

**Judges' Case
Management
Perspectives: the views
of opinion formers and
case managers**

for

The Lord Chancellor's Department

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1 INTRODUCTION

1.1 Background to the study

The justice system is currently embracing case management with unprecedented enthusiasm, but the courtship has a long history. As far back as 1895, the Commercial List was introduced to speed up the resolution of commercial disputes by assigning them to a specialist judge. More recent examples included the 1986 Fraud Trials Committee's proposal that the trial judge be nominated at an early stage to act as 'case controller' for serious fraud cases from discovery to verdict. In 1988, a Civil Justice Review was completed¹, and the Patents County Court was created to increase the speed and reduce the costs of hearing less complex disputes. In the same year, steps taken to reduce waiting time in the Queen's Bench included giving a High Court judge charge of the general list, removing cases which had been settled or withdrawn and announcing sanctions for non-compliance. In 1994, Area Criminal Justice Liaison Committees were encouraged in to introduce fast-track schemes for cases involving child witnesses to ensure they received the priority assigned to them by government policy. Recommendation 92 of the Pre-Trial Issues Working Group Report² advocated that magistrates' courts should commit defendants to appear on a specific date in the Crown Court in order that a plea could be taken and directions given. After pilot evaluation, plea and directions hearings (PDHs) were introduced nationally on a phased basis during 1995. In the same year, the Lord Chief Justice and Lord Chancellor issued a Practice Direction on the case management of civil litigation.

Despite some successes, these and other initiatives failed to combat an underlying trend of delay in civil and criminal cases. In family and civil cases, attention turned to more far-reaching solutions which placed increasing responsibility on the judiciary for the pace of litigation.

¹ 'Civil Justice Review' Report of the Review Body on Civil Justice.

² November 1990.

The Children Act 1989 set no overall deadline for the duration of child care cases, but directed courts to timetable applications for orders without delay and to give directions for adhering to the timetable. In the civil arena, the final report of Lord Woolf's enquiry into civil justice was published in July 1996.³ It called for a fundamental shift in the ethos of civil litigation which traditionally allowed the parties to dictate the pace at which cases proceed. In the new environment, the courts take control by assigning cases to "tracks" according to their value and complexity and by ensuring that the timescales established by the court at the outset are complied with.

In October 1996, the government of the day published *Access to Justice: The Way Forward*. This accepted the general thrust of Lord Woolf's proposals and announced a programme of work leading to the implementation of the new regime. This commitment was reaffirmed by the government elected in May 1997. The incoming Lord Chancellor appointed Sir Peter Middleton to review both Lord Woolf's proposals and those for changes to the legal aid system. This and subsequent discussions with the legal profession resulted in some changes in detail and timescale but the spirit of the Woolf proposals was preserved in the reforms implemented on 26 April 1999.⁴

The previous government also set in train the events leading to the reform of criminal justice procedure. In 1996, the Home Secretary asked Martin Narey, a Home Office civil servant, to undertake a review identifying "ways of expediting the progress of cases through the criminal justice system from initiation to resolution, consistently with the interests of justice and securing value for money".

The Narey report was published in 1997⁵ and at its heart were recommendations for streamlining the passage of cases through the system by more effective case management. The incoming government shared the concerns over delay in criminal justice, particularly in relation to young offenders, and the Crime and Disorder Act

³ Access to Justice (Final Report), Right Honourable the Lord Woolf, Master of the Rolls.

⁴ Complementary changes in procedure were introduced to the Civil Division of the Court of Appeal in May 2000, following the recommendations of a review by Sir Jeffery Bowman.

⁵ Review of Delay in the Criminal Justice System: a report (February 1997) Home Office.

1998 gave legislative force to many of Narey's recommendations. Among its measures are provisions to allow statutory time limits to be set for key stages in the passage of cases through the criminal justice system. Core measures designed to speed up the passage of cases through magistrates' courts have already been piloted, evaluated and rolled out. Other measures in the Act permit indictable only cases to be transferred directly to the Crown Court, bypassing committal. This was introduced nation-wide in January 2001.

1.2 The context of the study

The success of civil, family and criminal justice initiatives to reduce delay and cost depends on the development of case management skills by the judiciary and magistrates. Judicial training to implement these reforms has traditionally been jurisdiction-specific and knowledge-based rather than skills-based. As researchers, over the past ten years we have written about the implementation of case management initiatives in the U.S. federal courts and in England and Wales. We noted the pressures for judges to become hands-on case managers, and attempts to reduce the wide variations in judicial practice arising from 'local legal culture'.

In 1998, we approached the Lord Chancellor's Department with a request to conduct a 'snapshot' study of this changing judicial culture by interviewing those regarded as leaders and opinion formers as well as some case management practitioners. In previous studies, judges had often told us that effective case control was largely 'down to personality'. We wanted to go beyond this viewpoint in a qualitative study which would explore with judges what they saw as case management skills and how these could be acquired. Civil, family and criminal courts often share judicial resources and we wanted to see whether lessons learned in the criminal arena could be read across to civil and family business, and vice versa.

In England and Wales, cases are assigned to the same judge from filing to disposition only in specialist jurisdictions or particular circumstances. In order to maximise flexibility, most courts use a system in which cases are assigned to available time slots or lists, and may therefore pass through different judicial hands as the case proceeds. We wanted to assess whether case management initiatives had heightened judges'

collective responsibility for case progress. We were also interested in discussing the impact of case management on working relationships between the judiciary and administration.

1.3 Aims and objectives

The overall purpose of the study was to identify key features of successful approaches to case management which are independent of jurisdiction and level of court. Other objectives were:

- to identify and describe the skills involved in judicial case management
- to identify ways of promoting consistency among judges working together
- to consider the effect of case management on the organisation of judicial work, including reading time in advance of a hearing
- to describe arrangements between administrators and judges relating to case management, including the need for technological support
- to consider the implications for training.

1.4 Methodology

The study was based on interviews with representatives of all levels of the judiciary. These were transcribed and sent to interviewees for checking. In the first phase, interviewees with ‘opinion formers’, namely those with a key role in the development and implementation of case management reforms, were identified with the assistance of the Lord Chancellor’s Department. Those interviewed in the first phase suggested judges for us to speak to in phase two. We spoke to judges in the family jurisdiction and, in the Crown Court, to those with experience of conducting PDHs. Interviews were also conducted with resident judges in areas piloting the transfer of indictable only cases from the magistrates’ court directly to the Crown Court.⁶ In the civil arena, we spoke to High Court judges, designated civil judges, Masters and district judges and to judges who sat in the Technology and Construction Court, the Commercial Court, the Patents Court and the Mercantile Court. For the most part, these interviews

⁶ This information contributed to Ernst and Young’s report ‘Reducing Delay in the Criminal Justice System: Evaluation of the Indictable Only Initiative’ (June 2000).

did not begin until April 2000 to ensure experience of the new Civil Procedure Rules. Interviews were also held with personnel from the Lord Chancellor’s Department and the Judicial Studies Board.

The programme of interviews was supplemented with attendance at two judicial seminars organised by the Judicial Studies Board. One of us observed a Stage 2 ‘Access to Justice’ Seminar in February 1999 and both gave a short presentation about the study’s preliminary findings at a Civil Continuation Seminar in May 2000. The presentation included feedback from the audience on the operation of case management under the new civil procedure rules. Following the session, concern was expressed that the study had insufficient information on the views of district judges. Written responses were received from two district judges and telephone interviews were subsequently held with five district judges. The numbers of judges consulted during the study are set out in the following table:

Table 1: Numbers of judicial interviewees	
Level of judge	Number interviewed
Lord Justices of Appeal	5
High Court Judges	7
Circuit Judges	21
Masters of the High Court	2
District Judges	8
TOTAL	43

The following chapters discuss judicial views according to key issues of interest. The final chapter sets out the conclusions of the study.

The type of judge being quoted is indicated using the abbreviations LJ, HCJ, CJ and DJ for Lord Justice of Appeal, High Court Judge, Circuit Judge and District Judge respectively.

The study was carried out between September 1999 and June 2000. In view of the timing, it was perhaps inevitable that the new civil procedure rules introduced in April 1999 were uppermost in the minds of many interviewees. It is important to emphasise that evaluating the impact of the new rules was not part of the study terms of reference.

A draft report was submitted to the Lord Chancellor's Department in September 2000. Its comments have been incorporated. The Department points out that, since the interviews were conducted, the impetus for judicial case management and working in partnership with court staff has increased. The judicial views expressed in this report should therefore be seen in the context of the time when the interviews were conducted.

1.5 Acknowledgments

We would like to thank the many judges who participated in the study. They all gave their time generously of their time both in interview and in painstakingly checking and correcting our notes of the discussion. This report is almost entirely a reflection of their thoughts.

2 JUDICIAL PERCEPTIONS OF CASE MANAGEMENT

2.1 Introduction

The principle of case management is that the court, rather than the litigants, controls the pace of litigation: ‘Case management is not the ‘nanny’ judge who knows best being brought in to punish the ‘naughty boys’ of the profession. It is a modern approach to dispute resolution which seeks to move away from the bitter adversarial clashes of the past and encourage a greater degree of cooperation and partnership between all concerned.’⁷

All interviewees were asked what they saw as the new judicial tasks and related skills in a case managed environment. The responses revealed a diversity of views ranging from those who saw little impact on their previous practice to those who perceived a fundamental and profound change in the judicial role.

Judges who were advocates of case management shared a common view of its fundamental principles. They saw a need to:

- take control at an early stage by setting the timetable
- adopt an inquiring style in identifying key issues
- secure the cooperation of participants in case management.

Other factors which were considered desirable included:

- assigning the same judge to a case from filing to disposition, or at least through pre-trial case management
- ensuring that compliance with the timetable was monitored.

⁷ Master Turner ‘Some thoughts on the multi-track’ Inside Track, Law Society Civil Litigation Newsletter Issue 2 (December 1997).

Judges generally took a more robust view of their case management role in relation to the new Civil Procedure Rules and the family jurisdiction than in the criminal jurisdiction.

2.2 Judicial control of the proceedings

‘Speedy trial’ legislation, which introduced custody time limits to criminal cases tried in the federal courts of the USA in the 1974, required judges to get to grips with case management for the first time. As criminal cases were given increasing priority, civil backlogs grew. In consequence, federal judges gradually extended principles first learned in managing their criminal caseload to civil litigation. In this country, although case management was given a higher profile as a result of custody time limits, many interviewees observed that key case management skills developed not in the criminal jurisdiction but as a result of pioneering work by the Official Referees⁸ and in family court rulings and Practice Directions arising from the Children Act 1989. There are close parallels between judicial case management responsibilities in Children Act applications and in the fast track procedures under the Woolf reforms.⁹

The ability to focus on key issues, anticipate what difficulties might arise and to set a firm, realistic timetable was seen as fundamental to good case management whatever the jurisdiction.

“A strict programme is needed to ensure that cases are properly organised so that they take less time in court. The task of the judge in civil proceedings is to read the papers beforehand, know the history of the case, lay down its future course and cut down the issues.” (*LJ*)

“In crime and family work we need to think at an earlier and earlier stage about the pitfalls and problems and to plan ahead.” (*CJ*)

⁸ Now judges of the Technology and Construction Court.

⁹ District Judge Vincent ‘The view of a district judge’ Civil Justice Reforms Supplement to the JSB Journal (1999).

An interventionist approach on the part of the judge was seen by most as an essential part of good case management in both civil and criminal cases.

“The key is being proactive. If the judge is a neutral referee who only intervenes to apply the rules, then that is not case management.” *(CJ)*

“Judges in civil cases now have a liberated role. They can be inquisitive and can intervene to a much greater degree. Previously, the parties were allowed to proceed at their own pace. Trial dates were not taken seriously and could easily be adjourned. Now all that has changed. Interventionism is a slightly aggressive word but it can be helpful in focusing minds on the real issues.” *(CJ)*

“In the traditional court, the judge used to sit like a ‘cigar store Indian’. This is not what the Woolf reforms require. Being interventionist means taking control away from the practitioners.” *(CJ)*

“The judge should always be asking ‘what do we do next?’. The parties must understand that they will always be expected to respond to this question.” *(HCJ)*

“The heart of the process is to identify the issues and to get the defence to say where they stand. You can only do this by giving the judge the opportunity to ask probing questions.” *(CJ)*

A PDH is required in every Crown Court case in accordance with practice rules issued by the Lord Chief Justice in 1995.¹⁰ A copy of the Judge’s Questionnaire, completed as far as possible with the agreement of both advocates, is to be handed in to the court before the start of the hearing to inform the PDH judge in making listing decisions and issuing orders about case management. Where the form is incomplete, the judge may press the parties for more information. The PDH is a crucial opportunity to exert

¹⁰ A scheme to use PDHs more selectively has been piloted in Derby, Luton and Preston.

judicial control. One judge has written that ‘PDHs are of little value if they are not conducted by a small team of judges who believe in their usefulness and who are prepared to conduct them properly’.¹¹ In 1996, as part of the Narey exercise, we carried out over 50 interviews about the effectiveness of PDHs, including 10 with judges at different Crown Court centres. Respondents in that study agreed that adoption of a managerial approach by the PDH judge was crucial to effectiveness, and some judges were not considered sufficiently robust when questioning the advocates.

Some judges dealing with criminal cases took a firm case management position. For example, one said that he preferred to fill in the PDH checklist himself rather than have counsel do it, so that he could ask the questions. Many interviewees felt constrained in taking an interventionist role in the criminal process because they saw this as incompatible with the judge’s neutral stance. Such views were epitomised by a Crown Court judge who wrote: ‘In the past, the judge was not involved in the wrangling over listing. The system was based on the notion that the judge came to each criminal case as an unbiased arbiter, without previous knowledge of either side... Now, English judges are expected to be up to their elbows in the minutiae of every case - the witness problems, the listing problems - long before it comes to trial. We are expected to bully both sides into getting their case in order, to disclose all of their secrets to the other side; and to do the listing officer’s job for him.’¹² In family cases also, some interviewees thought it was appropriate to take a ‘lighter hand’ in case management.

“In family work, even a minor order can fuel a dispute rather than resolve it. A judge can guide and influence and suggest but must remember that children will be used by the parties for their own ends.”(LJ)

“The problem with crime is that the defendant pleads to a general issue when pleading not guilty whereas in civil matters the issues are specific

¹¹ Judge Crane JSB Journal, Issue 1 (1997).

¹² Judge Crabtree ‘Comment’ Archbold News (23 November 1999).

points. This makes it harder for the judge to be proactive in crime.”
(*CJ*)

“In the criminal jurisdiction, there is still a reluctance to be interventionist. It is seen as interfering with the defendant's right to a fair trial. The received wisdom is that the jury will not like it if you intervene too much.” (*CJ*)

In the past, some judges questioned the merit of holding a PDH in all cases.¹³ Interviewees in the current study also reflected mixed views about the value of PDHs in all cases.

“Some courts still regard PDHs as a nuisance. There is quite a widespread feeling that PDHs are a waste of time.” (*HCJ*)

“It is a long hard slog to bring in effective PDHs because judges need to be educated to identify the issues.” (*CJ*)

“When I went on circuit, I often found that PDHs were rubber-stamping exercises.” (*HCJ*)

“I do not see it as my function to press for a guilty plea at the PDH. It is an administrative hearing.” (*CJ*)

“The failure of PDHs to meet expectations is a significant issue. The PDH judge has no time to prepare; PDHs are paid so badly that advocates do not address the issues; those who attend are too junior to ‘deal’; legal aid no longer pays for conferences so instructions have not been taken from defendants; altogether there is a cultural inability to get to grips with the case until it gets to trial. If we could get PDHs right, it would make a difference.” (*CJ*)

¹³ Judge Balston ‘Plea and Directions Hearings’ *JSB Journal*, Issue 1 (1997).

Some judges attributed part of the difficulty to the lack of clear, shared objectives in criminal case management.

“I would like to see a Practice Direction from the Lord Chief Justice on case management in criminal cases. We have to stimulate an enthusiasm for this. It will need careful thought about how to overcome the nature of the defence culture and in order to comply with Article 6. The senior judiciary would need to consult widely with judges, defence and prosecution.”

Following the Narey report’s recommendations, section 51 of the Crime and Disorder Act 1998 required indictable only cases to be sent directly to the Crown Court after one or two hearings in the magistrates’ court, thus bypassing committal. The Crown Court then holds one or more preliminary hearings prior to the PDH. These provisions were evaluated in the nine Crown Court centres covering the Narey pilot areas. The subject matter of what was dealt with at preliminary hearings differed markedly across pilot areas, and resident judges’ views of the value of these hearings varied.

“We are not in control at preliminary hearings as we are at PDHs. We are just being told about the case - it’s not ‘hands-on’ because we have not got our hands on anything.” (*CJ*)

However, in the pilot courts most resident judges saw the preliminary hearing as an opportunity to take control of the case timetable.

“The whole point of Narey is for the judge to be managerial. Case management is in place in civil cases and the indictable only pilot is a good start for criminal cases. The advantage is that the judge can speed it along.”

“Judicial control is exercised at the preliminary hearing and the parties are told to get their skates on. I am trying to home train the legal community.”

“The choice of judge is crucial and having a team approach is absolutely essential. In our team, we are all equally beastly. If judges are not robust about PDHs, they won’t be about preliminary hearings. They do not recognise the value of investing judge effort. If you knock out a trial at this stage, you’ve paid for the investment. It does not have an adverse effect on trial work.”

Even in the civil jurisdiction, judges noted that the new case management powers were not welcomed universally.

“There are some judges who are much less willing than others to crack the whip, no matter how much they are told that it would be beneficial to the system and themselves.” (*HCJ*)

“Some older colleagues do not, perhaps, view intervention so favourably. Most circuit and district judges seem to like the interventionist role.” (*LJ*)

“Many district judges and even designated civil judges are still hands off and this is hard to change overnight.” (*DJ*)

2.3 Judicial continuity

In general, interviewees felt that case management skills could be exercised most effectively where the same judge was responsible for the pre-trial hearing(s) as well as the trial. In the *‘Access to Justice’* interim report, Lord Woolf acknowledged the problems caused where ‘different judges... at different stages have to spend time making themselves much more familiar with the facts of the same case so as to manage

the case satisfactorily'.¹⁴ He was impressed by the American 'single docket' system but noted that it achieved maximum continuity at the expense of minimising flexibility in judicial deployment. Lord Woolf recommended instead that civil case management be conducted by teams of judges and that a procedural judge should 'always' be in charge of the case throughout the period during which it proceeds to trial. In his final report, Lord Woolf recommended the involvement of a procedural judge in the 'majority of cases'.¹⁵

In many Crown Court centres, the resident judge has appointed a group of judges to conduct PDHs rather than distributing the work among all judges of the court. This approach was recommended by Lord Justice Auld.¹⁶ Our 1996 PDH study indicated that, despite the designation of a 'team', some centres had not developed a collegiate approach to PDH case management. Interviews in the present study suggested that this was still a problem, made worse where the PDH judge was not the trial judge.

"The criminal PDH is less effective because the judge is not necessarily the trial judge and so decisions can be ignored." (*HCJ*)

"It would be different if the PDH judge was also the trial judge. If it is not your trial, you have less personal investment in the case at the PDH. If you are the trial judge and did not do the PDH you may be less insistent on enforcing its decisions." (*CJ*)

In the indictable only pilots, with the exception of the smaller courts, resident judges responsible for allocating judges to preliminary hearings did not try to achieve continuity of judge between the preliminary hearing and the PDH. The resident judge of a large centre described this as 'asking for the moon'.

¹⁴ Paras. 11.20, 11.22, Interim Report (June 1995).

¹⁵ Para. 8.13, Final Report (July 1996). Woolf emphasises that 'procedural judge' is a function, not a title for a new type of judge.

¹⁶ 'Guidance for Judges from the Senior Presiding Judge' (November 1995).

Lack of judicial continuity was seen as an impediment to case management in parts of the civil jurisdiction.

“In Chancery, a Master usually takes the case management conference. There is limited scope at that hearing for case management, as the Master will not want to pre-empt the judge. Ideally, the trial judge would do the case management conference in cases of any size but resource constraints preclude this in all but the very biggest cases.”
(HCJ)

“The key to successful case management is judicial continuity, something we simply do not have in the High Court. I have to manipulate things in order to achieve it.” *(HCJ)*

Continuity was more likely to be achieved in longer and more complex cases, where pre-trial management was most important.

“There is the question as to whether the case management judge should also try the case. For most cases, this is not practical here but we would try to do it in a long and complex case.” *(CJ)*

“If a trial is expected to last five days or more, it is better if a judge does the case management. However, it must be the trial judge in order to reap the benefits of this approach otherwise it suffers from the same defects as using a Master.” *(HCJ)*

In the specialised jurisdictions, judicial continuity was a priority, at least for pre-trial case management.

“In the Mercantile Court and the Commercial Court, cases are handled by a specialist judge throughout. This creates continuity of case management which works well.” *(HCJ)*

“Judicial continuity from cradle to grave has been a feature of work in the Technology and Construction Court for many years. Despite this, less than 50 per cent of our cases are actually tried by the case manager. This is because of the constraints on listing caused by the length of trials, which can last for up to 80 days. We feel it is more important to have consistency during the case management process than to have the case tried by the case manager.” *(HCJ)*

Continuity was considered highly desirable in family cases, where listing practice in some courts made it hard to achieve. Some family judges thought the county court should have an allocation system to ensure judicial continuity. Problems are particularly likely to arise when criminal and family proceedings relating to children arise out of the same set of events. In a pilot scheme, pre-trial issues for both criminal and family proceedings are dealt with by the same judge but not one who will preside over the dispositive hearing in either case. These joint directions were reported to be working well. The methodology has been discussed at Judicial Studies Board seminars but there are difficulties in implementing this scheme more widely, not just because cases with parallel proceedings can be hard to identify but also because only a minority of circuit judges are qualified to preside at both categories of hearing. One such judge referred to a Family Division judgment which says that where there is a question of releasing documents from family proceedings to the criminal case, then the application should be dealt with by the family court judge. He pointed out that this is not a sensible approach because the family court judge would not necessarily be familiar with the third party disclosure issues in criminal cases.

Views differed as to whether the judge conducting pre-trial hearings needed to be an experienced trial judge. Much depended on the jurisdiction. The specialist civil courts felt that it was a strength that even when the case manager was not the trial judge, he or she had trial experience. In such jurisdictions, the involvement of a Master was not considered appropriate. In contrast, it was generally accepted that due to the volume of general civil work in which over 90 per cent of cases settle, case management had to be carried out by Masters and district judges. On the criminal side, where many more cases come to trial, most judges took the view that ‘case management judges should be

senior and authoritative'. Circuit judges routinely conducted PDHs for cases to be tried by High Court judges, who were rarely available to conduct the PDHs themselves. Recorders were only assigned to PDHs when otherwise the court would not get through the list. However, a few judges thought there was a need for a new tier of judge to address pre-trial matters.

“The criminal jurisdiction could learn from experience in the civil arena and not confine case management to the most senior judges.” (*H CJ*)

“We need pre-trial procedural hearings with a ‘criminal district judge’ who would sort out disclosure and other interim matters.” (*CJ*)

“If there were dedicated case management judges in criminal work it is doubtful whether there would be enough for them to do. Also some of the issues, for instance those relating to the counts on the indictment and acceptable pleas, are profound and impinge on the final outcome of the case. Decisions on such matters need to be taken by judges with trial experience.” (*H CJ*)

The Senior Master has pointed out that the present overlap in County Court and High Court jurisdictions is confusing, citing as one example ‘the anomaly that a district judge is usually also a judge in the High Court and can deal with the High Court business whilst a circuit judge is restricted to County Court business unless he is specifically authorised to take High Court work’.¹⁷ Some judges described the case management problems that emerged as a result of the designated civil judge not being a judge of the High Court. District judges were encouraged to refer cases upwards for case management if necessary. Outside London, around 90 per cent of trials in High Court multi-track cases are heard by circuit judges after release by the Presiding Judge. (County Court multi-track cases do not require release.)

¹⁷ Senior Master Turner ‘New rules for the millenium’ *NLJ Practitioner* (21 January 2000).

“This has left a huge gap in case management. There was no scope for Queen’s Bench cases to be managed by circuit judges unless they were specifically released for that purpose. As district judges are procedural judges of the High Court, if they needed help the request had to be forwarded by the DCJ to the Presider who could then authorise that the matter be released. This was unnecessarily cumbersome so it was eventually agreed with the Presider that the DCJ could allocate High Court cases to the appropriate judge for management. The sensible way forward is to create a unified civil jurisdiction and to introduce a proper system within that jurisdiction for allocating cases to the appropriate level of judge.” *(CJ)*

2.4 Cooperation of case participants

Many factors beyond direct judicial control affect the success of case management initiatives. Effective case management relies on the quality of preparation for hearings by case participants and their willingness to comply with court orders and timetables. Judges in the Crown Court referred to the difficulty of imposing sanctions on the defence for failure to comply with case management directions, although not all saw this as a barrier:

“I have disallowed costs for the PDH retrospectively when the orders made were not complied with. This happened only once but it had a salutary effect. Word spread quickly among the legal community and there has been no repetition.” *(CJ)*

The overriding objective of the new civil procedural code, to enable the court to deal with cases justly, imposes specific obligations on both courts and parties. Judges commented on the value of the overriding objective in creating a new cooperative atmosphere.¹⁸ Designated civil judges were expected to lead discussions with local court users and to get involved in local practitioners’ training initiatives.¹⁹

¹⁸ Rule 1, Civil Procedure Rules.

¹⁹ Judge Gibbs ‘Designated civil judges’ JSB Journal Issue 6 (1999).

“The concept of cooperation from lawyers is a major new feature. It has been key to the success of case management.” *(CJ)*

Outside the courtroom, there was thought to be an onus on the judiciary to use opportunities, wherever possible, to raise practitioners’ awareness of changes to civil procedure and obtain feedback about problems. This had worked best in the specialist jurisdictions which involved smaller groups of practitioners. Some judges thought it was necessary to look beyond court user groups as a means of obtaining feedback from the professions. Attendance was often erratic and it was not a setting in which participants often felt comfortable about raising problems.

“Feedback from the profession is that intervention causes some friction, at least with the parties who lose. Meeting the profession informally helps to ameliorate this.” *(HCJ)*

“It is important to have a mechanism allowing judges to tap into general concerns and worries from the profession before these escalate. We make a point of meeting solicitors and the Bar informally. One example will illustrate the importance of this informal feedback. Some practitioners had complained about the variation in approach between judges to the immediate assessment of costs. When this was discussed with a solicitors’ group, it emerged that, despite the perceived inconsistencies, it was very popular with clients because of the speed and certainty it provided. Such meetings are more productive than the formal court users committee. A mixed group may actually fetter discussion. As judges become more senior, they get more distant from the profession. It may be easier to encourage two or three younger judges to meet as a group with practitioners. This would help improve the reputation of the court.” *(HCJ)*

Unrepresented litigants present specific challenges to judges from the point of view of case management. The civil and family jurisdictions are most affected as the

overwhelming majority of defendants in the Crown Court are represented. Lord Woolf referred to the increasing numbers of litigants in person and the problems they face: ‘only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists.’ He called for courts to ‘take a more proactive role in relation to unrepresented litigants, both in giving information about sources of professional advice and other outside help, and in themselves providing direct assistance. Both court staff and judges must recognize the needs of litigants in person and, if necessary, adjust their approach so that there is no suggestion that they are being treated as an exception or even a nuisance.’²⁰

Judges were concerned that dealing with litigants in person was particularly resource intensive. Proposed solutions focused on the need for advice and assistance to be provided. A few judges thought there was a training need in relation the way litigants in person should be dealt with, and this is discussed in chapter 5.

Interviewees distinguished various categories of litigant in person, including those who were obsessive and who could not perceive the rights and wrongs of the matter; the manipulative; ‘professional’ litigants in person; and the hopelessly lost. Some would have a legitimate case but all imposed significant demands on system resources. It was difficult for a judge to accommodate the needs of the litigant in person and still be seen as maintaining an even-handed approach.

“Judges have to bend over backwards to explain court procedure to them but other parties can feel aggrieved if the judge is seen to be helping a litigant in person too much. They may feel ‘I am paying a lawyer and I seem to be suffering as a consequence’.” (*CJ*)

“Explaining cost issues to litigants in person can be difficult. For instance, if a defendant does not qualify for legal aid and the value of the case is around £8,000, does the judge say ‘if you lose, you will be

²⁰ ‘Access to Justice’ Final Report (1995) paras. 17.2-3.

liable to pay not only £8,000 but also costs which could bring the total to (for instance) £20,000'? The litigant may feel pressured if this is done." *(CJ)*

"When the judge is quick or brusque with counsel it is not seen as unjust but this approach is not appropriate with litigants in person." *(HCJ)*

Views differed as to the impact of the civil justice reforms on litigants in person. It was thought that they should not be exempt from the new rules although there was scope for leniency when applying sanctions. Several judges thought that though there was less legal jargon, the new procedures were not any easier for litigants in person to understand. However, some judges saw new opportunities to help.

"They still find the court process hard. If anything, we explain more to them than previously. It is now easier to manage cases involving a litigant in person as there is more scope to tell them what to do and to write to them in response. I can do more on my own initiative." *(DJ)*

"Previously, a litigant in person might not come to court until the day of trial: now there is a reasonable chance that they will come in earlier and that is the opportunity for them to be advised." *(CJ)*

Others saw the new procedures having made the management of such cases more difficult.

"The reforms have made things more difficult as litigants are encouraged to throw in everything in their submissions to the court." *(Master)*

Suggestions for improving the response to unrepresented litigants included the development of a range of explanatory materials and a video. However, what most

judges wanted to see was an expansion in advice and assistance, on the basis that expenditure on such schemes would save time and costs in court.

“Money should be made available for advice to be provided, for instance by the Citizens’ Advice Bureau. It would not be possible to put them into every county court but, for instance, a CAB adviser could be present on mortgage repossession day. Deserving cases could be referred to a professional legal adviser by the CAB.” *(CJ)*

“We run a duty solicitor scheme here on Wednesdays for housing work (a flyer goes out out with every claim form); most London courts do this, or have a CAB representative. Very few defences are filed; they just turn up. The ideal would be to have a CAB attached to every county court.” *(DJ)*

The Court Service advised us that, over the last ten years, many courts have developed partnerships with local advice agencies on a voluntary basis. In a 1999 survey, 118 different schemes operated in 102 county courts (under half of all county courts). Of these schemes, 62 per cent covered housing only, 29 per cent covered debt and 9 per cent dealt with other aspects of court work such as family business. Schemes dealing with housing provide cover for a majority of the housing work dealt with in all county courts.

3 CONSISTENCY

3.1 Introduction

Since the Children Act 1989 was implemented, a number of case management decisions and Practice Directions have promoted greater consistency of approach in family proceedings. These were reinforced by reports of good practice from the Children Act Advisory Committee issued between 1991 and 1997. In criminal proceedings, PDHs have been the subject of Practice Rules, guidance from the senior judiciary and research reports, all aimed at promoting a more effective standardised approach. When the new Civil Procedure Rules were introduced, the need for more consistent case management was emphasised to an unprecedented extent. The Lord Chancellor approved the appointment of designated civil judges ‘working on behalf of the Vice Chancellor as Head of Civil Justice, the Senior Presiding Judge and other supervising judges to promote consistency in the application of case management principles.’²¹ Objectives for Judicial Studies Board seminars included providing judges with the opportunity to ‘develop a common approach’. The job description for designated civil judges refers to their responsibility to ‘secure consistency of approach and eliminate local practice’. Noting the consequence of the civil justice reforms to extend significantly judicial discretion concerning case management decisions, the Lord Chief Justice has observed that this ‘requires a degree of consistency and the use of training and discussion to promote consistency is clearly very important’.²²

Critics of case management point out that giving judges discretion to exercise judicial control brings with it greater scope for inconsistent judicial decision-making. Writing shortly after the publication of Lord Woolf’s Final Report, Michael Zander observed that ‘the impact on the final outcome of cases may be uncertain but inconsistency in handling the new procedural powers will potentially create a sense for litigants (and even more for their lawyers) of justice not being done and not being seen to be done’.²³

²¹ ‘Nine months to go’: Implementing Civil Justice Reform Progress Report (1998).

²² Lord Woolf ‘The Needs of a 21st Century Judge’ Address to the Judicial Studies Board, London 22 March 2001.

²³ ‘Consistency in the exercise of discretionary powers’ New Law Journal (1 November 1996).

We asked judges whether they felt that consistency of approach to case management was desirable and, if so, how it can best be promoted. Unless otherwise stated, most of these responses were given in the context of the Civil Procedure Rules.

3.2 Is consistency desirable?

In the civil arena, where consistency is now an explicit objective, there was a general consensus was that a measure of consistency was necessary to ensure confidence in the system.

“The court user is entitled to expect consistency.” *(HCJ)*

“Some degree of consistency in case management is important because parties need to know where they stand.” *(CJ)*

“Collegiality and the promotion of consistency are important.” *(DJ)*

Several judges distinguished consistency of approach from consistency of outcome but did not agree on which was more desirable. Many qualified their commitment to consistency with the need to preserve judicial independence.

“Consistency is important but not crucial. It is important because practitioners should know what will be the judiciary’s likely attitude to case management. It is not crucial because there is always a need for flexibility. But it is not acceptable to have one judge who is completely out of line”. *(CJ)*

“Consistency is impossible to achieve because of the need for judicial independence. Actually, I would be worried if our decisions became too consistent.” *(Master)*

“The point of case management is to give ‘tailor-made’ directions in each case, not standard ‘off-the-peg’ directions. Consistency of that kind is not only impossible but undesirable.” *(DJ)*

“Case management is largely a matter of discretion so there is great scope for inconsistency.” *(CJ)*

“In relation to decision-making in the hearing of cases, there needs to be some nation-wide consistency.” *(HCJ)*

Interviewees drew a distinction between the authority of the resident judge and that of the designated civil judge as promoters of consistency.

“In civil matters it is the role of the DCJ to promote consistency. In criminal cases it is more difficult. Resident judges have no authority over their colleagues.”

“Consistency is hard to achieve in criminal matters. There may be a need for rules in the conduct of PDHs. As a resident judge, I receive some feedback on the conduct of cases but the provision of information needs to be more systematic.”

“Some degree of consistency in case management is important, though those of us here who do PDHs probably all do things differently”.

“In the Crown Court, the resident judge must manage cases with the support of a like-minded team around him. It is hopeless if one judge is hands-on while another in the same court is hands-off.” *(LJ)*

“The resident judge is known to take a firm line in his own court. He may be bullish with the advocates but not with his fellow judges”. *(CJ)*

3.3 The appellate process

Some judges regarded the appellate process as the primary mechanism for ensuring consistency.

“Decisions of the Court of Appeal are important in promoting consistency.” (*LJ*)

“If we adopt different solutions to problems it does not matter as long as they work. The differences between courts are not monitored - the Court of Appeal is there to remedy any injustice.” (*CJ*)

In his 1996 article, Michael Zander was skeptical about the effectiveness of the civil appeals process in promoting consistency: ‘Each judge will apply his new discretionary powers according to his lights doing his best in the circumstances of the individual case. The Court of Appeal’s role in promoting consistency will be minimal, partly because appeals will often be prevented by refusal of leave and partly because the appeal court will generally uphold the exercise of the judge’s discretion.’²⁴

Appellate judges acknowledged the importance of the Court of Appeal’s monitoring role but emphasised that it was only likely to deal with significant cases or points of practice or where ‘something is clearly wrong’. Echoing Zander, it was agreed that the Court was very unlikely to interfere with sensible exercise of discretion, therefore limiting its role in promoting consistency. In any case, fewer case management decisions than expected had been appealed.

There was a question about the commitment of the Court of Appeal to case management.

“If judges do not feel that they are backed up by the Court of Appeal, they are less likely to intervene and parties may be encouraged to try to

²⁴ ‘Consistency in the exercise of discretionary powers’ *New Law Journal* (1 November 1996).

overturn case management decisions. I don't feel that there is great enthusiasm in the Court of Appeal for case management; its judges tend not to have been trial managers. There is not a sense that the back-up is there." *(HCJ)*

"There needs to be backing from the Court of Appeal for a tough line on case management in criminal proceedings, particularly concerning in relation to the disclosure provisions in the Criminal Procedures and Investigations Act." *(CJ)*

The new procedures gave designated civil judges the opportunity to promote consistency through ruling on appeals in case management matters.

"I say to solicitors, 'if you have a rogue district judge, appeal him'. All appeals go to the DCJ who should address this. The system was intended to ensure that there would be consistency from the bottom up as well as the top down." *(DJ)*

One Lord Justice thought designated civil judges could be more influential than the Court of Appeal in this respect. However, as with the Court of Appeal, there have been fewer appeals than anticipated to designated civil judges. One questioned the wisdom of giving them this responsibility.

"It might encourage a consistency that is linked to the idiosyncrasies of a particular DCJ. The matter was taken out of my hands as pressure of work meant I had no choice but to delegate some such appeals to other judges. Moreover, our administrative system was not always capable of identifying such appeals, so they were sometimes heard by other judges even without reference to me."

Interviewees perceived inconsistencies in the way that designated civil judges approached their responsibilities.

“Some DCJs lack the vision to spot weaknesses in their team and are not resourced to do so. Some DCJs are good at this and others do little.” *(LJ)*

The comments of some designated civil judges highlighted the range of approaches adopted to promoting consistency.

“If a district judge makes an inappropriate order, this is picked up by court staff and referred to me. I then put on FELIX [the judicial electronic bulletin board] what the order was, who made it and what was wrong with it.”

“I cannot tell district judges what to do although I can make suggestions. We had a debate about whether routinely to impose sanctions for failure to comply with an order. One judge was unsympathetic to such an approach. In such circumstances, judicial independence means that that no consensus approach emerges.”

“I would not confront a judge to ask what he was doing in making a particular order. Instead, I would issue guidance on the subject. The guidance is designed to encourage conformity with the CPR; and anyway any judge is free to disagree with my suggestions.”

“I brought district judges together to discuss our philosophy. One district judge was not fully committed to the new procedures and so I am trying to channel him away from case management.”

“I deliberately do not intervene unless things go seriously wrong. District judges are very knowledgeable and have more experience of case management than many judges at higher levels.”

3.4 Promoting consistency through exchange of views

Across all categories of the judiciary, informal discussions with other judges were seen as the most successful means of promoting consistency. The division of a court's judges between locations is seen as a barrier to communication: 'A crucial part of the success of the Commercial Court is the constant discussion of points of law and procedure that take place behind the scenes. In order to maximise the consistency of approach, the judges need to be able to exchange views regularly. If they are housed in two separate buildings, this is hardly conducive to regular discussion'.²⁵

The benefits of informal discussions were highlighted by several interviewees.

"If it is not possible to have judicial continuity, then at least judges must talk together and lunch together to ensure an exchange of ideas and experience". (*HCJ*)

"We are doing nothing in a formal sense to promote consistency but we are a small court with four judges sitting here on a regular basis and we can resolve many problems as we see each other daily." (*CJ*)

"We are aware of our different approaches while endeavouring to improve consistency. You can't get total consistency. The most important thing is to get people together." (*CJ*)

"In complex cases it can be hard to get to grips with the issues. Judicial discussion groups would be the best way to spread knowledge about practice. These could focus on particular aspects of judicial case management. Such discussion between judges would allow an exchange of experience and approach." (*HCJ*)

²⁵ Judge Colman 'Commercial Breakthrough' *The Lawyer*, 5 February 2001.

Great emphasis was placed on the importance of judicial dining arrangements. Eating together allows an informal exchange of views and builds collegiality. However, it was noted that opportunities for circuit and district judges to eat together were rare. Some parts of the country had made more efforts in this direction than others.

Open communication among all levels of judges has been described as an essential ingredient in promoting consistency: ‘Judges rightly value their independence. They do not like being bossed about, especially by other judges, of whatever rank... open access and communication between all judges (High Court, specialist and non-specialist circuit judges, and district judges) is vital. By continual friendly interchange, consistency of practice can be achieved.’²⁶ Judicial Studies Board ‘Access to Justice’ seminars involved judges at all levels, from district judge to Lord Justice, and this aspect of the training was commended by many interviewees. The Board’s Director of Studies described the judicial ‘mix’ as having ‘created a powerful atmosphere of common enterprise and, on an important personal level, gave judges the opportunity to appreciate at first hand the contribution made by those with other roles in the justice system.’²⁷ Building on this approach, the Board has replaced the separate seminars held for district and circuit benches with combined Civil Continuation seminars.

Designated civil judges had instituted local and group-wide meetings with district judges as a result of the implementation of the Civil Procedure Rules but their regularity, and the extent to which the meetings also involved circuit judges, differed. Some designated circuit judges were more proactive than others, organising regular meetings of circuit and district judges, as well as recorders and assistant recorders. Those responsible for large geographical areas were able to visit outlying courts less frequently, and had greater difficulty in coordinating meetings.

District judges’ perceptions of the effectiveness of the designated civil judge role varied.

²⁶ Judge Gibbs, ‘Designated civil judges’ JSB Journal, Issue 6 (1999) p 12.

²⁷ Judge Collins, Judicial Studies Board Annual Report (1998-99).

“Our DCJ is the team leader. He is very ‘hands on’ and the role should evolve in this direction. He does not hold formal meetings but sits in on our monthly district judge meetings. There should be formal meetings also, but there is so much informal contact here it hardly warrants it.”
(DJ)

“It is the DCJ’s role to liaise and transmit information to others. DCJs must take the issue of consistency seriously and keep their ear to the ground and try to tackle problems. Here, we have suffered for years through lack of communication with the circuit bench. There is not enough community spirit. Greater communication is a lovely idea but unrealistic.” (DJ)

One district judge observed that, as a result of the Civil Procedure Rules and improved communication, there was now a less marked difference between the approach of district and circuit judges. He contrasted this with the ‘considerable difference’ in approach which remained between circuit judges and High Court judges and advocated more cross-fertilisation of ideas between all three tiers of the judiciary.

All interviewees had a computer supplied by the Court Service. Many judges acknowledged the contribution of the judicial electronic bulletin board FELIX in promoting consistency. It had played a vital part in enabling judges in different parts of the country to exchange views and in disseminating information. One Lord Justice commented that law reporters tended not to understand procedural law and in consequence, few relevant Court of Appeal decisions were reported. He had therefore put such cases on a read-only conference on FELIX to which over 300 judges had signed up. A designated civil judge had used FELIX to tell district judges to stay relevant cases pending a House of Lords decision. The system could also highlight some systemic case management problems; a Lord Justice had noted a flow of messages about fast-track cases blocking the list then settling on the eve of trial. He thought these issues should be referred to the Lord Chancellor’s Department and judicial policy makers.

On the other hand, there were many complaints that FELIX was an antiquated system which contained too much unhelpful material and it was too time consuming to find useful information. It was also a limitation that the part-time judiciary did not have access to FELIX.

3.5 Observation and appraisal

Consistent case management requires access to information about what directions are made and whether they are complied with. However, judges with management responsibilities are not supported by systems that supply such information. Designated civil judges commented on the difficulty of obtaining formal feedback about the effectiveness of the new procedures while resident judges spoke of their lack of awareness about judicial practice at PDHs, even in their own court. We asked judges about the usefulness of monitoring and observation as aids to promoting greater consistency in case management.

Judges at all levels generally welcomed feedback and research but were wary of monitoring.

“Because judges can’t answer back there is a tendency to ‘circle the wagons’ so when monitoring is suggested, judges are defensive. Feedback, whether or not you call it monitoring, is necessary. If criticism is sensible, the judges will take it on board.” *(HCJ)*

“Discussions on FELIX show that there is not enough trust between some judges and the administration. There is a perception among some judges that the administration is looking at them to see if they are working hard enough, for instance through keeping statistics on sitting hours and cases disposed of.” *(LJ)*

“I would not give a blanket ‘no’ but monitoring how judges do their job in court sounds like ‘snooping’ and is something they would not like. Observing judges being considered for promotion may be more justifiable.” *(LJ)*

One court published information about pending judgments on the Internet which had the indirect effect of encouraging early completion.

“The Patents Court has developed and maintains its own web site ‘in-house’. The web site lists judgments which are outstanding and for how long. Although not strictly ‘monitoring’, this does encourage judges to complete judgments quickly.” (*HCJ*)

Although bench chairmen in magistrates’ courts are regularly observed for assessment purposes, the first formal initiative involving observation of judges by judges is the twice-yearly appraisal of deputy district judges which has been piloted on the Wales and Chester Circuit. The scheme was due to go ‘live’ nationally in October 2001. The criteria are known to the deputy district judges and are listed on the appraisal forms. The appraising district judge, who must have been in post for at least three years, ensures that the person being appraised receives a suitable mix of work on the day. A protocol covers arrangements for the day of appraisal and the type of box work to be included. The appraising district judge sits in and the assessments are completed by both judges together. There is also an important element of self-appraisal.

District judges selected as prospective appraisers will attend half-day seminars run jointly in each circuit by a district judge who is an appraisal coordinator and an external management trainer. The seminars are not run under the aegis of the Judicial Studies Board, although the district judge is a Board tutor. A course will be offered annually for appraisers appointed in the future.

The appraisal scheme aims to minimise disparities in marking by individual appraisers. Following initial training, appraisers will meet together periodically and appraisal coordinators will look for any whose marking appears to be ‘out of line’. Each deputy district judge can also query the markings in his or her own appraisal. Appraisal forms allow for the identification of the appraisee’s training needs. This information will be collated by the appraising judge or appraisal coordinators for each circuit and

forwarded to the circuit training coordinators who will feed it into the Judicial Studies Board planning process.

Mentoring of deputy district judges will occur in parallel to appraisal. Only a small number of district judges will be selected as appraisers but most district judges will act as mentors. It is considered impractical for all mentors to attend seminars but each will be briefed by a district judge who is an appraisal judge or appraisal coordinator.

A district judge who conducts appraisals emphasised the need for the appraiser to present his comments and criticisms in a constructive way. In November 1999, information from appraisals in the pilot area began to be fed into the recruitment of full-time district judges.

“This has created new pressures for appraisers with respect to the gravity and impact of what they say. I have some doubts about linking appraisal to recruitment until we have fully addressed the issues of moderation and consistency. We need to find a way to achieve greater uniformity of assessment. How do we ensure appraiser A approaches what he perceives to be an ‘error’ in the same light as appraiser B?”

(DJ)

Nevertheless, this district judge felt there was ‘no doubt’ of the value of appraisal as a matter of continuing development, if it can be made to work constructively with good rapport between the appraiser and appraisee.

“There’s an element of the thespian in all of us. Alongside that, there is an unshakeable belief in our ability to do things right. I have never been appraised but I remember what it was like, when I was first appointed, to ‘bat away in the dark’. You have no way to develop your skills. If I was being appraised tomorrow, I would not like it but I would recognise the huge potential benefit for me. My experience as an appraiser is that observation has helped develop my own skills.” *(DJ)*

Observation of judicial performance was recognised as a learning tool for newly appointed judges. Some thought it also had potential as a means for sitting judges to get feedback if, for example, the observation was conducted by a retired judge who was particularly well-respected.

“Pupillage with an experienced judge could be a condition of appointment. Recorders already sit with a judge prior to starting. New judges here sit in informally on case management conferences.” *(CJ)*

“New judicial entrants, for example deputy High Court judges, could observe experienced interventionist judges. They need not sit on the bench but should have the opportunity to discuss the judge’s approach with the judge, both before the proceedings commence and afterwards. If they see a selection of judges, they would begin to pick out what works well.” *(HCJ)*

“It would be useful to have assessment through observation. I see no harm in the practice of a possibly retired or senior colleague sitting in to observe. We already have assistant recorders sitting in with the judge in order to learn judicial court craft.” *(HCJ)*

“One possibility is for judges to do the observation: there may be a role for retired judges. I don’t feel that the judges would feel at all threatened by this; we would all benefit. It can be a very lonely life as a judge.” *(LJ)*

“I would be interested to sit in on case management conferences held by other judges but this is a sensitive area. My predecessor as resident judge suggested that retired judges might sit in and watch judicial practice. Subject to the Lord Chancellor’s agreement, this could now be introduced in the cause of consistency.” *(CJ)*

In March 2001, the Lord Chief Justice announced the results of a survey by the Judicial Studies Board of the training needs of the senior judiciary which found that most judges would welcome having regular feedback on their performance:²⁸ ‘What needs to be assessed in addition to our decisions is our inter-personal skills, our listening skills and our skills in expressing ourselves orally. We all need a totally honest mentor to comment on our performance. The problem is that once we are appointed, we acquire bad habits of which we are not aware. Even if we start off as the model judge, it is easy to allow our standards to slide and to be unaware that this has occurred. I see no reason why we should not be prepared to subject our efficiency as judges to scrutiny by judges. A judge who is taking demonstrably longer than others to progress his work is a matter of concern. Without in any way subjecting him to criticism, he might need help and support. For a colleague who has the necessary skills and experience to talk the issue through with the judge in question can only be helpful for the individual judge and the system as a whole’.

The Lord Chief Justice concluded: ‘I would eschew any idea of annual appraisal of judges even by colleagues. However, I would not be averse to a culture developing where each member of the judiciary has the expectation that a more senior colleague would, once a year, discuss what can be done by way of training or otherwise to promote greater effectiveness and job satisfaction... While I regard this limited form of appraisal as justified in its own right, I do not lose sight of the fact that public perception is also important. In a world where appraisal in almost every activity is a matter of course, it does not necessarily help to win friends and increase trust and confidence of the public if the judiciary regard any form of appraisal as anathema. Certainly I do not believe that what I have proposed would interfere with the independence of the judiciary’.

²⁸ Lord Woolf ‘The Needs of a 21st Century Judge’ Address to the Judicial Studies Board, London 22 March 2001.

4 RELATIONSHIP WITH COURT ADMINISTRATION

4.1 Introduction

The nature of the relationship between the listing office and the judiciary is a vital aspect of case processing. It is an anomaly that judges have responsibility for listing but no management control of the court staff who carry it out. A former Lord Chancellor described this as involving ‘a constructive partnership between the judiciary and the Department at all levels’.²⁹ Lord Justice Browne-Wilkinson raised questions about the viability of the present structure in supporting the administration of justice. He observed that ‘this separation of powers and duties, reflected as it is in a wholly separate administrative hierarchy who are not answerable to those responsible for the operational functions of the court, i.e. the judges, seems to me one of the basic shortcomings of the present system’.³⁰ The potential for conflict arises in areas where responsibility is unclear resulting in ‘friction’ which ‘in itself, has to be managed’.³¹ Its success has been said to depend ‘to a large extent... on how well the Lord Chancellor can hold the two hierarchies together’.³²

In this chapter, we report interviewees’ accounts of how this partnership was working in practice and describe their suggestions for improvements.

4.2 Liaison between judges and the Court Service

The 1988 Civil Justice Review suggested setting up new formal arrangements for cooperation between judges and administrators, and improving internal links between judicial and administrative groups. It emphasised that effective implementation of reforms would ‘involve judges at all levels together with the whole of the

²⁹ House of Commons Home Affairs Committee (1992) *Work of the Lord Chancellor’s Department*, Minutes of Evidence 29 January and 11 March 1992. Paras. 8-9, 111.

³⁰ ‘The Independence of the Judiciary in the 1980s’ (1988) *Public Law* pp. 44-57 at pp. 47, 54, 56.

³¹ I. R. Scott ‘The English Civil Justice Review: Implementation and Further Reform’ in I. R. Scott (ed.) *International Perspectives on Civil Justice* (1990) Sweet and Maxwell, p. 126.

³² ‘The Judiciary in England and Wales’ (1992) *JUSTICE*, p. 37.

administrative court service'.³³ Little progress was made on these recommendations until 1996 when Lord Woolf called for 'a considerable adjustment' by both partners in order to achieve 'the most productive form of administration of the court system... in which both judges and administrators are involved. There needs to be a partnership between the judiciary and the administrators where the partners have distinct roles but work together to further an agreed policy.'³⁴

Judges welcomed greater judicial involvement at a policy level. They noted that judges were not included on the management board of the Court Service when it was set up but they are now being consulted, for instance through the Judicial Resources Subcommittee of the Judges' Council which looks at Court Service plans in a broad way. Meetings between the Senior Presider and Chief Executive of the Court Service were also seen as beneficial.³⁵ However, good liaison suffered a setback through what was seen as the lack of wide judicial consultation leading up to the Court Service report 'Transforming the Crown Court'. Judges welcomed the opportunity provided by Lord Justice Auld's Criminal Courts' Review to canvass judicial opinion.

³³ 'Civil Justice Review' Report of the Review Body (1988) paras. 304, 321.

³⁴ *Access to Justice*, Interim Report (June 1995) paras. 10.15-16.

³⁵ The Court Service advised us that its Chief Executive has set up regular meetings with the Association of District Judges and Her Majesty's Council of Circuit Judges. The Director of Civil and Family Business (Court Service) and the Director of Civil Justice (LCD) meet monthly with the deputy Head of Civil Justice and the Senior Presiding Judge. The results of these various meetings has led, for example, to the provision of new equipment to facilitate telephone conferences and tape recording. Judges are now included among the membership of a number of working groups and project boards. For example, a district judge is seconded to the Modernising the Civil Courts (MCC) project full time with a remit to participate in team planning, product development and to provide a judicial perspective for pilot projects. Other judges have been nominated as "reading judges" to comment on MCC material. A judicial working group has been set up to review the judiciary's requirement for technical support within the project. It will also assess the impact of technology on judicial working methods, location and numbers. Judges are working with LCD and Court Service officials to develop a programme of legislative changes needed to effect the MCC proposals. The Association of District Judges is providing general support to the programme by reviewing "outputs".

Resident judges described close working relationships with the listing officer requiring almost daily communication over the management of criminal cases, particularly since the introduction of PDHs. Those in the family jurisdiction also relied heavily on liaison with administrative personnel.

“There must be regular meetings between the designated family judge and the court manager. A good relationship is vital to effectiveness and the need for regular meetings with the administration should be in the job description of the designated family judge. We have to understand the difficulties of administrative staff and they need to appreciate our needs.” (*HCI*)

Judges in the High Court, Court of Appeal, Masters and district judges also spoke of the need for regular meetings with the court manager and listing officer. However, this was not always the norm.

“Good judges develop an effective relationship with court staff and encourage communication. Others do not know their names or what they do. I ask newly appointed High Court judges to come and meet staff in the Central Office. Only a third reply but when they do come it proves worthwhile.” (*Master*)

“Good case managers are close to their staff. Bad ones are not.” (*HCI*)

A designated civil judge wrote that ‘I, like most others, have been an abstentionist so far as the court office is concerned. Indeed, in eight years ... I cannot have been into the General Office more than three or four times. That may have to change... the least [the court staff] deserve is that their DCJ should be a visible presence’.³⁶

³⁶ ‘Rapport can get too close’ Judge Langan QC, JSB Journal Civil Justice Reforms Supplement (1999).

Most interviewees agreed that the introduction of the Civil Procedure Rules had created closer liaison with the administration than previously, except for district judges who thought it had made little difference to already excellent relationships. Designated civil judges saw the relationship with the administration as central to the success of their role.

“The relationship between the DCJ and the court manager is of the utmost importance. The court manager must have the confidence to raise issues openly and honestly with the judge.”

“In my group, I have made every effort to foster collaboration. I have made this a guiding principle in my role as DCJ. It can be achieved if it is approached correctly. Such an approach is characterised by informality, openness and the ability to exchange ideas between judiciary and staff without undue barriers due to status or function.”

“I now have much more dialogue with court staff because of the increased need to work together. I go to the court office every day to discuss the list with the listing officer.”

4.3 The quality of working relationships

Court Service staff helped familiarise court users with the principles of the Civil Procedure Rules before implementation, often travelling from court to court with DCJs to explain the detailed procedures on their behalf at Court User Group meetings. Administrators were closely involved with the DCJs in identifying Civil Trial Centres and their feeder courts. Diary Managers, who had a crucial role in implementation, took responsibility for the listing and case management of fast and multi-track trials and worked closely with the DCJs.

Most judges welcomed the new working relationship with court staff and the increased emphasis on partnership, although it was clear that tensions remained.

“The relationship with the Court Service was never seen as a partnership before. It does not yet achieve this status because there are still tensions but at least it is recognised that both bodies have common objectives.” *(DJ)*

“There are many judges who would resist coming together with their administrative staff.” *(CJ)*

“Judges are regarded as an inconvenience by administrators. The resentment works both ways. Judges do not want to be told what to do and the administration does not want interference.” *(CJ)*

“Case management ought to have resulted in greater collaboration but I am afraid that the attitude of ‘them and us’ persists.” *(LJ)*

“There is disquiet and distrust among the judiciary about the Court Service. Judges feel that the Court Service sees them as just another resource to enable them to reach their targets.” *(CJ)*

“The changes have resulted in less, not more, collaboration. Most staff have little perception of the judicial role and are concerned only with meeting their targets.” *(DJ)*

“In the civil jurisdiction, there needs to be a closer relationship between the judiciary and administrators but there is a cultural resistance in the Court Service to what is seen as judicial encroachment.” *(LJ)*

Even those who recognised the need for a closer working relationship had concerns about the calibre of court personnel. Where poor performance occurred, it was seen as reflecting on the authority of the court.

“You have to have people in listing who are sufficiently intelligent and competent to do it. You have to trust them and if they are not up to it,

then you are in trouble. They have to be strong enough to fight the legal profession.” (LJ)

“The problem is that we need people of high calibre but court staff are poorly paid. Good youngsters on our staff are being lost to firms of solicitors ... There is a real problem of courts being behind with filing and sending out orders. It can undermine a judge’s authority if the court cannot be trusted to get things out on time. If you have both solicitors present, you may have to say that your order stands, even if it is not sent out.” (CJ)

Prior to the introduction of the civil justice reforms one judge described cooperation between court staff and judiciary as ‘on a knife edge. Budget driven staff and cost cuts have led to staff shortages, and to those that remain being grossly underpaid.’³⁷ They are at full stretch coping with mundane tasks under the present, less demanding system. Unless serious action is taken to remedy the situation, the civil justice reforms will fail.’³⁸ The impact of staff cutbacks was mentioned by several interviewees, and in one court this was said to have led to a blurring of judicial and administrative functions.

“Each side must be aware of the demarcation lines between their roles. For instance, I must not tell staff how to do their job. District judges and Masters must avoid any temptation to go and help staff with their backlog of work or to open the post etc. This oversteps the mark. However, lack of staff resources and training led to administrative breakdown in a number of sections after Woolf implementation, so judges had to intervene to keep the system going.” (CJ)

³⁷ The Court Service points out that its pay settlement in 2000 went some way to address concerns. Some individuals at the lowest end of the pay scales received pay increases of nearly 10%; the rest received an average rise of 4.7%.

³⁸ Judge Gibbs ‘Designated Civil Judges’ JSB Journal 1999 Issue 6, pp. 11-13.

“Cutbacks in administrative staff and high turnover has meant that there is less collaboration than is required or than there used to be.” *(HCJ)*

A Lord Justice felt there was scope for expanding the responsibilities of legally trained support personnel.

“Where hands-on case management is not necessary, there is no reason why staff generally should not manage the case, but they cannot exercise discretion. Here we have legal staff who can make judicial-type decisions, for example holding dismissal lists. We could do more through consent orders. If both parties agree to a timetable within the norms of the particular court, a staff member could endorse it but I would be nervous about doing this if the matter was disputed. I could see a judge developing staff as part of his office, as in the Technology and Construction Court.”

4.4 Organisation of judicial time

There were concerns about the accommodation of judicial preparation time for general civil work in the court schedule. The preface to the first edition of the Civil Procedure Rules 1998 emphasised that ‘the judge now has to read in depth the available papers and supporting documents and get to grips with the case in a way which, in the past, he has never done before the trial... because under the new system it is his job to further the overriding objective by active case management’.

“Our system is designed around allocation of adequate time for reading before the trial and writing the judgment afterwards. But if our work is assessed only on judge sitting time in court, then it looks as if we are not working. Every minute spent reading in advance will save at least the same amount of time to the parties in court.” *(HCJ)*

“The administration turns a blind eye to the need to make time for pre-trial reading. This is a terrible mistake. If the case starts and the judge adjourns to read the papers in time which had been set aside for part of

the trial, the time sitting in court may be reduced but the parties have to pay for the whole period from commencement to end of trial. This is an absolutely fundamental cultural issue. The Court Service wants to see judges sitting in court but this does not make everything move faster, quite the contrary.” (*H CJ*)

“Case management brings its own problems. There is much more box work and district judges struggle to have enough time. We shouldn’t have a five day list and have to read in between time. By being prepared and making sensible decisions you can cut through the chaff. From the Vice Chancellor down, it is recognised that reading can’t be treated as a bolt-on to the working day.” (*DJ*)

In the Crown Court, there were also concerns about the difficulty of setting aside reading time to prepare for PDHs. Lack of preparation time has been given as one reason why the judge ‘may not feel it necessary to suggest’ any orders.³⁹

“The PDH judge gets a huge pile of files and only has time to read beforehand the guilty pleas where reports have been prepared.” (*CJ*)

“The list for the PDH judge is limited to 15 cases per day on three days a week. When you finish on the first day, you start reading for the second.” (*CJ*)

Judges in specialist jurisdictions were more likely to have formal arrangements for judge reading and preparation time.⁴⁰

“Our system works well because we set aside slots in our diary for advance reading and writing judgments. This is not true in general

³⁹ Judge Balston ‘Plea and directions hearings the case for, and against’ JSB Journal Issue 1 (1997).

⁴⁰ Sir Jeffrey Bowman’s Review of the Crown Office List (2000) recommended that judges sitting in the Crown Office List should have one reading day a week.

Chancery work where I am given papers for the next day at the last minute.” *(HCJ)*

During our study, the Association of District Judges surveyed its members in order to develop a formula for the amount of reading time needed per case management conference. Early findings suggested a formula of 1:2, i.e. that a minimum of 15 minutes of preparation was needed for a 30 minute case management conference.

4.5 Monitoring compliance with court orders

Traditionally, judges relied on the parties to report on each other’s compliance with court directions.

“I ask for a progress report from the claimant’s solicitors where I am uncertain about whether people will do things on time. The date for the report is entered into the court diary. If I am not satisfied with the report then I can ask for a further report or call the case in.” *(CJ)*

“The court is not really able to monitor compliance with orders, for instance the payment of costs for an interim hearing within the 14 days allowed. However, this does not undermine the authority of the court – it is up to the beneficiary to monitor such matters.” *(CJ)*

In our 1996 study of PDHs for the Narey exercise, some Crown Court centres had appointed case progression officers to check on case status before the PDH and on compliance with court orders; however, most felt that monitoring compliance with orders was not an appropriate court role, that staff were not trained for this function and that staff resources were insufficient to take it on.⁴¹

In the current study, there was acceptance across jurisdictions that monitoring was a court responsibility.

⁴¹ The Court Service is now introducing case progression officers in all Crown Court centres, and a case progression pilot project forms part of the Crown Court Programme.

“Traditionally, you waited until matters came to you. In the new environment, you ensure matters are brought to you. If the parties ask for a stay, you set a date for them to come back to you. The key is to monitor what is happening.” (*Master*)

“The key is to maintain a grip on the case and call it in if there is a problem. This should be combined with a case progression officer keeping on top of things. In 99 per cent of cases this will be sufficient to get cases to trial in a reasonable time.” (*HCJ*)

Pressure on resources remained a problem. Interviewees referred to the lack of adequate technology to support case management and assist with monitoring. The Civil Justice Review had recommended in 1988 that computers to support case management be introduced as a matter of priority.⁴² The inability to deliver the technological support recommended by Lord Woolf in 1996 was seen as significantly undermining the potential success of the new measures.⁴³

“Monitoring is manual and therefore not as effective as possible.” (*CJ*)

“We need an effective IT system to ensure that orders are sent out in a timely manner and to monitor compliance.” (*HCJ*)

“We do not seem to monitor compliance with orders and technology might be able to help with this task.” (*CJ*)

⁴² ‘Civil Justice Review’ Report of the Review Body on Civil Justice Recommendation 41.

⁴³ The Court Service points out that automated listing and case monitoring systems were in place by 26 April 1999 and all CaseMan systems were updated and went live that day. Since implementation there have been further updates, the most significant of which has enabled the storage and retrieval of standard forms of orders. In July 2001, ‘CaseMan +’ will be rolled out. This will integrate the current stand-alone listing and case monitoring systems, avoiding the need to duplicate information and allowing diary managers automatic transfer of trial window information.

“The two most important features for a computer system aimed at implementing the Woolf reforms are the ability to monitor progress and to provide fixed trial dates. CASEMAN has neither of these features.”

(CJ)

“We have to rely on court staff to monitor compliance with judicial orders but here too we suffer from the lack of a good IT system. At present, there are no triggers to highlight problems of non-compliance.”

(HCJ)

“What I would like is a management system that is capable of creating orders quickly and monitoring compliance. The designated family judge should have access to an electronic report showing non-compliance with orders made. The lack of this is a stumbling block in the family jurisdiction.” *(HCJ)*

4.6 Joint training

Many judges thought that case management would benefit if more joint meetings or training events were organised for the judiciary and Court Service personnel. These opinions are set out below in chapter 5.

5 TRAINING

5.1 Introduction

The question of training arose in discussing every aspect of case management. This chapter describes judicial views on whether training in case management skills is needed and deals with the training needs of judges with management responsibilities. Training issues concerning litigants in person and administrative personnel which were raised in previous chapters are also explored in more detail. The role of the Judicial Studies Board in relation to case management training is addressed.

5.2 Case management training

Views differed as to whether recruits to the Bench came with adequate case management skills. A few judges thought that no additional training was necessary.

“I am not convinced of the need for case management training. However it is possible I might change my view, which is what has happened in relation to race awareness training.” *(LJ)*

But many disagreed.

“There should be more training. The idea that once you are a judge that you know everything is ridiculous.” *(HCJ)*

“If the view is that case management experience is gathered before you become a judge, then it is mistaken. Many judges have not had such experience. Only one HCJ was previously a solicitor. Barristers do not have experience of case management, particularly at a senior level where they do not even manage their working day. I have been a district judge for six years and my 20 years in practice did not prepare me for this.” *(DJ)*

One district judge who interviewed candidates for deputy district judge positions said that very few ‘understood the court perspective’. He commented that the Judicial Appointments Division was looking at the use of psychometric testing but they should also be trying to identify candidates with case management skills.

Many interviewees thought that case management training was essential to the judicial role, irrespective of jurisdiction, and saw such training as a way to promote consistency.

“There is a case for skills training in case management. There is a need to harness judicial independence to a more corporate approach.” *(CJ)*

“The judge must be proactive, not just an umpire. Case management skills must be taught. There is currently no central judicial ethos or style of case management.” *(HCJ)*

“The Vice Chancellor is very keen to get away from differences due to local practice. Training helps to promote ‘the party line’.” *(DJ)*

“The training requirement is to emphasise the new broom approach and to stiffen the judicial backbone. Training should get judges out of their old ways and illustrate the potential benefits of working closely with the administration.” *(LJ)*

“We need to get everyone back into school to learn about case management. We need a better system of training.” *(Master)*

Suggestions and training techniques included case discussions, observations of other judges (discussed in chapter 3 above) and mock trials. Discussion of case management templates and protocols was also thought useful in illustrating structured decision-making.

As noted in chapter 2, one of the criticisms of the judge's intervention at PDH is that participants may view it as compromising the judge's impartiality.⁴⁴ One judge saw a role for training in helping judges avoid the appearance of bias.

“When case management becomes more widespread in criminal cases, judges should be trained to manage effectively without disclosing a view about the case - parties should not get the impression he has made up his mind. You should never make assertions, just ask questions. I worked out a system in family cases. You must ask counsel to say what the issues are, and in doing so, they themselves focus in and narrow the issues. I would demonstrate it - it takes time to acquire these skills, it is not as easy as it sounds. Judges who can do it should teach judges who can't. There is a real need to train judges to press the defence about the defence statement. Naturally, the defence only wants to give away the bare minimum but this is being accepted by judges at face value. Judges should press for compliance with the criteria set down.” (CJ)

5.3 The role of the Judicial Studies Board

Some interviewees took the view that case management training was not necessary, or could only be acquired through practical experience. However, the majority felt that the development of case management skills needed to be addressed in training, preferably by the Judicial Studies Board.

The Board does not fund case management training *per se*. Although its civil⁴⁵ and family courses involve case management, this subject is not specifically addressed at its criminal continuation seminars.⁴⁶ The only judicial seminars on the subject of PDHs

⁴⁴ Judge Crabtree 'Comment' Archbold News (23 November 1999).

⁴⁵ Case management forms an integral part of civil induction seminars for recorders and, at a more basic level, for deputy district judges. It is also addressed in civil continuation seminars attended by judges on a three year cycle. Syndicate exercises on case management are included in both courses.

⁴⁶ These are held on a three year cycle. Attendees include recorders and High Court judges who do not routinely conduct PDHs in criminal proceedings. The JSB indicated that a slot on PDHs may be included in future criminal continuation seminars.

were convened in 1997 by the Lord Chancellor's Department and chaired by Lord Justice Auld.

The 1998 Court Service report 'Review of the Effectiveness of Plea and Directions Hearings in the Crown Court' concluded that 'there is a great deal of variation in the issues that are actually discussed at the PDH'. The report noted, for example, that courts where prosecution witness availability was not normally discussed at the PDH had significantly higher than average rates of ineffective trials due to prosecution witness non-attendance. It recommended that the Court Service consult the Lord Chief Justice and the Senior Presiding Judge about the possibility of giving the Judicial Studies Board a specific role in the provision of PDH training and 'enhancing the role of the resident judge in upholding PDH standards in his court'.⁴⁷

Interviewees saw a particular need for case management training in the criminal jurisdiction.

"The seminars on Woolf and on family work were case management oriented. This is not the case with the criminal seminars." (*H CJ*)

"Development of the necessary judicial style [to conduct PDHs] would need JSB instruction by someone who could enthuse the judges to do it." (*H CJ*)

"My experience of crime was largely trying murders and crimes of that sort. I did not develop much of a nose for procedural matters and I do not think I was the best person to handle these aspects of the case. I could have benefited from training in this area but it was not provided." (*H CJ*)

"There is a need for the JSB to organise training on PDHs." (*CJ*)

⁴⁷ Paras. 6.4, 6.7, 6.10.

“PDHs are not as effective as they could be because judges need training.” (*CJ*)

5.4 Training in wider management responsibilities

A key feature of the new case management environment is the creation of senior positions involving managerial responsibility in respect of judicial work. Sir Jeffery Bowman’s review of the Crown Office suggests that the trend is set to continue: ‘There is scope for substantially more judicial case management and a lead judge should be appointed annually from the nominated judges to have overall responsibility for the work of the Crown Office.’⁴⁸

The development of a job description for designated civil judges was an innovative step that accompanied the civil justice reforms. Seminars held by the Vice Chancellor gave designated civil judges an opportunity to exchange views on their responsibilities.⁴⁹ There is no job description for the role of resident judge, and there is no formal training for this position.⁵⁰ Several judges observed that managerial skills are not traditionally associated with judicial work, and are not included in the criteria for judicial selection.

“Judicial selection is a lottery. The only thing that does not count in the present selection system is the ability to manage.” (*HCJ*)

A former Director of Studies at the Judicial Studies Board has said that ‘it is increasingly true to say that the modern professional judge, at whatever level, regards training now as an entitlement, and no longer as a duty.’⁵¹ Several judges saw a need

⁴⁸ Review of the Crown Office List, Lord Chancellor’s Department (March 2000).

⁴⁹ These conferences, organised and funded by the Court Service, were attended by senior members of the judiciary, DCJs, district judges, Circuit Administrators, Group Managers and LCD and Court Service officials. The bi-annual conferences have now become regular fixtures. In April 2001, the first exclusive Designated Civil Judge Conference was held.

⁵⁰ Para. 112, House of Commons Home Affairs Committee (1992) Work of the Lord Chancellor’s Department. Minutes of Evidence, 29 January and 11 March 1992.

⁵¹ Judge Collins, Judicial Studies Board Annual Report (1998-99) p. 3.

for skills training to assist in the exercise of their broader management responsibilities. They referred to the example of the Chief Social Security Commissioner, who had taken a management course when appointed and found it to be of great value.

“The JSB is wary of taking on too much and does not see management skills as falling within its terms of reference. A broader vision is needed. They should cater to all of a judge’s needs, including management responsibilities. This is unquestionably a JSB function. The JSB should collaborate with the Lord Chancellor’s Department which has its own structure for training. If the JSB cannot provide the necessary training, this could be commissioned from elsewhere in government e.g. the Civil Service College.” *(LJ)*

“Those with a wider role, for instance the Lord Chief Justice, the Vice Chancellor, and the Master of the Rolls, have a substantial list of responsibilities. Presiders have an enormous responsibility for the management of judicial personnel and resources. They are tasked with exercising managerial and organisational skills but they have no background to do this. The same is true for resident judges who have responsibilities relating to court staffing, giving a lead to fellow judges and monitoring performance to meet targets. These are all managerial tasks. They have no training for this and the skills required are not clearly identified.” *(CJ)*

It was emphasised that any such training would have to be practically focused.

“I am sure there is a training need for judges in management skills but it must be tailored to reflect what judges do. Perhaps we should train Presiders, DCJs and resident judges together. There must be around 200 judges at all levels with responsibilities beyond individual cases and they all need such training. But it would need to be up tailored to their needs – they would not take kindly to a traditional management course.” *(CJ)*

“Any training programmes must be practical rather than a discussion of theoretical abstract principles.” (*LJ*)

It was also recognised that not all judges with management responsibilities would accept the need for training in such matters.

“Some instruction in the use of management information would be useful for resident judges. Presiding Judges may not be amenable to training in this area.” (*HCJ*)

The Lord Chief Justice has emphasised that ‘the need for judicial administration and management skills must be acknowledged and taken into account when recruiting and appointing judges. We need to pay greater attention to management and career development issues’. He also envisages that management training for judges would facilitate closer collaboration with the administration: ‘The partnership which has developed between the Lord Chancellor’s Department and the Court Service on the one hand and the judiciary on the other is happily based on a satisfactory working relationship. Probably it is much better than ever before... To make their contribution, the judiciary in turn needs skills which they currently lack. They need to learn about management, they need to know about administration’.⁵²

5.5 Litigants in person

Judges were asked about case management difficulties caused when a litigant was unrepresented, a problem arising most often in civil and family business. As discussed in the previous chapter, most suggestions focused on the provision of advice or assistance (usually from an external source) thus reducing the burden on the judge and court personnel. Most interviewees thought that judicial training on this topic would not help or would be resisted: the ability to handle litigants in person was generally thought to be a skill which judges did or did not possess.

⁵² Lord Woolf ‘The Needs of a 21st Century Judge’ Address to the Judicial Studies Board, London 22 March 2001.

“You could try to train judges as much as you like to handle litigants in person but those who are poor man-managers or who focus solely on the merits of the case would not learn it.” *(LJ)*

“These cases require patience, but firm patience. There is no other way to deal with them. You will have some judges who are neither firm nor patient - leopards don't change their spots.” *(LJ)*

“Judicial training in dealing with litigants in person is needed but there may be resistance to this. Everyone will say they know already.” *(LJ)*

A minority of judges thought there was a training need for the judiciary in relation to litigants in person, although it was not seen as a high priority.

“It is a collegiate task to ensure that litigants in person feel justice has been done: ‘wise old heads’ telling those who have come to this more recently how to go about it. You have to get across to judges the sorts of mistakes they can make and show them good practice.” *(LJ)*

“It is a question of personnel management, getting litigants to sit down to discuss the issues and giving them the space to do so. But it still must be possible to shut people up at some point. Some of the techniques can be learned but it would not be top of my list for judicial training.” *(HCJ)*

“Litigants in person do pose training issues but I'm not sure that we have fully faced up to these yet because of trying to get the Woolf show on the road.” *(CJ)*

The Judicial Studies Board has recognised the need for further training in this area. A section on those appearing without legal representation was included in the Equal Treatment Bench Book in January 2001. This aims to identify the difficulties faced and

those caused by litigants in person before, during and after the litigation process. It provides guidance to judges to help ensure that both parties receive a fair hearing.

5.6 Joint training with the Court Service

As noted in chapter 4, joint training of judges and court managers was put forward as one way to improve case management and build closer working relationships with the Court Service. The Judicial Studies Board has no budget to train administrative personnel. The first joint meetings were those of designated civil judges and court managers organised by the Vice Chancellor to discuss the civil justice reforms. Interviewees said these had been well received and many judges welcomed the idea of extending this initiative.

“Joint training with court staff is worth exploring. The ground has been broken in this respect by the six monthly conferences held by the Vice Chancellor but we still have a long way to go.” *(CJ)*

“Those of us who took part in the joint staff-judiciary events found them helpful. The court will fall if there is not daily cooperation between all judges and staff and knowledge of their mutual responsibilities.” *(HCJ)*

“There is scope for joint meetings between judges and court staff to discuss the approach to listing and to share experience.” *(HCJ)*

“I do see some place for joint training involving senior managers and judges to further the idea of partnership.” *(CJ)*

“I foresee practical problems in putting together training combining judges and administrators because it would be difficult to arrange sessions with the right people. Administrators would send people at a too senior level; you would not get the listing officers. Having said that, I do see a modest amount of seminar training that could happen for

judges and administrators where the philosophy of listing could be discussed.” *(LJ)*

Some interviewees felt that the Judicial Studies Board could do more to underline the importance of working in partnership with court staff.

“The JSB should look at having a slot for an administrator to speak on its refresher courses.” *(HCJ)*

“There is still a ‘them and us’ culture and the JSB could do more to challenge this.” *(CJ)*

6 CONCLUSIONS

Addressing the Judicial Studies Board in March 2001, the Lord Chief Justice Lord Woolf stressed that ‘At the present time we are obtaining nothing like the benefit that we should from case management’ and observed: ‘We have been remarkably slow in seeking to find out the individual views of our judiciary’.⁵³ This study provides a snapshot of judicial views about case management in 1999-2000, a time of accelerating change in the court system. Far-reaching reforms to civil procedure have given judges unprecedented case management powers. Sweeping changes to the criminal process are anticipated as a result of the forthcoming Criminal Courts’ Review. The system may be in transition but the movement is all directed towards giving judges an increasing role in controlling the pace of litigation.

The picture emerging from this study was of case management as a systemic issue, not dependent simply on judicial personality but on the exercise of specific judicial skills in harnessing the efforts of participants. Interviewees shared a common view of the essential characteristics of judicial case management: early setting of the case timetable; adopting an inquiring style in order to identify key issues; and securing the cooperation of case participants. However, judges differed in the extent to which they felt able or prepared to apply these principles. Judges generally took a more robust view of their case management role in relation to the new civil procedures and in the family jurisdiction than in PDHs in criminal cases. However, even in civil cases not all judges felt comfortable with an interventionist approach.

The operation of the legal system is predicated on a degree of predictability. Greater consistency and the elimination of ‘justice by geography’ is the objective of many case management initiatives. Striving for consistency, however, is a paradoxical feature of judicial case management. Michael Zander has observed that giving judges greater discretion to exercise judicial control brings with it greater scope for inconsistent

⁵³ Lord Woolf ‘The Needs of a 21st Century Judge’ Address to the Judicial Studies Board, London 22 March 2001.

judicial decision-making.⁵⁴ While judges were in favour of an element of consistent case management, they balanced this with the need for judicial independence and the exercise of judicial discretion. Some stressed the need for consistency of approach rather than outcome, but to the parties it is the outcome and not the approach that matters most. The appellate process, which is unlikely to interfere with the sensible exercise of discretion, was generally thought too blunt an instrument to refine case management procedures.

In a study we conducted in 1993, resident judges emphasised the liaison aspect of their role rather than any responsibility for case management.⁵⁵ Seven years on, the perspective had shifted but resident judges were finding it difficult to promote a consistent case management approach among their colleagues. The team approach to PDHs had, in some areas, failed to produce collective responsibility for the caseload. A distinction was drawn between the role of the resident judge in the Crown Court and that of the designated civil judge. Both needed to avoid curtailing judicial independence. However, the role of designated civil judge was a creature of the new regime, with specific responsibilities ‘to promote consistency in the application of case management principles’. The role of resident judge had spanned the transition to case management but the implications of this have not been specified.⁵⁶

There may be other reasons to revisit the responsibilities of the resident judge. Lord Woolf and others have commended the U.S. federal court model in which case management is facilitated because the same judge is responsible for managing the case throughout its life. In this country, the need for listing flexibility means continuity of judge assignment is unusual except in the most complex civil or serious fraud cases.⁵⁷ Lack of continuity was seen as having an adverse impact on the operation of PDHs;

⁵⁴ ‘Consistency in the exercise of discretionary powers’ *New Law Journal* (1 November 1996).

⁵⁵ ‘From Committal to trial: Delay at the Crown Court’ *Standing Commission on Efficiency*; *The Law Society Research Study No. 11*, p. 108.

⁵⁶ The Lord Chief Justice describes an assessment of the needs of the resident judge as ‘long overdue’: Lord Woolf ‘The Needs of a 21st Century Judge’ *Address to the Judicial Studies Board*, London 22 March 2001.

some judges did not have an investment in the process if they were not the trial judge.⁵⁸ The transfer of indictable only cases to the Crown Court, implemented nationally in 2001, has increased even further the number of judges handling a case in its passage through the court. Such initiatives will not reap significant benefits unless the resident judge can engender a sense of collective responsibility for the caseload. The scope of the resident judge role may be increased still further by the recommendations of the Criminal Courts' Review. This will, in turn, require a clearer statement of responsibilities and a reappraisal of the support required to do the job effectively. There is a clear need to evaluate the contribution of resident judges and designated civil judges to effective case management. It should be possible to develop an approach to evaluating the roles that is acceptable to the judiciary.

There was a difference of view as to whether the judge at a pre-trial hearing needed experience in conducting trials in the jurisdiction in question. Trial experience was considered a prerequisite in the specialist civil jurisdictions and in the Crown Court but in the majority of civil work, it was accepted that most pre-trial case management could be conducted by district judges and Masters. A few judges thought that there was scope for a criminal 'district judge' to address pre-trial issues such as disclosure. In the U.S. federal courts, although all criminal and civil matters are assigned to an individual judge, a significant portion of both civil and criminal pre-trial case management is delegated to magistrate judges (appointed for a renewable term in contrast to judges appointed for life under Article III of the Constitution). In certain categories of cases, magistrate judges also conduct trials by consent. In the federal courts, the magistrate judges have become a useful resource and a member of the judicial 'team'. Evaluation has shown that lawyers were significantly more satisfied when magistrate judges managed the pre-trial process.⁵⁹ There are implications here for proposals being considered by the Criminal Courts' Review of a unified criminal

⁵⁷ No comparison has been undertaken of the relative costs and benefits of different types of listing.

⁵⁸ There are, of course, other factors contributing to less-than-effective PDHs, including the lack of incentives for attendees to prepare for them and the lack of effective sanctions.

⁵⁹ J. Kakalik 'Just, speedy and inexpensive?' *Judicature* Vol. 80 No. 4 (1997) pp 184-189 at p. 188).

court system with district judges being given case management responsibilities in either-way cases.⁶⁰

Judges do not have the opportunity to observe each other's case management practice in court. Opportunities to exchange views were valued and discussions at seminars, meetings and through the electronic bulletin board FELIX (though clogged with irrelevant material) were widely commended by interviewees. Some saw court observation as a potential learning tool and thought that the benefits of feedback and discussion need not be confined to newly appointed judges, who routinely sit in with an experienced judge. For these judges, the prospect of informal peer review, perhaps by retired judges, allayed concerns about monitoring and threats to judicial independence. In the case of deputy district judges, court observation by district judges has been developed into a system of formal appraisal due to go 'live' nationally in 2001. One participant in the pilot system suggested that observation had learning benefits for the appraiser as well as the person being appraised.

Judges welcomed greater consultation with the Court Service at a policy level. At a working level, closer and better defined partnership was vital to the success of case management initiatives, and in many areas relationships with the administration were described as effective. At the time our interviews were conducted, however, tensions remained on both sides and concerns were raised about the effects of staff cutbacks and the failure to retain experienced court personnel. The lack of technology to monitor compliance with court orders, in particular the failure to provide the technological support recommended by Lord Woolf, were also seen as drawbacks to effective case control. Judicial case management required papers to be read beforehand if the maximum benefit was to be obtained from pre-trial hearings. Judges were critical that reading time was not often formally accommodated. Case management required a more flexible and integrated approach to the organisation of judicial time.

The Vice Chancellor has held joint meetings of judges and court personnel to discuss the civil justice reforms and these were well received. Many judges welcomed the idea

⁶⁰ Criminal Courts' Review Progress Report No. 2 (14 August 2000).

of extending this initiative. Some saw a role for the Judicial Studies Board in underlining the importance of partnership and breaking down what was described as “the ‘them and us’ culture”. The Board has no budget to train administrative personnel but could consider collaborating with the Court Service and Lord Chancellor’s Department in a joint training initiative. In the 1980s, the Federal Judicial Center and the Administrative Office of the U.S. Courts pioneered civil case management seminars attended by court ‘teams’ consisting of judges, court managers and court staff. To facilitate participation, numbers at each seminar were kept to around 30 and attendees were seated at round tables. They commented favourably on the opportunities to learn from other courts and promote a team approach to case management.⁶¹

Many interviewees noted that case management skills do not come automatically and their development through training was essential to effective judging. Training would assist, as one put it, in “harnessing judicial independence to a more corporate approach”. Training was also seen as necessary in learning how to question advocates without disclosing the judge’s view about the case. There was particular interest in the provision of training in the criminal jurisdiction and for those judges with managerial responsibilities.

Case management training, presently confined to Judicial Studies Board civil and family seminars, should be extended to the conduct of criminal cases. Planning case progress, ensuring adherence to the timetable, developing a collegiate approach and working in partnership with support staff are skills needed in all jurisdictions. The Board has recognised that equal treatment is an issue that permeates all of judicial training. If it is accepted that case management is not an ‘add-on’ but a fundamental aspect of good judicial practice, it deserves a similar status.

Questions emerged from the study which merit ongoing judicial debate. What aspects of the case management process require consistency and what level of variability is acceptable? What are the mechanisms by which consistency is to be achieved? The

⁶¹ J. Plotnikoff ‘Civil Case Management Seminars’ Clerks Division, Administrative Office of the U.S. Courts (1984).

Judicial Studies Board, acting in a new role of ‘judicial think tank’ as called for by the Lord Chief Justice, should address these issues.⁶²

⁶² Lord Woolf ‘The Needs of a 21st Century Judge’ Address to the Judicial Studies Board, London 22 March 2001.

Rule 2.4 of the Civil Procedure Rules 1998 provides that, unless an enactment, rule or Practice Direction provides to the contrary, judges, masters or district judges sitting in either the High Court or county courts have the same powers whether they are full-time or part-time judges. Limits on the jurisdiction of masters and district judges are then to be found primarily in the Practice Direction to Part 2B of the CPR (PD2B0), which deals with the allocation of cases to the various levels of judiciary. In what follows, references to masters has been omitted in the interest of brevity.

The jurisdiction of the county courts is entirely statutory and covers almost the whole field of civil law. The general jurisdiction in civil law is mostly concurrent with that of the High Court, save that personal injury claims for less than £50,000 and money claims for less than £15,000 must be started in the county court. Further detail is to be found in the High Court and County Courts Jurisdiction Order 1991 (as amended). A number of statutes confer exclusive jurisdiction on the county courts - for example, virtually all cases under the Consumer Credit Act 1974, and most actions by mortgage lenders and landlords.

The tables below summarise, in relation to each type of application or case listed in the first column, the jurisdiction of the two benches. The first table deals with the county court, the second with the High Court. The second table is applicable only to deputy district judges; recorders, unless appointed as such, will not sit as deputy High Court judges.

TABLE 2.1: Country Court Jurisdiction

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
Case management under the CPR, including summary judgment applications under Part 24 of the CPR	Yes.	Yes.
Interim applications under Part 23 of the CPR, including any interim remedy under Part 25 of the CPR within the jurisdiction of the county court (rule 25.1(1) and PD25 para. 1)	Yes, but note that the county court has no jurisdiction to hear applications for search orders or for freezing orders.	Yes, but the same restrictions as set out opposite apply and also see below in respect of injunction applications.
The trial of a case allocated to the small	Yes, but only if the judge consents (PD2B para.	Yes.

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
claims track	11.2).	
The trial of a case allocated to the fast-track	Yes.	Yes. On any one day it may be possible to find several fast-track trials block listed for hearing before judges of both benches.
The trial of a case allocated to the multi-track under CPR r.8.9(c)	Yes.	Yes (PD2B para. 11.1(a)). Mortgage and landlord cases fall within this provision. However, certain proceedings under the Landlord and Tenant Acts, Agricultural Holdings Act 1986, Legitimacy Act 1976, Fair Trading Act 1973. Local Government and Finance Act 1982 and the Mental Health Act 1983 under CCR Ord. 43 rr. 4, 6, 18 and 20, Ord. 44, Ord. 46 r. 1 and Ord. 49 rr. 5, 10 and 12 are excluded.
The trial of a case allocated to the multi-track under Part 26 of the CPR	Yes.	Only with the consent of the parties and the permission of the designated civil judge in

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
		respect of the particular case (PD2B para. 11.1(d)).
Claims under the Consumer Credit Act 1974	Yes, although the majority of these claims are heard by district judges.	Yes, unless a case is defended and allocated (see PD7B para. 6.2) to the multi-track.
Proceedings for the recovery of land (including summary proceedings under Part 1 and interim possession orders under Part 2 of CCR Ord. 24)	Yes.	Yes. Whilst the jurisdiction is concurrent, local arrangements may well exist for the distribution of business between the two benches (PD2B para. 13).
Assessment of damages	Yes.	Yes, even if the case has been allocated to the multi-track at a disposal hearing under PD26 para. 12.8.
Approval of a compromise on behalf of a child or patient (CPR r.21.11)	Yes, although approval of cases settled other than at trial will normally be heard by district judges.	Yes.
Application for an injunction	Yes.	Yes, if: <ul style="list-style-type: none"> • the application is made in proceedings which the district judge has jurisdiction to hear (see above) (PD2B para.

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
		<p>8.1(a));</p> <ul style="list-style-type: none"> • the application relates to a money claim not yet allocated to track but within the limits of the small claim or fast tracks (PD2B para. 8.1(b)); • the terms are agreed the injunction relates to a charging order, is ancillary to an order for the appointment of an equitable receiver or is in proceedings under RSC Ord.77 r.16 relating to the Crown debt (PD2B paras 2.3 and 8.1(c)); • the application is to vary or discharge an injunction by consent (PD2B paras 2.4 and 8.2).
Family Law Act 1996 Part IV injunctions	Yes.	Yes, save that deputy district judges cannot deal with the enforcement of

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
		Part IV orders.
Committal to prison for a civil contempt	Yes. Note that only circuit judges have jurisdiction to handle committals relating to the oral examination of a debtor.	Yes, but only if the committal is under: <ul style="list-style-type: none"> • section 25 of the Attachment of Earnings Act 1971; • sections 14 or 118 of the County Courts Act (assaults on bailiffs or various contempts of court); • sections 152 - 157 of the Housing Act 1996 (anti-social behaviour); • section 3 of the Protection from Harassment Act 1997. (See PD2B para. 8.3.)
Application under section 204 of the Housing Act 1996 (Homelessness appeal)	Yes.	No (See PD2B para. 9)
Application under the Access to Neighbouring Land Act 1992	No - CCR Ord. 49 r. 1(7) confers exclusive jurisdiction on the district judge.	Yes.

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
Enforcement of judgments	Yes, although district judges will hear the majority of applications relating to the enforcement of judgments.	Yes, save that by virtue of CCR Ord 31 r3(3) a district judge has no power to vary a charging order made by a circuit judge.
Interpleader applications under CCR Ord. 33 Part 1	Yes.	No, if the interpleader relates to goods seized in execution. The interpleader proceedings may be instigated by the district judge but will be heard by the circuit judge (see section 101 of the County Courts Act 1984 and CPR Sch 2 CCR Ord.33 r4(2)). However, the district judge does have jurisdiction to hear other interpleader applications.
Claims under section 124 of the County Courts Act 1984 (liability of bailiff for neglect to levy execution)	Yes.	Following the implementation of the Human Rights Act 1998 and, bearing in mind the district judge's responsibilities under section 123 of the County Courts Act 1984, such cases should be referred to

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
		the circuit judge.
Summary assessment of costs	Yes, in the similar circumstances to those relating to district judges/ - q.v.	Yes, at the conclusion of a fast track trial or any other hearing lasting less than one day. [PDCosts para 13.2]. Exceptions apply in respect of mortgagees costs [PDCosts para. 13.3], when the receiving party is legally-aided [PDCosts para. 13.9], when the receiving party is a child or patient [PDCosts para.13.11] or where there is good reason not to do so [PDCosts para. 13.2].
Detailed assessment of costs	No (PDCosts para. 30.1(3)).	Yes.
Appeal from an authorised costs officer	No.	Yes (CPR r.47.21)).
Appeal from a detailed costs assessment of a district judge	Yes, if the assessment proceedings were in the county court (47.22(3)).	No. (PD52 para. 2A.1)
Insolvency proceedings - companies (if the total paid up share capital is less than	Yes.	Yes, save that the following applications shall be made direct to the

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
£120,000)		<p>circuit judge (PD Insolvency Proceedings para. 5.1):</p> <ul style="list-style-type: none"> • committals for contempt; • urgent interim relief; • restraint of presentation or advertisement of a petition; • appointment of a provisional liquidator; • various applications relating to administration orders; <p>Otherwise the district judge will in the first instance hear the application although he may give directions and refer it to the circuit judge (PD Insolvency Proceedings para. 5.2).</p>
Personal insolvency proceedings - bankruptcy	Yes.	<p>Yes, save that the following</p> <ul style="list-style-type: none"> • applications shall be made direct to the circuit judge (PD Insolvency

TYPE OF COUNTY COURT CASE	CIRCUIT JUDGE JURISDICTION	DISTRICT JUDGE JURISDICTION
		<p>Proceedings para. 9.1):</p> <ul style="list-style-type: none"> • committals for contempt; • injunctions, their modification or discharge; • interlocutory relief. <p>Otherwise the district judge will in the first instance hear the application although he may give directions and refer it to the circuit judge (PD Insolvency Proceeding para 9.2)</p>
Directors' disqualification proceedings	Yes, although the hearing shall in the first instance be before the registrar (PD Directors' Disqualification Proceedings para. 10.2).	The district judge shall conduct the first hearing and has concurrent jurisdiction with the circuit judge although he may give directions and refer an application to the circuit judge (PD Directors, Disqualification Proceedings para. 10.6).

Except for certain matters expressly reserved to the county court (e.g. Consumer Credit Act claims, money claims under £15,000 and personal injury claims under £50,000), the High Court exercises an unlimited jurisdiction in all civil matters. With the exception of a very few matters which rarely arise in practice, any High Court case may be begun in a district registry and then proceed to trial either in London or in one of the provincial trial centres designated for High Court cases.

District judges who sit in district registries exercise the same jurisdiction as Masters of the Queen's Bench Division. A few district registries have full Chancery jurisdiction; at these courts the district judges have the same jurisdiction as Chancery Masters of the High Court.