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PROFESSIONAL SKILLS: TOWARDS A MANAGERIAL MINDSET (Case Management, Rules of Court and Practice Notes in the Conduct of Civil Proceedings)

by

Justice Geoff Lindsay AM
Equity Division
Supreme Court of New South Wales

INTRODUCTION

1 This paper addresses the significance, and operation, of the concepts of "case management", "rules of court" and "practice notes" in the conduct of civil proceedings in the Supreme Court of NSW with particular reference to proceedings in the "General" and "Succession" Lists of the Equity Division of the Court.

2 It invites readers to dwell upon the purpose, context, and practical operation, as well as the text, of formal "rules" of law and legal practice that govern the conduct of civil proceedings. That invitation implicitly invites appreciation of the culture within which all who participate in court proceedings play a role.

3 That culture is not static. Over several decades (since the practical abolition of civil jury trials) its focus has shifted from giving priority to adversarial contests in which a judge was expected to remain aloof as a "referee" towards processes in which a judge exercises managerial control over the conduct of proceedings.

4 The courts' embrace of a case management philosophy in their administration of justice was predicated upon the abolition of civil trial by jury and empowerment of all judges, sitting alone, to exercise all the powers of the court.

5 The manner in which hearings are now conducted, with written evidence and written submissions privileged as a precursor to oral engagement, has changed the nature of advocacy and the role of a judge. Mastery of "the documents" of a case is a high priority.

6 Much of what is presented in this paper may have relevance to the conduct of civil proceedings in forums other than the Supreme Court of NSW, particularly those courts to which the *Civil Procedure Act* 2005 NSW, the *Uniform Civil Procedure Rules* 2005 NSW and the *Evidence Act* 1995 NSW apply. Nevertheless, a trite but profound introductory observation is that prudence dictates that a person who instigates or defends civil proceedings should always strive to be familiar with the particular ground rules (the law and the lore) currently operative in the particular proceedings.

7 Cases can be won and lost in the operation of "adjectival law": the practice and procedure of particular courts, specialists lists within a Court; the management practices of judicial officers (not limited to judges); and a practical understanding of the rules of evidence.

8 It is imperative for any person seeking to participate in "Equity proceedings" to be familiar with the case management philosophy that informs practice and procedure in the Supreme Court of NSW; the governing legislation in the nature of "rules of court" (principally, the *Civil Procedure Act* 2005 and the *Uniform Civil Procedure Rules* 2005, the *Supreme Court Act* 1970 NSW and the *Supreme Court Rules* 1970 NSW); the Practice Notes published by the Chief Justice for the guidance of participants in proceedings; and the predispositions of sitting judges. Ultimately all law or, at least, much of it (like politics, as the saying goes) is essentially "local". An important part of

knowing the jurisdiction to be invoked is knowing the personality of the judge called upon to exercise that jurisdiction.

9 Each of the concepts of “case management”, “rules of court”, “practice notes” and “rules of evidence” is grounded in legislation but needs to be appreciated in the context of particular types of jurisdiction exercised by the Court and the role played by “adjectival law” (“practice and procedure” and “rules of evidence”), and advocacy, in the service of the “substantive law” that is generally seen as governing the rights and obligations of participants in court proceedings.

10 Unless it goes to the existence of a court’s jurisdiction, the legislation governing the conduct of proceedings in a court is generally construed, and applied, in a manner that serves the purpose of the jurisdiction to be exercised by the court. In this sense, a court is generally master of its own procedures and, although it may reserve a right to require strict compliance with procedural rules, for the most part it may be content to manage proceedings in accordance with the spirit, rather than the strict letter, of the rules.

11 It helps a judge to modify “strict procedures” if advocates demonstrate mastery of their brief and can, if called upon to do so, identify a “proper forensic purpose” for the orders they seek, based upon a thoughtful “case theory” of how proceedings should proceed and be determined.

12 A common example of this is a case in which there is an interlocutory dispute about a process of discovery (whether by way of a formal order for discovery or upon an application that a subpoena for the production of documents or a notice to produce documents be enforced or set aside) before the close of pleadings or the service of all lay evidence in chief.

13 Practice Note SC Eq No 11 operates well beyond its literal terms, assuming those terms can be given objectively clear meaning. It was issued to change the culture of a system of case presentation in which some parties oppressed

their opponents by pursuing onerous demands for discovery or, if discovery was given, by concealing truly material documents in a dump of a mass of documents. In case management terms, the practice note sought to limit forensic endeavours to define "the real questions in dispute" not by pleadings (according to an English tradition) but by waves of discovery (as has been observed in US proceedings).

14 Another example of a need to be able to identify a "proper forensic purpose" is found in a probate suit where the Court may allow early discovery procedures as a matter of course to permit a reasonable investigation of the existence and validity of a deceased person's testamentary instruments: *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671.

15 Familiarity with, if not mastery of, adjectival law in aid of substantive law is a prerequisite for effective advocacy.

NUANCES IN LEGAL LANGUAGE AND PRACTICE

16 It is not enough simply to read "the rules" (ie. a text) without regard to "the spirit" (ie. the purpose) of the rules of a court without an appreciation of subtleties arising from an evolution of the rules and legal practice.

17 The words lawyers use not uncommonly evolve in meaning with changes in the practice of courts. This is well known to legal historians tasked with unlocking the past, negotiating unfamiliar ways of thinking about law, legal practice and broader concepts.

18 An example of this can be found in the way lawyers think about adjectival law in the shift *from* a system for the administration of justice through specialist courts and tribunals (reminiscent of the old Common Law Courts and the Court of Chancery in England or the divided Common Law and Equity jurisdictions within the Supreme Court of NSW before 1972) *to* a Judicature Act system *and* in modification of the Judicature Act system by the embrace of a case management philosophy of court administration.

19 Under a Judicature Act system such as that introduced in NSW on 1 July 1972 with the commencement of the *Supreme Court Act* 1970 NSW a judge of the court can exercise all the jurisdiction of the court rather than being confined, as was the model of court administration developed in NSW in the 19th century, confined to a single head of jurisdiction.

20 The expression "case management" is associated with a philosophy of court administration that privileges management control of proceedings by the court over management of proceedings by parties.

21 A core legislative provision that presently provides a foundation for "case management" in the Supreme Court is Part 6 of the *Civil Procedure Act* 2005 NSW (entitled "case management and interlocutory matters"), particularly section 56(1) of the Act, which reads:

> "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings".

22 With the fading of historical memory, and given the primacy of section 56(1) in the submissions of parties and in the judgments of the Court, we may have forgotten that the section was not in its terms novel at the time the *Civil Procedure Act* 2005 NSW was enacted. What was novel was that a comparable provision in Part 1 Rule 3 of the *Supreme Court Rules* 1970 was elevated from rules of court to an Act of Parliament. This was done (as procedural changes mandated by the Court often are) to change the culture attending the conduct of proceedings. To shake things up.

23 In a paper delivered by Justice Hamilton, then a judge of the Supreme Court and Chair of the Attorney General's Working Party on Civil Procedure, on 16 August 2005 entitled "The New Procedure - Nuts and Bolts for Judicial Officers" reproduced as Chapter 9 of *The Handbook: Thomson's Guide to Uniform Civil Procedure in NSW* (edited by myself with Hamilton J as Consulting Editor), the following was written at paragraph [9.500] under the heading "The Course of an Action: Case Management":

> "In turning to the course of an action under the new regime, I shall deal first with the provisions relating to case management. These must be viewed against the rise of case management in the courts over the last 30 years. This has occurred largely without major amendment to legislation or rules. What amendments there have been have been piecemeal and fragmentary. Yet virtually all civil proceedings in all courts are now case managed to some degree and in some form.
>
> Because of their importance, provisions relating to case management are now elevated to a leading position in the rules: [UCPR] Pt 2. However, the governing provisions relating to case management are now embodied, not in the UCPR, but in the CPA [the Civil Procedure Act]. This is both to mark their central importance in modern procedure and to ensure that no argument can be raised that a case management procedure or sanction is beyond rule making power. The pinnacle provision is the overriding purpose provision of s 56, previously contained in SCR Pt 1 r 3. I must admit that I was something of a sceptic (although not an opponent) when Pt 1 r 3 was introduced in 2000, avowedly as a culture changing measure. I have since become a devotee. I have found the ability to refer to the rule in court very useful in dealing with recalcitrant parties. I have also found it a useful way of reminding practitioners of their duties in this regard, without the appearance of personal criticism of one side's representatives. …
>
> Section 56 retains the NSW "just, quick and cheap" formula: cf UK *Civil Procedure Rules 1998* r 1.1(1) and Queensland *Uniform Civil Procedure Rules 1999* r 5(1). Section 56 leads Div 1, Guiding Principles, in Pt 6, Case management and interlocutory matters. The following sections are s 57, Objects of case management, s 58, Court to follow the dictates of justice, s 59, Elimination of delay and s 60, Proportionality of costs. Sections 57 and 58 are congruent with "just", s 59 with "quick" and s 60 with "cheap". These provisions are largely new (although s 59 echoes WA *Supreme Court Rules* O 1 r 4A). …"

24 Historically, and functionally, case management philosophy came to the fore in NSW when civil jury trials were effectively abolished in the 1960s, paving the way for the adoption of a Judicature Act system of court administration. This, in turn, paved the way for the management, and determination, of civil proceedings by a judge sitting alone and, at a later time, the introduction of court ordered "alternative dispute resolution" procedures (including compulsory mediations) which have become so commonplace that their description as "alternative" procedures is perhaps unwarranted.

25 An incidental effect of the introduction of case managed proceedings, made ready for determination by directions hearings as required, is that the concept of a "trial" as a "once and for all" day of reckoning (as it is in a trial by jury), has been largely abandoned. Even at a "final hearing" a judge can, on such

terms as may be appropriate, adjourn the hearing to a future date. This is often done if a hearing goes beyond its allotted time or the judge allows parties an opportunity to file written submissions.

26 One particular incidental effect of case management in equity proceedings is that judges no longer routinely have available to them the procedural option of making a determination of the principal questions in dispute between the parties and referring consequential questions to a master (associate judge) for inquiry and determination. They are expected (at a single hearing or, based on case management considerations, a staged hearing) to determine all questions in dispute.

27 Before the courts' embrace of case management philosophy parties were given greater leeway than they now have in case preparation. Interlocutory disputation was tolerated more than is now the case, with plenty of scope for motions for disputes about pleadings and the provision of particulars, summary disposal of proceedings, and general discovery and the administration of interrogatories by service of a notice without (in other than common law proceedings) an order of the court. There was less judicial oversight than there now is of the readiness of proceedings for the allocation of a date for a trial or final hearing.

28 In *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [113] the High Court of Australia stated:

> "In the past it has been left largely to the parties to prepare for trial and to seek the Court's assistance as required. Those times are long gone."

29 Advocates now commonly seek justification for whatever case management orders they seek in reliance on CPA section 56, perhaps with such frequency as to discount the currency. However, it remains coin of the realm, and something disregarded at an advocate's risk.

ADVOCACY IN CONTEXT

30 What is required for effective advocacy can vary greatly between different types of jurisdiction invoked in court proceedings and the predisposition of judges accustomed to exercise distinct forms of jurisdiction. Historically, this was most evident in the comparison between the style of a common law advocate conducting a jury trial and the style of an equity lawyer seeking to persuade a judge sitting alone. The caricatures of those two types of barrister linger in the collective memory of experienced lawyers. A common law advocate knew "the facts", but not much "law". An equity advocate knew "the law" but had no great insight into "the facts". In taking this with a grain of salt, we should remember that it is in the nature of a caricature to be unfair!

31 Historically, a common law trial before a judge and jury commonly focused on competing claims of right capable of determination by a binary outcome (guilty or not guilty; verdict for the plaintiff, verdict for the defendant) unattended by conditional orders. Such a trial was, historically, conducted on pleadings ("issue pleadings") designed to identify an issue or issues amenable to a binary outcome. That type of case was commonly conducted on oral evidence, led in chief and subjected to cross examination, with a minimum of documentary evidence. It attracted a robust style of advocacy with a heavy emphasis on oral advocacy and the determination of facts rather than subtle arguments on questions of law.

32 In days gone by the word "trial" was closely aligned with the determination of common law proceedings. The equivalent upon an exercise of equity jurisdiction was a "final hearing", reflecting the fact that proceedings commonly proceeded by way of a series of "interlocutory hearings" culminating in a final hearing. Equity proceedings were commonly managed by a registrar or master before referral to a judge for a substantive hearing, after which the judge might order that questions ancillary to final orders (such as an assessment of compensation or the taking of accounts) be referred to a master for decision.

33 Remedies available upon an exercise of equitable jurisdiction (commonly an injunction, an order for specific performance, orders for the appointment of a receiver and manager or directions in the administration of an estate) involved an exercise of discretion by a judge. Relief commonly could be granted, or withheld, on conditions. Evidence was commonly adduced by affidavits (with cross examination on affidavits) after a process of discovery: discovery of documents and, in the administration of interrogatories, "discovery of facts". Advocacy commonly took the form of submissions on questions of law and the proper exercise of discretions, both substantive and procedural. Equity pleadings (styled "narrative pleadings") were designed to "state the facts" (in a narrative form) material to a "prayer" for discretionary relief, identifying "all the circumstances" of the case. The whole process was paper-driven.

34 A "prayer" for relief "in all the circumstances of the case" focused attention on the justice of the case at the time of orders being made. This approach stood in contrast with the general focus, in common law cases, on whether a "right" was infringed, or a "wrong" committed, at a time earlier than the time of determination of an action at law. This difference in approach sometimes manifested itself in an assessment of damages at the time of a breach of duty, coupled with pre-judgment interest calculated from that time to the time of judgment (at common law) and an assessment of compensation at the date of judgment (in equity). A more flexible approach is now taken to the time at which damages should be assessed but an advocate should appreciate that differences in the jurisprudence of common law "damages" and "equitable compensation" continue to lurk in the shadows, remembering that an order for the payment of money under section 68 of the *Supreme Court Act* 1970 NSW is sometimes referred to elliptically as an award of "equitable damages".

35 In many cases these subtle (and, at times, mainly historical) differences in terminology do not matter greatly. However they form part of the learning that remains essential to skilled advocacy.

36 Strictly, the expression "cause of action" reflects a claim of a remedy on a common law "cause of action", reminiscent of the "forms of action" (such as

debt, covenant, conversion, trespass, assumpsit, indebitatus assumpsit and trespass on the case) governed by stereotyped writs issued as originating process. This contrasts with the concept of "an equity" as a ground upon which a court of equity might grant or withhold a discretionary remedy to prevent a strict enforcement of common law rights where enforcement of those rights would be against good conscience.

37 The distinction between a common law "cause of action" and an "equity" justifying a grant of a remedy in an "equity suit" has been submerged in popular discourse and in the provisions of legislation such as the *Uniform Civil Procedure Rules* 2005 NSW and the *Limitation Act* 1969 NSW (witness, for example, UCPR rule 13.4(1)(b) and rule 14.28(1)(a) which provide for summary relief based upon an absence of a "reasonable cause of action or defence") which tend to speak of a "cause of action" without overt distinction between the common law and equity jurisdictions or, indeed, other heads of jurisdiction.

38 This recalibration of legal language is accompanied by the approach of some lawyers to the drafting of pleadings. Under a *Judicature Act* system of court administration pleadings are generally required to conform to the equity tradition of "narrative pleadings". Nevertheless, the complexity of modern proceedings (in which several "causes of action" are often pleaded in the alternative) pleadings often these days embrace a hybrid form of pleading in which a factual narrative is pleaded, and largely repeated, under headings which identify headline issues to which particular paragraphs of the pleading are said to go.

39 This tendency is, to some extent, a product of conferral upon courts of statutory powers to grant discretionary remedies which overlay a common law cause of action or an equitable prayer for relief.

40 Exceptions to the tendency to conflate claims made across jurisdictional divides can be found, for example, in the standard pleadings which attend a simple claim on a "common money count" (now reflected in UCPR rule 14.12);

a simple claim in negligence (in which the elements of a cause of action can be pleaded in terms of a duty of care, breach, causation of damage, and damage) and a probate suit.

41 The importance of the common money counts should not be overlooked. One of them, in particular, historically provided a foundation for the modern law of restitution: that is, a claim for "money had and received by the defendant for the plaintiff's use".

42 UCPR rule 14.12 is in the following terms:

> **"14.12 Pleading of facts in short form in certain money claims**
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> (cf SCR Part 15, rule 12; DCR Part 9, rule 8)
>
> **(1)** Subject to this rule, if the plaintiff claims money payable by the defendant to the plaintiff for any of the following:
>
> (a) goods sold and delivered by the plaintiff to the defendant,
>
> (b) goods bargained and sold by the plaintiff to the defendant,
>
> (c) work done or materials provided by the plaintiff for the defendant at the defendant's request,
>
> (d) money lent by the plaintiff to the defendant,
>
> (e) money paid by the plaintiff for the defendant at the defendant's request,
>
> (f) money had and received by the defendant for the plaintiff's use,
>
> (g) interest on money due from the defendant to the plaintiff, and forborne at interest by the plaintiff at the defendant's request,
>
> (h) money found to be due from the defendant to the plaintiff on accounts stated between them,
>
> it is sufficient to plead the facts concerned in short form (that is, by using the form of words set out in the relevant paragraph above).
>
> **(2)** The defendant may file a notice requiring the plaintiff to plead the facts on which he or she relies in full (that is, in accordance with the provisions of this Part other than this rule).
>
> **(3)** Such a notice must be filed within the time limited for the filing of the defence.

> **(4)** If the defendant files a notice under this rule:
>
> (a) the plaintiff must, within 28 days after service of the notice:
>
> (i) file an amended statement of claim pleading the facts on which he or she relies in full, and
>
> (ii) include in the amended statement of claim a note to the effect that the statement has been amended in response to the notice, and
>
> (b) if a defence has not been filed, the time limited for the filing of defence is extended until 14 days after service on the defendant of the plaintiff's amended statement of claim."

43 As a stand out from other forms of pleadings, probate pleadings (in which the validity of a testamentary instrument is contested) remain wedded to a style of pleading reminiscent of a common law "issue pleading" designed to identify issues arising from commonly encountered disputation. That reflects the logical structure of an inquiry into the validity of a will.

44 A statement of claim propounding a will ordinarily alleges that the deceased person died, leaving property in New South Wales, having duly executed a particular instrument as his or her last will and died without revoking it. A defence to such a pleading ordinarily denies the validity of the will and, in terms, alleges (in most cases) a want of testamentary capacity and/or a want of knowledge and approval, and (less frequently) an allegation of undue influence (ie, "probate" undue influence, commonly described as "coercion") or fraud.

45 Customarily, a defence identifies those grounds of opposition to a grant of probate (that is, it identifies an issue) without a narrative form of pleading of facts, but simply setting out particulars of each ground. Most probate pleadings follow a similar form whatever be the type of allegation made as a ground for challenging the validity of a will: ie, a bare statement of the ground, not elaborated by a pleading of material facts but simply particularised.

46 Commonly the standard form of particulars is at such a high level of generality that the particulars might be thought to be a generic description of a model aged, feeble will-maker. In those cases, to come to grips with the real

questions in dispute one may need to read written submissions filed and served in anticipation of a contested hearing, together with the parties' central, contentious affidavits.

47 Sometimes the real questions in dispute only emerge when the case managing judge, or the judge presiding at a final hearing, interrogates counsel. This, in itself, does not necessarily distinguish modern and ancient modes of legal process. In every generation, there has been scope for bench and bar to debate "the real questions in dispute" and to settle pleadings or give directions in the light of that debate. In probate proceedings it is a debate that might be had in the ordinary course of a case management directions hearing.

48 Everybody (the judge not excepted) must be prepared for this if probate proceedings are to be managed effectively. Often, major questions for discussion are whether all interested persons have been served with a notice of proceedings; whether there is a serious challenge to the testamentary capacity of the deceased; and whether collateral accounting questions should be deferred pending a determination of who should represent the deceased's estate.

49 In describing different types of advocacy, it is generally sufficient to draw a contrast between the common law and equity jurisdictions. However, it is a mistake commonly made to overlook the idiosyncratic nature of other forms of jurisdiction, including the protective, probate and family provision jurisdictions which have a history and dynamic that requires separate consideration.

50 Advocates who are immersed in a common law or equity tradition need to adapt to these specialist jurisdictions which have a strong managerial rather than adversarial flavour because the central personality in those jurisdictions (an incapable or deceased person), by the very nature of the jurisdiction being exercised, is unable to protect his or her own interests and is in need of empathetic protection.

51 Different jurisdictions have a different dynamic, governed by the purpose for which the particular jurisdiction exists. The purposive nature of a jurisdiction generally informs the way proceedings are managed and ultimately the way they are determined.

52 This ties in with the purposive nature of advocacy. In presenting argument an advocate needs a "case theory": a plausible argument why facts should be found and law should be applied in achieving an end (purpose) for which the advocate contends. An experienced advocate, having mastered his or her instructions and tested them by reference to available documents, "prepares backwards" (from a desired determination by the court) in order to "present forwards" (moving a judge from known or provable facts to a desired outcome), rather like one negotiates a maze.

53 Despite the adoption of a Judicature Act system for court administration and the embrace of a case management philosophy in the conduct of proceedings, it remains important for an experienced advocate to be aware of the purpose and nature of each type of jurisdiction engaged in proceedings at hand. In my experience, it is also important to be aware that there are two sometimes very different ways of thinking about a case.

54 In common law and commercial cases, the parties commonly focus upon competing claims of right, claims made by competent litigants who are presumed able to look after their own affairs and to make sound judgments about their best interests. In commercial cases, especially, much of the evidence and adversarial debate will focus upon transactional documentation.

55 A very different way of thinking is commonly encountered in (for want of a better description) what might be called the "welfare jurisdiction" of the Court: cases involving an exercise of protective, probate, family provision jurisdiction or equity cases involving a vulnerable person or an allegation of unconscionable conduct of one kind or another.

56 Characteristically, these types of case often involve a central personality (a deceased person or a person incapable of managing his or her own affairs) who is absent (or not wholly present) in the proceedings. They might also involve a person, or a class of persons, identified or identifiable only because of the nature of their interest in property the subject of the proceedings. On the whole, this class of proceedings generally involves administration (management) of "the person" or "the estate" (property) of a person.

57 Advocacy in this type of case has a strong management flavour (often involving an element of public interest) that distinguishes it from an adversarial contest over competing claims of right advanced by competent parties able to protect their own interests.

58 Increasingly, all types of proceedings, across jurisdictional boundaries, are paper driven in a case management environment. Part of this is a reflection of the administrative and time pressures on judges and their staff, a manifestation of which is that very few judges these days can complete their court work between the traditional hours of 10 am and 4 pm. Judges commonly deal with directions at 9 am or 9.30 am before proceeding with a fixture at 10 am and possibly fitting in a directions hearing in another set of proceedings at 4.15pm.

59 In this environment short, succinct, purposeful written submissions, coupled with draft short minutes of orders that crystallise a party's submissions, can be critical to a judge's preparation in advance of the hearing of an interlocutory application or a final hearing. A judge may glance at the originating process (a summons or statement of claim and any cross claim) to get a sense of the nature of the case, but a close study of complex proceedings within time constraints is unlikely to be possible or even beneficial before oral engagement with advocate.

"RULES OF EVIDENCE"

60 A consequence (perhaps not fully appreciated) of the abolition of trial by jury in civil proceedings; the adoption of a Judicature Act system of court

administration; and the embrace of a case management philosophy of judicial administration by a judge sitting alone, has been an abandonment of arguments about technicalities in the application of the "rules of evidence" governing the reception of evidence by the Court in civil proceedings.

61 In a jury trial decision-making functions are divided between a judge and a jury. The jury is charged with adjudication of "the facts". The judge is charged with instructing the jury on "the law". It is necessary, then, to regulate the nature and scope of "evidence" that can be put before, and considered by, the jury.

62 The logistics of assembling and then supervising a jury mandate that a "trial" be appointed at a fixed time and that judge and jury perform their respective functions at that time and within a timeframe that does not lend itself to adjournments to facilitate further investigation of "the facts" or the collection of further "evidence".

63 In the current "case management" setting for the determination of civil proceedings, a judge can manage the process of factual inquiry and do so without the artificial constraints attendant upon confining a jury to the "strictly relevant". A judge ordinarily endeavours to confine the evidence to that which is, or might reasonably be, relevant to the facts in issue; but a judge can receive evidence "subject to relevance" and consider its relevance in light of the whole of the evidence and the final submissions of parties.

64 The "rules of evidence" were significantly changed with enactment of the *Evidence Act* 1995 NSW (sweeping away many technical "rules" that previously privileged procedural fights in the conduct of the hearing) but, in the context of case managed proceedings, perhaps the major change was a change in the culture of the legal profession and the judiciary in how civil proceedings should, in the interests of justice, be conducted.

65 Familiarity with the provisions of the Evidence Act 1995 is, of course, important for lawyers in the conduct of civil proceedings (and, especially so,

for the conduct of criminal proceedings where trial by jury remains a dominant paradigm and technical constraints on evidence may be critical); but, in practice, "the rules of evidence" can generally be taken to require only a few questions be routinely asked in the interrogation of evidence:

(a) Is the evidence *relevant* to a "fact in issue"?

(b) Is the evidence *probative* of a "fact in issue"?

(c) Is the tender of the evidence attended by *procedural unfairness* if received or rejected?

66 Each of these questions requires identification of "the issues" between the parties. That is a process governed not only by pleadings and particulars, but also by written submissions and engagement of parties and the court in an orderly way, conscious of a need for case preparation and presentation to be purposefully "managed", not left to flounder.

CONCLUSION

67 A case management philosophy of court administration was promoted in the early days by framing it as necessary for an efficient deployment of public resources to improve "access to justice". Whether it has achieved that end is open to debate. Courts and tribunals remain over-stretched in terms of available resources for the provision of demand-driven services.

68 What "case management" *has* done is to change the way we think about the resolution of civil disputes. It has elevated "purposive" reasoning in adjectival law, and in a way which can reasonably be expected over time to influence the way we think about substantive law. A truth commonly observed by legal historians is that substantive law often lies hidden in the interstices of practice and procedure.

69 The concept of "management" is driven by "the purpose of management". The purpose of things (the "why" things must be or are done) is now

paramount in the administration of justice. The purpose of “law” and “legal procedures” provides the standard against which everything is measured.

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