complicated, but to avoid liability practitioners now strive mightily not to omit any possible basis to advance their clients' case, so causes of action multiply and pleadings grow prolix.

Another cause is the discovery of unconscionability as a concept under whose rubric every disappointment and unfulfilled expectation tends to become a loss which must have been caused by an opponent's unconscientious conduct.

The phenomenon of prolix pleadings is not new. In his first "*Miscellany at Law*" Sir Robert Megarry cites two examples, one from the late 17th century and the other from the 18th century which strike a resonance today. The judges then were more robust in the manner in which they handled rogue pleaders. In the first case a plaintiff had his son prepare a replication, which was a form of reply. It took up 120 sheets of paper "yet all the matter thereof which is pertinent might have been well contrived in 16 sheets of paper". The pleader was committed to prison and the jailer ordered to take him around the courts on the following day and, " . . . then and there . . . to cut a hole in the midst of the . . replication . . and put the (pleader's) head through the hole and so let the same hang about his shoulders and . . lead the said (pleader) about Westminster Hall whilst the courts are sitting and show him in the Bar of every of the three courts and then . . take him back . . to (prison)".

In the second case the offending party was himself a barrister who pleaded his own case against eight defendants, each of whom was accused of numerous act of infringing his rights of property. According to Megarry "the declaration was so catching by running charges against all defendants that it was necessary for them to guard every loop hole which made their pleas various and long". The book of pleadings prepared for trial amounted to about 3,000 pages. The court, it was said, was strongly inclined to impose a severe censure but desired first, very properly, to determine whether there was a legitimate claim. It engaged two senior counsel to settle a document setting out the issue properly in dispute. They did it in one day. It took up less than one sheet of paper. The costs of the excessive pleadings, which amounted to £1,000 in 1751, were ordered to be paid by the verbose barrister.

Because misrepresentations often have to be artificially constructed, or implied from facts themselves diffuse, and because unconscionability is a concept general rather than

specific, it is difficult to plead concisely a set of material facts. One tends to see nowadays complex and convoluted pleadings which obscure, rather than reveal, what the fight is all about. It is a real cause for concern because good points can be overlooked or left in obscurity to emerge late in the piece without proper development.

Although I have not yet done so I am seriously considering directing the parties in an appropriate case to prepare a summary of their pleadings. It should be no more than a page or two in length, it should omit particulars, but should set out succinctly the basis of the plaintiff's claim and the grounds on which the defendant resists the claim. It will be appropriate when the pleadings are very long and hard to understand and it is not clear what the dispute is really about. A reason for not doing it is the additional cost the order will impose.

Ideally the summary should be prepared shortly after the close of pleadings and before disclosure and subsequent interlocutory steps. The summary should be as brief as the circumstances of the case permit.

It is absolutely essential to ascertain what is the nature of the dispute before the trial starts. This sounds so obvious you must wonder why I mention it. The reason is bitter experience. Although such occasions are rare I know of one case in which the real nature of the dispute only became apparent after a number of days of evidence had been heard. None of it had been directed toward the real basis of the claim. An adjournment, lost time, and a substantial amount of wasted costs were the result. To avoid such situations it will sometimes be necessary, though one hopes not very often, for the judge to spend sometime, perhaps the best part of a day, in going through the pleadings with the parties to gain an understanding of the respective cases and to divine the case intended to be put forward, so that documents and proofs of evidence can be directed to the real case and not some chimera. The task is tedious and the temptation to put it off is considerable. As well it will incur the parties in additional expense. Nevertheless, if there appears a reasonable suspicion that the pleadings are concealing rather than demonstrating the

issues, the task should be undertaken. It is likely to result in overall economies of time and money.

In a discussion such as this it is not appropriate, and it would not be helpful, to address specific directions that may be made to manage a dispute. It may, though, be apposite to say something about a couple of topics. One is the desirability of splitting issues and separately determining individual questions that arise in a dispute. The *Uniform Civil Procedure Rules* are more liberal in this regard than the former Rules of Court and seem to encourage the determination of preliminary issues, or the separate trial of issues.

Despite this approach my experience does not suggest that there has been much change from the former practice, which was to discourage such a piecemeal approach.

I am personally reluctant to separate issues and to try them distinctly. I expect we have all seen cases in which we were tempted to adopt that approach because it appeared that the resolution of one distinct issue would bring about substantial savings in time and money. My experience is that such endeavours have always been unsuccessful, mostly because of the difficulty in truly separating one issue from the context of the dispute as a whole. Issues are seldom truly independent. Nearly always they are interrelated with other issues, and evidence relevant to one can throw a light on others. A degree of artificiality is involved in determining beforehand that some only of the relevant evidence can be lead with respect to the separate issue. If all of the evidence otherwise admissible in the dispute is adduced on the trial of a separate issue there is no real saving in time or money. Often the precise extent of the interrelationship and the evidence in support of them will not become apparent until the separate trial is commenced when one is faced with the dilemma: abandon it, or conduct what may well turn out to be an inconclusive hearing.

I think these remarks hold good even for the separation of quantum from liability, and questions of construction of contractual terms. As to the first of these, except in the simplest case where nothing much is to be gained by the separation, the assessment of

damages can be effected by evidence principally relevant to liability, and vice versa. For example where damages are claimed for loss of business opportunity, or for what is called consequential losses, the precise nature of what is claimed, and how it is said to arise from an act of negligence or breach of contract, cannot easily be divorced from questions of liability. The point arises: liability for what? The nature of the loss claimed will often indicate that a particular inquiry into the circumstances giving rise to liability is called for. In other words the only issue that might conveniently be hived off is the mechanical calculation of dollars and cents, and that is not usually a matter giving rise to much difficulty so that there is no real point in not determining it with the other issues. If separate hearings into liability and damages are conducted, when the latter is looked at closely it may emerge that a particular claim depends upon a finding on a question of liability that was not addressed because the need to do so was not appreciated in the absence of a debate on damages. The inconvenience and possible unfairness are obvious.

Often in building disputes there is a debate about the meaning of contractual terms and the construction of an agreement can often affect the outcome of at least part of the action. It might appear that questions of construction are therefore especially susceptible to being determined as a preliminary issue. I am skeptical. In my experience even questions of construction can depend upon context, so that to construe provisions of a contract in the abstract, as it were, devoid of context may produce the wrong result or one that is irrelevant in the sense that it does not, in the end, address the real point in contention. Evidence of the facts in dispute and how the dispute has arisen are often helpful, and sometimes essential, to an understanding of what function the contractual term was meant to serve and therefore assist in its construction.

Can I conclude with the description of a technique I have used in dealing with expert evidence in a long trial? Instead of the plaintiff calling its witnesses, including experts, in its case as it saw fit, and the defendant then, perhaps a week or two later, calling its experts, all the experts were called in a short space of time as a separate segment in the trial. The case I have in mind involved four types of expert: accountants, two different disciplines of engineering and chemists. What happened was that the plaintiff called its

accountant who was examined and cross-examined; then the defendant called its accountant who similarly gave evidence. This procedure was then followed for the other experts so that the parties and the judge had the opposing opinions and arguments neatly confined and debated in a manner most conducive to an appreciation of the issues and their resolution.

The procedure obviously requires the cooperation of the parties. The Rules of Court do not extend so far as to compel a plaintiff to let a defendant call witnesses before its case is closed, or to compel a defendant to call witnesses in the plaintiff's case.

In long cases involving several experts on each side I think the idea is a good one.