

## Civil Justice Quarterly

2006

### The management of civil cases: a snapshot

John Peysner

Mary Seneviratne

**Subject:** Civil procedure

**Keywords:** Case management; Civil procedure; Costs; County courts; Expert evidence; Settlement

**Legislation:** Civil Procedure Rules 1998 (SI 1998 3132)

#### \*C.J.Q. 312 Background

The civil justice reforms, introduced in 1999, aimed to improve access to justice by eliminating the defects in the civil justice system. These were identified by Lord Woolf as being: too expensive, too slow, lacking equality between powerful and wealthy litigants and under-resourced litigants, too uncertain in terms of the length and cost of litigation, too fragmented and too adversarial.

The remedy identified was to shift the responsibility for the management of litigation from the parties to the court. Thus, the courts were to have the final responsibility for determining suitable procedures for each case and realistic timetables. The court would ensure compliance with procedures and timetables, and there would be established procedures and protocols for litigation. As a result of these reforms, litigation would be shorter, more certain, and less costly. Central to the reforms is the principle of court rather than party management of the conduct of the case. This involves judicial control of litigation by case management, so that the process is court-managed not party-driven.

#### The research

The aim of the research was to assess the extent to which the courts have been successful in using case management to meet the objectives of the civil justice reforms. It was not concerned with the small claims jurisdiction, but only the fast-track and multi-track systems. As will be explained later in the article, the fast track is an "off-the-peg system" of litigation, with standard provisions for \*C.J.Q. 313 disclosure; trials lasting up to one day; limits on oral expert evidence, and the trial to be heard within 30 weeks of allocation. The multi-track, on the other hand, is a "bespoke" system for larger and more complex cases.

The research explores the extent to which court case management, by taking decisions on timing and the deployment of resources out of the hands of the parties, enhances the aims of the civil justice reforms. It concentrated on the typical experience of case-managed litigation in county courts across England. The study was conducted in eight county courts: Central London; Sheffield; Nottingham; Newcastle; Worcester; Cambridge; Luton and Reading. In each of the eight courts, in-depth interviews were conducted with one circuit judge, two district judges, and the listing officers and diary managers on the extent to which culture and practice have changed and what remains to be achieved. In three of the courts focus groups were held with practitioners from the area served by the relevant court.

One point that is worth noting at this stage is that during the period of this research (2001-2004) there has been enormous drop in cases issued in the courts. This could be explained by the fact that there has been a drive to early settlement, and that this is occurring at the pre-issue stage. This is a particular result of the pre action protocol system--compulsory exchange of information prior to the launch of litigation--which is a requirement of a number of types of cases, including personal injury. If so, it would appear then that litigation is becoming a last resort, which was one of the aims of the reforms.

#### Culture

The study sought to discover how far, if at all, there had been a change in culture, as a result of the civil justice reforms. Since the reforms, the overriding objective has been to "enable the court to deal

with cases justly” given effect by the court actively managing cases and encouraging the parties to co-operate with each other in the conduct of proceedings. The research questions were designed to discover how the legal world had reacted to case management, whether the reforms had ensured a change in culture and whether there was generally more co-operation in the litigation process.

The overall view was that the culture had changed for the better. The general feeling, shared by judges, court staff and practitioners, was that the reforms had achieved the objective in this respect, and that this was an improvement on the previous system.

“Well, I think, I like to think we’ve done very well actually. I mean it was a huge culture change to start with, and, as you know, we did have a lot of training for the implementation of CPR. But I think the transition went, well and, you know, we all seem to be singing from the same sort of hymn sheet.”

(district judge)

There was a general view that co-operation between parties and the court was significantly better. Practitioners were keeping the court informed of progress, *\*C.J.Q. 314* working within the boundaries set and keeping to the timetables. Also, co-operation between the parties had improved, and the judges noted that when disputes arise, it is usually between the judge and parties, rather than inter-party disagreement. The pre-action protocols have, of course, helped to produce a more co-operative environment, because of the consequences of non-compliance. Nevertheless, it seems that “forced” co-operation is eventually becoming habitual conduct. Not only was there co-operation between the parties, but there was also better co-operation between the judges.

There were mixed views about whether delay was still a problem. In the multi-track, some judges thought that case management actually caused delay. Some judges believe that solicitors can case-manage more effectively than judges, and should be allowed to get on with it, with judicial intervention only when necessary. It was also difficult to allocate responsibility for delay. In many cases the fault lay not with solicitors or clients, but with experts not submitting reports on time. There were mixed views about the 30-week deadline for fast-track cases. Some judges thought this target was potentially damaging, and that the process should not be target-driven. On the other hand, there were those who said that many fast-track cases could be tried within 20 weeks. From the practitioners' point of view, there was general agreement among solicitors that timetabling was a good thing, as it moved cases on more quickly. Overall, by a combination of timetabling, the drop in litigation and effective use of listing for trial the notion that delay is an inevitable feature of our civil procedure seems to be a thing of the past.

### Case management in practice

Although there are three named tracks for cases, in essence there are five. The small claims track is currently for claims under £5,000, or £1,000 for personal injury cases. The procedure is controlled by district judges on an informal basis and is outside the scope of this research.

The fast track is currently for claims with a value between £5,000 and £15,000. Many simple cases within the fast-track limit will be case-managed after allocation on a generic basis with standard directions (for disclosure, exchange of expert evidence and so on) and no procedural intervention. This is a slimmed-down procedure, with no evidence-in-chief of lay witnesses, no oral evidence from experts and a trial completed in a day or less. However, there are some cases in the fast track which have to be case managed. These cases proceed within the general regime but have “tailor-made” directions and effectively require a case management conference. In effect therefore there are two types of fast-track trials.

Similarly, there are two types of multi-track. Some cases in the multi-track can proceed with standard directions. For example, a simple debt collection matter for £15,001 is above the current fast-track limit. However, it will normally be resolvable in one day or less and disclosure and expert evidence may be limited. If so, the procedural judge at allocation can make standard directions. Case-managed multi-track cases will be fully case-managed with *\*C.J.Q. 315* “tailor-made directions”, one or more case management conferences and, if required, a pre-trial review.

We found that most fast-track cases were taking less than a day to be heard, and there were few cases in the multi-track. The system of allocation to track seems to be working well, and none of our interviewees could recall an appeal against a decision on track allocation. Where circumstances changed--if an injury worsened unexpectedly, for example--cases could be easily re-allocated but this was rare. Moreover, the research confirmed that the new disclosure regime was working well and

specific disclosure applications were much reduced from the position before the introduction of the Civil Procedure Rules (“CPR”).

### Experts

Experts were identified by Lord Woolf as one of the main problem areas in the civil justice system. The problems related to the inappropriate and excessive use of experts, their expense, and their availability for trial. The new system makes it explicit that the overriding duty of the expert is to the court, not to those paying or instructing them. Experts are now subject to the court's case management powers. Thus, the judge decides whether expert evidence can be adduced, whether it is to be given at trial orally or in writing, and how much of the fee is potentially recoverable from the other side. Moreover, the judges now have unprecedented power to order that evidence on an issue should be given by a joint expert, jointly instructed and paid for by the parties, or appointed by the court. In fast-track cases, if there is no earlier agreement between the parties, the court will generally give directions for a single joint expert, unless there is good reason not to do so. We found that claimants generally suggested experts to defendants, often at the pre-action protocol stage, who were likely to be acceptable so they became, in effect, joint experts by default.

The days of the “hired gun”, the expert generally instructed by one side only and perceived to be “pro-claimant” or “pro-defendant”, are largely over and neither practitioners nor judges expressed any nostalgia.

“I think there has been a recognition by experts that they are reporting to the court, not to each of us.”  
(claimant lawyer)

### Case management conferences

Case management conferences represent the practical and philosophical expression of court control in the case-managed track. They are a flexible device normally presided over by district judges but particularly difficult or important cases can be conducted by circuit judges or designated civil judges. In simple multi-track cases, directions can be given after allocation without a case management conference, but in any complex case the case management conference *\*C.J.Q. 316* is the venue which brings together the legal advisers and the procedural judge, who then shapes the future conduct of the matter. Fast-track cases proceed on written and, normally, standard directions but in rare cases the parties can be called in for what becomes, in effect, a case management conference.

Case management conferences are one of the major successes of the Civil Procedure Rules. The system remains as an adversarial one and has not moved to an inquisitorial basis. Case management under the CPR can be directive but in many respects it is employed subtly. The parties retain the initiative but are encouraged by the system to use that initiative with a view to a speedy and efficient resolution of the case. This in turn is encouraged by the financial pressures to turn round cases. Although procedural judges retain a wide discretion to make case management orders and to refine and define issues before trial, it seems that these are often “reserve” powers. The majority of practitioners retain the initiative by anticipating the judge's approach and by co-operating together to offer case management proposals which will be accepted: in effect, they act “in the shadow of the court”.

There were, however, few case management conferences, and where they did take place, there was a startlingly widespread use of conferences being conducted by telephone. This reflects both financial disincentives to waiting at court, but also the fact that the legal market is changing, particularly in personal injury work, so that it is commonplace for solicitors acting for legal expense insurers, claims management companies or marketing networks to conduct litigation for clients in distant courts. Moreover, it was apparent that solicitors in the same town often preferred to conduct conferences by telephone rather than go to court. One possible concern here is whether the quality and vigour of the preparation by the parties or the conduct of the conference was affected by the fact that they were not present in person. In fact the impression was that cases were better prepared as it was more difficult for a lawyer to operate “off the cuff” on the telephone rather than in person.

It is suggested that telephone conferences should now be the standard approach.<sup>1</sup> The development of telephone conferencing does present a tension with a key objective of Lord Woolf, that clients should be faced with the reality of their litigation by being present at case management conferences, so that they might be informed of the cost of litigation and given a steer towards settlement. Indeed, the CPR gives courts the power to order a client to attend. However, in practice, clients rarely attend

case management conferences and are rarely ordered to do so.

## Settlement

Throughout the Civil Procedure reforms there are specific references to the need to encourage settlement and a range of methods to encourage settlement. **\*C.J.Q. 317** There is a very high settlement rate. Judges noted that the vast majority of cases settle, and we were told of settlement rates of 60 per cent or more. In some courts, the settlement rate was 80 per cent. Solicitors noted that the majority of claims are settled pre-issue, and that this is a direct result of the Rules, which have “given everyone a clear roadmap of what’s going to happen.” There was no doubt among those interviewed that the reforms had encouraged settlement. The judges felt that the reasons were the focusing on the case at a much earlier stage. The appointment of single experts has helped, and even where there were two experts there is more possibility of settlement post-reform because they have to make clear if they agree or disagree.

Although the reforms have had a beneficial effect in encouraging settlement, there remains a major problem of late settlement. The system is managed on the basis that the majority of cases will settle. Thus court lists are managed by over-listing, that is, more cases are listed than can be heard in the expectation that the majority will settle. However, cases are settling on the day before the trial, and there are still cases settling on the day of trial, at the door of the court. This is problematic because where court time is vacated late in the day there is no opportunity to put on another trial. A number of judges felt that cases do not tend to settle until barristers see them, and that this is usually just before trial. Another factor was that the parties may not actually come to court until the day of trial, as in many cases the case management is done by telephone. It is only when the parties come to court that they communicate effectively with each other. In addition, insurance departments in defendant insurance companies are often overwhelmed with work, and this results in issues being left to be tackled at the last minute.

One suggestion for discouraging late settlement was to taper listing fees, or even impose fines. At present, listing fees are returned to the claimants if the case is settled and withdrawn from the list 14 days before the date of trial. After this time, the listing fee is lost, even if the case is settled. The suggestion was made that there could be a return of part of the fee depending on the time within the 14 days before trial that the case was settled. The problem with this suggestion is that the sums involved are small and such a system would only work if there were a big financial incentive to settle, or a significant financial penalty for not settling, or an incentive for settling early.

The general feeling was that whatever rules and regulations there are, and whatever incentives there are for early settlement, the effect of the “door of the court” is the incentive to settle.

“People will not settle until its judgment day, whatever you do.” (circuit judge)

Thus, late settlement is considered to be an enormous problem, but there is a feeling of resignation about it. All that can be done is to try to manage it effectively, in the way that is being done at present. Of course, the persistence of this problem has to be judged against its diminishing importance: fewer litigated cases mean fewer late settlements.

The large increase in the numbers of cases settled has not been matched by a corresponding increase in the use of alternative dispute resolution (“ADR”).

**\*C.J.Q. 318** “Mediation has a place, but I think possibly Lord Woolf’s expectations of it were a bit on the high side.” (circuit judge)

Most parties in person at fast-track trials never think in terms of mediation. The focus is the trial, and they do not think in terms of other ways to resolve the issue. Most practitioners noted that ADR is not inexpensive, so that there is no financial incentive to use it.

It seems then that ADR has not become incorporated into the court process. Cases are settling, but this is not because they are being mediated. The judges are reluctant to order mediation, because of the lack of facilities and resources, and there is some confusion about the appropriate timing for ADR in any case. Practitioners said that mediation was inappropriate at the beginning of the litigation process, because there was insufficient information to know the strength of the case. Towards the end, all the costs had been incurred, so there was little point in not going ahead with the trial. It would not be possible to find support from these findings for court-mandated ADR.

## Part 36

Prior to the CPR, a defendant in a claim for damages had an enormously effective weapon in forcing the claimant to come to settlement: the payment into court of a sum of money in full settlement of the claim. The draconian prospects of a party failing to beat a payment in and having to pay costs even though they have won the case is the most effective engine in encouraging settlement in claims where the damages are reasonably predictable, such as most personal injury or debt-collecting. Lord Woolf recognised that claimants were in an unequal position because they had no equivalent of the payment-in system. Part 36 of the CPR is a key element in “levelling the playing field” and producing “equality of arms” between parties to litigation, one of the key objectives of the Woolf reforms. In particular, by a claimant's offer to settle the claimant indicates, without prejudice, an amount of money, which the claimant will accept in settlement of the claim, plus costs. If the offer is accepted the case settles at this point. If the offer (or any renewed offer) is refused then the matter proceeds to trial. If at trial the claimant “beats” their offer, that is, the judge awards more, then three consequences *can* occur:

- (1) The claimant receives indemnity costs rather than standard costs. Normally, the successful party will receive standard costs which are likely to cover a substantial part but not all of the costs the successful party has to pay to their own solicitor. Indemnity costs are assessed on a more generous basis and are likely to cover virtually the successful party's entire bill.
- (2) The defendant pays an interest penalty on the damages.
- (3) The defendant pays interest on costs.

Whilst these additional awards are not automatic, they are likely to be awarded.

**\*C.J.Q. 319** The Pt 36 process, and the sanctions attached to it, was acknowledged as being effective by the respondents, with the particular advantage of opening up the discussion at an earlier stage in the process. It was even considered useful in commercial work, where practitioners had experience of both claimant and defendant offers. Even where offers were not accepted it was felt to be useful, as it helps to generate negotiation possibilities. One problem was highlighted with the system, in that if the offers are made early, one side may not be in possession of the relevant information, and this creates problems for solicitors in discharging their duty with proper care towards their clients.

Practitioners noted one problem with Pt 36 offers; it is fiendishly complicated and solicitors have to spend some time advising clients on them. The Pt 36 machinery needs to be kept under review to see if changes in the procedure could build on its success while reducing its complexity. This would involve considering both the design of the procedural rule and whether the “sticks and carrots” built into the rule could be made more effective and increase the propensity to settle cases.

## Resources

A common refrain from judges and court staff was the need for more judges. One particular problem for judges was the lack of reading time to prepare for trials. In most cases, specific reading time was not set aside, and judges often read cases the night before the trial or conference. District judges spoke of having to read 100 files in half a day and getting large trial bundles on the morning of the trial.

“Well perhaps the answer is there in front of you. I've got half a day to deal with all those files ... a hundred maybe. Half a day is what, three hours, a hundred case in three hours, so I have less than two minutes to deal with each one.” (district judge)

The idea of the CPR was that district judges would hear fast-track cases, and circuit judges would deal with multi-track cases. However, in some courts, circuit judges do fast-track trials, leaving few, if any, trials for the district judges. Some district judges are only doing one or two fast-track trials a year. In others, circuit judges do not do any fast-track trials, and recorders (civil) do multi-track trials. Many circuit judges will not do any civil work, but concentrate on family and criminal cases. Some district judges questioned the way cases were allocated, and did not feel it was necessary to have the differentiation between district and circuit judges. District judges deal with quantum, and in practice this is often a more difficult issue than liability. It was felt that there should be more freedom of choice of judges, and transfer between judges. We found no justification for the distinction between High

Court and county court, and noted that in the provinces there is little High Court activity.

The use of information technology ("IT") was also variable, but on the whole, the court system was primitive in comparison to solicitors' firms. The \*C.J.Q. 320 courts did not generally communicate with solicitors by email, which was only used internally in departments, although some courts contacted solicitors by email for listing appointments. Practitioners felt that it should be possible to email directions direct to the judge for a case management conference, but most judges were not keen to communicate by email, believing that there could be problems, for example, in relation to the timing of service of papers. Many judges and court staff complained about the IT systems in the court, and noted that the promised investment in IT is not happening. Practitioners echoed this complaint, saying that the IT systems in the courts are "diabolical".

"It was a real betrayal of the civil justice system by DCA and the Treasury that they failed to provide resources to provide an adequate IT system when the CPRs were implemented." (solicitor)

One issue was whether the trial judge should case-manage a particular case, in order to make case management more effective. It was agreed that such a "docket" system would be an ideal and does improve case management, but that it could not work in practice because judicial time is not flexible enough.<sup>2</sup> The view among district judges was that circuit judges ought to be more involved in case management, and that multi-track cases should be allocated to the circuit judge who will do the trial. But in practice, the listing system mixes and matches cases to the available circuit judges, and that would be impossible in a docket system. Similarly, there was also a feeling among the judges that there was little need for more specialist judges. There are few judges doing civil work anyway, and more specialisation was not required. Moreover, judges enjoyed the general work. The system was difficult to organise even with generalist judges, and it would be almost impossible with specialist ones.

Many practitioners were very critical of the quality of some judges. They felt that the judges lacked the necessary expertise, despite their training, and that it was experience that the judges required, rather than training. Practitioners were very critical of the ability of the judges, saying that it is apparent that some of them "haven't a clue" what they are doing. They were all agreed that there should not be criminal judges doing civil trials.

"Sometimes it's a breath of fresh air when you start talking to somebody about certain issues and they are immediately switched on to what you are talking about and they have done it in practice. [It] makes you realise how poor the calibre of judge is." (solicitor)

"I'd rather [the case] be adjourned and somebody that knows what they are doing deal with it." (solicitor)

There were many criticisms of the court administration by practitioners. One solicitor said:

"There's a big black hole somewhere between the door of the court and the district judge's file, and the only way to get over that hole is always \*C.J.Q. 321 to ring two days before and say could you please check you've got the following documents, which is what we always do." (solicitor)

Others said that the administration was "dire", noting the problems with court files and papers missing. The staff and judges were considered to be good, but placed in a completely impossible position. Practitioners thought that the workload was too high for the resources, and too much work was sent from the High Court to the county court. Appointment dates for pre-trial applications were considered to be irrelevant, because by the time the parties received the directions, the dates had expired. Because of these problems, solicitors routinely employ clerks to come to court every day to issue over the counter. This poor administration added unnecessarily to costs.

"The district judge wouldn't authorise that consent order without attendance and when they got there it was because the rest of the court file wasn't there and they couldn't see what had gone on previously, and as soon as they saw the previous order they said yes that's fine. And that was a very low value claim and resulted in there having to be a court hearing and attendance." (solicitor)

## Costs

The question of expense has always been central to litigation in England and Wales, and historically the focus has been on the expense and uncertainty of English litigation costs.

A range of case management techniques introduced by the CPR were intended to draw the sting of excessive and unpredictable costs. In fact, post CPR, the question of costs has become more contentious.

Lord Woolf proposed two approaches to cost control: generic and specific. Both use case management methodology. The generic control involves procedural rationing for low value cases, with the intention that this would reduce costs as well as reduce the time to disposal. Specific control is normally reserved for cases above £15,000 (and complex cases below this figure), which are dealt with in the multi-track, where a series of case management powers are available to the judge that can be applied case by case. These case management powers are very extensive and can include, for example, the reduction or complete elimination of expert evidence or the trial of one aspect of a case before others; often liability before quantum. Case management aspires to meet Woolf's ambitions on costs: to make costs more predictable, certain and proportionate.<sup>3</sup>

Costs emerged as the most contentious, difficult and labile area of the reforms. Costs were felt to be increasing overall as well as being front-loaded, *\*C.J.Q. 322* and practitioners felt that costs schedules, attached to allocation questionnaires and required at other stages, went into a black hole and were not henceforth used by the court. It was suggested that the reforms had *caused* an increase in costs. This matches evidence of practice and judicial opinion in the professional journals, and concern at the highest level of the judiciary.

The major finding of the research, agreed unanimously by all interviewees, is that costs are front-loaded. In personal injury work and in an increasing number of other areas of litigation, including professional negligence and defamation, parties cannot safely launch litigation unless they have gone through pre-action protocols. The new rules on statements of case require considerably more detail and preparation than former pleadings. The necessity to sign a certificate of truth before issuing a statement of case inevitably increases early costs as compared to the system of issuing a writ and seeing what happens. It is implicit in the new approach to litigation that the propensity to issue pre-trial applications should be suppressed as compared to the previous level of interlocutory applications, which were the norm in some types of cases, in particular commercial work. However, when pre-trial applications are made, the new opportunities and tests offered by such applications as summary disposal require considerably more preparation than might have been the case formerly. The result is higher recoverable costs for applications and, probably higher global costs. Unless procedures in the pre-action protocols are reduced in scope, or costs are fixed and reduced in the pre-litigation and early litigation phases, case management has no impact on this forward-loading effect. It is clearly an inevitable result of the Woolf objective that court proceedings should be a last resort and only launched when cases are prepared.

"Once you do litigate you are frontloading, even in fast-track claims. If you are going to be ready for trial, you would get in all your witnesses and everything lined-up, which in the old days you weren't really doing until the eleventh hour because you'd think it's going to settle. I've got a gut feeling it's going to settle, if not we'll run round at the end and get the witness evidence, so again we've been forced to be ready for trial, so you've got to get your good proofs of evidence in the right order, in the right format, done, sent to clients, and all this sort of stuff and make sure they've signed and done them, that's bound to increase the cost." (solicitor)

Prior to the introduction of the CPR, it was widely recognised that costs were often disproportionate. In other words, the amount of costs claimed appeared to be excessive when compared to the issue at stake, in particular, the monetary value of the claim. The research consistently found amongst the judiciary a feeling that costs, particularly in the fast track, were disproportionate and that the CPR had not cured this problem. This was particularly marked amongst circuit judges who, under the new system of summary assessment, were for the first time carrying out initial cost assessment, rather than appeals, when conducting summary assessment at the end of fast-track trials.

*\*C.J.Q. 323* "In the sort of small fast-track claims, which may only be for £1,000 if it's personal injuries you find that the solicitors have run up a bill of £10,000 or £11,000. It is very concerning that a case has been brought, a very simple whiplash for £1,500 or something, and £10,000 has been expended on it."

(circuit judge)

As noted above, in Lord Woolf's original scheme, the issue of disproportionality was to be tackled by introducing fixed costs in the fast track. As these have not been introduced into litigated cases (except

for fast-track trials) and with an essentially open-ended cost assessment system, the issue of proportionality has to be applied on a case-by-case basis in both the fast track and the multi-track.

In practice, under the present arrangements it seems very difficult for the courts to exercise pro-active control. For example, while the rules dictate that litigation effort in the fast track is limited,<sup>4</sup> there was a general impression that in many cases fee earners of too senior a grade have been utilised, or excessive work, for example on perusing documents or seeing witnesses, has been carried out. The difficulty is that any "after the fact" assessment can become a blunt instrument to control disproportionate costs. This places judges in a difficult position and may explain, to some extent, the dichotomy of views we found between judges and practitioners as to whether costs were disproportionate and, if so, why this might be. Summary assessment becomes a blunt instrument if judges have limited experience and little time to examine files of costs and advocates were not the fee earners with the conduct of the case.

"It's very unusual that you've got anyone who actually knows about the costs of the case. What you've usually got is counsel with, possibly with the file, not always with the file. My general approach is first of all to go for the hourly rate, which has usually been over claimed, and particularly to see if the appropriate level of fee earner was being used. I'm fairly severe on that, which will bring a bill down maybe 10 per cent or 15 per cent or something, which still won't bring it down greatly." (circuit judge)

In areas outside personal injury work or straightforward money claims it was generally accepted that the demands of the rules require substantial work in many cases. Ultimately, there is a tension in a system of costs assessed after the event, between the ideal of proportionality and the strictures of professionalism, and the need to risk-manage against professional negligence that dictate the level of work that solicitors feel they need to carry out on a particular case.

Whether or not costs are proportionate or front-loaded, the key issue remains as to whether overall costs have increased. In other words, have the introduction of tracks and active case management acted as a brake on costs, been neutral or have they increased them. Despite the absence of detailed research in this area<sup>5</sup> anecdotal evidence from different players in the system as \*C.J.Q. 324 to their impressions of the overall position is offered. Certainly the judiciary, who see those costs claimed in formal bills and make assessments, offered a consistent view: costs were high before the CPR and they became higher after the introduction of the CPR. This was true for both district judges in their detailed and summary assessment work, and circuit judges who carry out summary assessments as well as hearing appeals from district judge assessments.

This is, in one sense, a surprising finding. Most assessments take place after a period of litigation activity often at or after trial. By this stage the forward-loading effect should have exhausted itself as most of the necessary preparation would have to be carried out by this stage under the system operating pre-CPR. Indeed, the requirement that witness statements be reduced to writing and exchanged<sup>6</sup> was in operation well before the CPR and widely believed to have caused costs to increase. Yet the judiciary's view is that, case-by-case, costs have increased (not merely been front-loaded) and this has happened across a range of firms. This invites the question: are there other factors, over and above the CPR requirements, that might have increased claims for costs? In modern law firms, all departments have to pay their way and this has led to a more commercial attitude in litigation costs. This is expressed in a number of ways including pressure on courts to increase the hourly rates that underpin cost claims, making sure that all work is claimed for and nothing is overlooked.

Practitioners were not so ready to accept that overall bills were higher but none responded that costs had gone down. However, they felt that the system required a level of detailed activity that produced high costs so implicitly accepting that costs had increased. The remedy in some cases was for repeat players (for instance insurance companies) to be proactive to reduce costs. Implicit in this attitude is a general feeling that the CPR changes which were intended, amongst other issues, to reduce complexity have not entirely accomplished this aim. Certainly, although the pace has somewhat ameliorated, the hope that the CPR would constitute a stable code that would be introduced and then revisited occasionally has not been achieved. There have been frequent introductions of revisions, albeit mostly minor. Whilst some progress has been made in the fast track, the case-managed multi-track is still a fiercely complicated process. In many cases at the lower value end of the multi-track the judiciary were responding by making fast-track-like standard directions, which are intended to reduce costs.

The reforms did not make costs more certain and predictable by fixing costs and introducing



prospective budgeting, but the CPR placed greater emphasis on cost-estimating. This requires details of costs incurred and estimated to be incurred to be submitted by representatives at the allocation and pre-trial checklist stage. In this way, it was hoped that downward pressure on costs would be exercised by both the potential payers, the losing party and the winner who might not recover all costs on a “between the parties” basis, and the case-managing judge. This would be particularly important in cases where *\*C.J.Q. 325* proportionality was a particular issue, that is, in the fast track and at the lower end of the multi-track.

It is apparent that to provide the material for such an exercise three things must happen: cost estimates must be served; they must be reliable; and they must be relied on. Our study found that none of these vital factors was present. It was also found that while judges met with no opposition in exercising their general case management powers judges universally stated that the cost estimation rules were not obeyed. Some judges seemed to be adopting a somewhat laissez-faire attitude, very different than the rest of their case management jurisdiction, and this appeared to reinforce the lackadaisical attitude of many practitioners. Whether this reflected some underlying feeling that the existing rules were not practical was not entirely clear. Certainly, it seems that future costs were not regarded as a high priority at, for example allocation stage, where the judge's emphasis was on driving the case forward in an efficient way. This may well reflect the evident truth that most cases which are issued will settle and both damages and costs will be dealt with without further troubling the court. Of all the issues in costs that were raised in the research, cost estimates attracted the greatest unanimity across the spectrum of the judiciary and practitioners. More recently, a further tightening up of the rules in this area has been introduced but experience suggests that there should be continuing monitoring of their effectiveness.

Overall, this research draws the same conclusion as the RAND report into case management in the US Federal Courts<sup>7</sup> namely that case management is effective in cutting delay but it is ineffective in cutting costs or, indeed, may increase costs. Lord Woolf's aspiration that case management would achieve his aims in relation to costs has not been achieved. Rules alone cannot achieve proportionality, economy, certainty and predictability of costs: policy solutions are required.

### General conclusions

The case management machinery introduced under the CPR has been successful in reducing delays, making the process more predictable and certain and shifting control from the parties (or, as is often the case, from their representatives) to the court. This is a positive development, as the primary focus of litigators is on their client's interests and the court is in a better position to hold the balance and look to the public interest. This is important as the court system is a vital public service and its relatively scarce resources need to be used as effectively and efficiently as possible.

The overriding objective of the CPR is for “courts to deal with cases justly”. Justice requires rigour and accuracy in decision-making, together with openness and transparency and a sense of fairness, but this must be balanced *\*C.J.Q. 326* with the use of scarce and expensive resources both of the judicial system and individual litigants. There was no evidence from the research that the case-managed system simply trumps justice with the strictures of efficiency: in fact this balance is best exemplified in the fast track. On the contrary, the new case-managed system focuses minds on the essential issues in a case.

The problem we found was in relation to the costs of litigants. Lord Woolf's hypothesis was that by increasing the efficiency of the litigation process, by diverting disputes from litigation, and by cutting delay in the rump of cases that were issued in the courts, costs would be cut in step with the constrained procedures. The research suggests that this has been proved wrong. This is perhaps unsurprising. In the business world there is a universal tool, often known, as the “Quality Triangle”. This offers a virtually iron law, that of the three objectives in a business--speed of delivery, cost of production and quality of production--it is possible to improve two out of three but rarely all three. For example, products or services can be delivered quickly and cheaply but not of the highest quality. We find that the case-managed court-based dispute resolution system is delivering quality (justice) at a much improved pace but not any more cheaply, and possibly, at higher cost. To complete the Woolf scheme it will be necessary to introduce further reforms to preserve the gains of the new system, by exploring cost control measures, whilst all the time striving to ensure that quality/justice is not sacrificed.

This paper is an abridged edited version of a research report: “The Management of Civil Cases: the Courts and the post-Woolf Landscape” (DCA Research Series 9/05). The research evaluated the

effects of case management in meeting the key objectives of Lord Woolf's civil procedural reforms.

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1. Onemajor disadvantage of telephone conferences, not to be underestimated, is that the job of district judge, which is already heavily focussed on "box work"--dealing with paper applications--becomes even more isolated.
2. Judges also need to be involved in child care cases and crime, as well as civil cases.
3. Proportionality is the concept that the cost of a case should be in proportion to the value of the case, value being a function both of the case's intrinsic importance as well as its importance to the parties and the level of damages. Thus, while some vastly complex and hugely expensive cases may justify very high legal cost, judges in most cases should use their case management powers to ensure that costs do not run out of control.
4. For example, the limits on experts, disclosure and trial time.
5. As we explain in detail in the Research Report, it was concluded that for both practical and theoretical reasons it was not possible for the research to deal in detail and in a systematic way with the issue of costs. The reasons for this are based on a matrix of difficulties in capturing data both pre- and post-CPR, and the difficulties in establishing a pre-CPR baseline.
6. This was a proposal of the Civil Justice Review.
7. Kakalik *et al.*, *Speedy, and Inexpensive?: An Evaluation of Judicial Case Management Under the CJRA* (RB-9027, RAND Institute for Civil Justice, 1996), [www.rand.orgs/pubs](http://www.rand.orgs/pubs).

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