THE MANAGERIAL OR INTERVENTIONIST JUDGE

by

JUSTICE ANDREW ROGERS

THE ELEVENTH ANNUAL CONFERENCE OF

THE AUSTRALIAN INSTITUTE OF

JUDICIAL ADMINISTRATION

22-23 AUGUST 1992

BRISBANE

At the outset it is appropriate to point out that there are two aspects of managerial judging, which, the Report of the Industrial Property Advisory Committee (12 March 1992) suggested, inevitably shade into each other (p43). The Report correctly distinguishes between "procedural activism and substantive activism. The 'activist' judge shall be concerned, not only with procedural efficiency, but also with identifying liability, designing relief and developing the law". Time simply does not permit me to discuss substantive activism in any detail. As well I do not intend to repeat points I addressed in an article "Judges in Search of Justice" (1987) 10 UNSWLR 93, but what I wrote there has full bearing on the topic under discussion.

Litigation used to be a perfect example of laissez-faire ideology in action. All litigants were treated as equal for the purpose of allocation and use of procedural weapons and the conduct of the case. The myth of equality justified complete party autonomy. If the parties, for their own reasons, by consent, asked for an adjournment it was no business of the court to decline. If the parties wished to have general discovery, administer interrogatories, put every contention in issue that was a choice which the rules permitted and it was not for the court to intervene. More importantly if the parties allowed the dispute to go so sleep for months, or for years, that again was an available choice. Nor did party autonomy cease there. The evidence that was called

and the extent to which it was tested, the points to be argued, were for the parties to determine. Furthermore if the length of time taken by the trial served to delay other cases in the list that was just too bad. In all this the decision maker remained a passive figure until the time came to give judgment. The now out dated conflict solving process demanded no more from the decision maker than neutrality between the parties. The judge was required to remain blind to any considerations that transcended the resolution of the particular dispute then before the court. The judge was not permitted to promote any larger goal, or value, even if the cost of this promotion would tax both litigants equally. Today, many lawyers recognise that an adjudicator remains obliged to expand the argument and to go beyond the material presented by procedural participants, whenever such action appears to be necessary to attain a just result between unequal contestants. The adjudicator should not remain aloof and uninvolved.

We recently had a case, in which, an acting judge of our Court entered judgement for the defendant. It seemed to be a somewhat surprising result and he explained that counsel for the plaintiff had failed to ask "the right question". Should this be allowed to occur at the present time?

The former judicial approach was thought to be the cornerstone of impartiality. It is that impartiality

which is claimed to be most at risk once the judge takes an active role in the supervision of the preparation of the case for hearing and perhaps even in the conduct of the hearing itself. According to the critics, if directions are given by a judge designed to compensate for inequalities between the contestants, or requirements imposed for the sake of the community generally, or for the better allocation of resources, the judge may no longer be perceived as a completely impartial conflict resolver. It is asserted that the judge is no longer able, easily to decide who wins a dispute in which he, or she, is now seen as entangled. The loser may suspect that the verdict went against him, not because his claim of right was unfounded, or because he conducted, or presented his case badly, but because the adjudicator favoured the adversary on the basis of some extraneous consideration. It is certainly true that the more the judge injects himself into procedural matters the more the usual contest style and its accompanying structure of incentives are weakened. The question still remains, is judicial activism necessarily destructive of impartiality or the perception of impartiality? With my admittedly imperfect knowledge, it does not appear to have that effect in civil law countries.

Managerial judging now has the imprimatur of that hot bed of radical thinking, the House of Lords. All of the Law Lords agreed with Lords Roskill and Templeman in Ashmore

v Corporation of Lloyd's (1992) 2 All ER 486. Lord Templeman said (p 493):-

> "Mr Lyndon-Stanford repeated the arguments in the Court of Appeal and as Ralph Gibson LJ remarked:
>
> > 'He claimed in particular that it was wrong thus to take the conduct of the proceedings out of the hands of the plaintiffs and thereby to disappoint the plaintiffs in their legitimate expectation that the trial would proceed to a conclusion upon the evidence to be adduced.'
>
> Ralph Gibson LJ thought that there was 'considerable force in those submissions'. My Lords, I disagree; the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings."

Lord Roskill was even more forceful when he said (p 488):-

"In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues." (my emphasis).

In the result the question is not should we have managerial judges but to what extent should judges undertake such duties. One observer suggested that "the trend toward managerial judging is irreversible because the trend toward complexity in civil litigation that gave rise to managerial judges is irreversible" (Langbein "The German Advantage in Civil Procedure" 52 U.Chi.L.Rev 823,861 (1985)). Whilst I agree with the conclusion I suggest that the reason is more than just complexity of litigation. In exploring the question it may be useful, even with this knowledgeable audience, to look briefly at what brought us to this point.

At the heart of the difficulty, felt by those opposing the concept of the managerial judge, lies the undoubted

fact that dispensing justice is different from selling a hamburger. The point is made with much greater elegance by Professor Sallman in "Judicial Participation in Caseflow Management" (1989) 8 C.J.Q 129,130. It is necessary for a civilised society to provide a means whereby a dispute, between two or more citizens and perhaps the State, is prevented from degenerating into a violent disturbance of a greater or lesser kind. Forget the mystique of the raised bench, the gowns and the wigs, the arcane language and the trappings which is employed by the priesthood serving the goddess Justice. It is the procedure in arriving at the result and the result itself which have to be acceptable to community expectations. Both the procedure and the result have to be fair.

I will be addressing civil disputes, partly because of time constraints and partly because my experience does not qualify me to speak with any authority on criminal cases. However, my failure to address judicial activism in criminal cases is not to be taken as an indication that there is not a great deal happening in that area of dispute resolution as well. Probably the most complete description of the far reaching and radical changes that have emerged are described in the 1992 Child & Co lecture "Serious Fraud / Long Trials / And Criminal Justice" delivered by Mr Justice Henry in England. Amongst other achievements the Judge survived presiding over the Guinness trial. He remains a strong adherent of the jury system, but, in order to make it possible to have serious

frauds tried with a jury, he has suggested daily or weekly running summaries of the evidence, on each issue, to be supplied by the judge, statutory limits on the lengths of jury trials only to be exceeded with the leave of the court, power to the court to deny jury trial if satisfied that the case cannot be brought within the statutory time limits only because of unreasonable refusal by the defendant to admit facts which plainly should be admitted, and most interestingly, that the judge, rather than the prosecution, open the issues to the jury. As he put it:-

> "If the judge rather than the prosecution were to open the issues to a jury, I believe that defence compliance with the disclosure orders will be much fuller than if they fear that the prosecution will use the opening to poison the well. At present there is little comfort in the opening of the trial for the defence. The prosecution open their case, often with headline catching comment, and the defence has no opportunity to say what their answer is. In short and simple cases this does not matter, the issues are clear and self evident. In long fought cases it may matter. It seems to me that there is a case for the trial judge opening both the law and the issues to a jury."

Let me revert to the safer shores of civil litigation. Managerial judging is, in a large measure, a response to

the change in the composition of litigants and the information explosion that has taken place. Until relatively recently, litigation, with some exceptions, was the preserve of the rich, who could afford the luxury of disputes working their way through the courts at a pace which suited the lawyers and, dare I say, the judges. That approach was destroyed by the Industrial Revolution, the consequent claims, supported by the Unions for damages for injuries suffered in industrial accidents, the advent of the motor car and accidents with almost assured compensation, from compulsory third party insurance, and finally legal aid. The point is that the courts were thenceforth required to provide services to a class of litigant, in many cases unable to grapple with the intricacies of legal procedures. Post war migration introduced an added layer of difficulties, in this country, at least.

The courts and the judges were confronted with the difficulties of an unprecedented increase in the volume of litigation, conducted now, in a large measure, on behalf of litigants incapable of ensuring that their claim was proceeding either at the speed, or in the manner, that, if they had the wherewithal to make an informed choice, they would have chosen. In a very important sense, interventionist judges, entered the field in order to give direction to the progress of cases in the place of those who, for whatever reason, were exercising inadequate control over its progress. The

willingness of some judges to safeguard the interests of litigants, even from their own legal advisers, has found strong expression in the judgment of Cole J in Skinner v Edwards (Builders) Pty Ltd v The Australian Telecommunications Commission (unreported 5 June 1992). His Honour said:-

> "I am appalled by this litigation. I would have thought it was tolerably obvious that if engineers issue incorrect drawings to an architect who fails properly to check them before issuing them to a proprietor who has his own technical advisors who also failed adequately to check them with the proprietor then issuing those documents to a builder who forwarded the incorrect documents to sub-contractors who tender on the basis that the documents are correct, the sub-contractors would be entitled to recover from the builder who in turn would be entitled to recover from the proprietor. It would be equally obvious, I would have thought, that each of the engineers, the architect, and the proprietor would bear some responsibility for each failing properly to check the drawings. Any application of commercial common sense a year ago in respect of a claim of such small dimension as $103,000 should have produced a resolution. Instead of such a solution there has been a legal festival comprising a series of feast days extending over twelve months.

I expect that the costs by now exceed the initial claim.

Within reason, parties are entitled to litigate such issues as may be in dispute between them. The Court's function is to hear and resolve those disputes. If there be no resolution by agreement between the parties, the Court will perform its function but it will also give directions as it is empowered to give aimed at narrowing issues so as to eliminate matters which are either inconsequential to or immaterial to the ultimate resolution of the dispute. That results in savings of cost and time to the litigants and the community generally.

There is much public debate regarding the cost if litigation. The court does what it can, consistently with its obligation to endeavour efficiently to resolve litigation, to reduce costs. Nonetheless, once litigation is commenced the parties are inevitably involved in significant cost. There are mechanisms within the rules and practices of the Court for prevention of abuse of wrongful or improper joinder of parties simply for the purpose of obtaining a contribution towards a verdict under threat of being liable to incur significant legal cost.

The Court expects parties in commercial litigation, and that includes the litigation within the Construction List administered by the Commercial Division, to act in a sensible commercial fashion. That imposes upon the parties an obligation to consider the ultimate financial outcome of litigating or compromising a dispute. Unless there be some major matter of principle involved, there is no point in a party to commercial litigation succeeding in establishing a factual circumstance or legal consequence at a net cost, or loss.

The expectation that the Court has that parties will act sensibly imposes a very heavy duty indeed upon legal advisors, both barristers and solicitors. They have, in my view, an obligation at the commencement of litigation in this Division to advise their clients of the likely duration, inconvenience and cost of litigation upon alternatives of success, qualified success, or loss. Only then can a client make a sensible commercial decision regarding litigation or compromise. I have great difficulty in accepting that if the clients in this matter had each been advised that the litigation would take a year to conclude, would involve architects, engineers, quantity surveyors, contractors and tradesmen, would involve a hearing of at least a week coupled

with subsidiary hearings prior to and subsequent to a reference, and that the likelihood was that total cost would exceed the amount being claimed, some sensible commercial compromise could not have been achieved. Particularly is that so where, as here, I would have thought it was tolerably obvious, if not inevitable, that each of Telecom, UDC an W & R would bear some financial responsibility for the errors in the drawings."

More recently another factor intruded. The cost of litigation was getting to be of scandalous proportions. Complex commercial cases were assuming the proportions of medieval battle trains The trolleys of photocopied documents in arch levers, the battery of partners, employed solicitors and paralegals with their portable telephones to call for reinforcements, the lap top computers to spew out even more information, were not only stretching court accommodation to the point where a usually spacious courtroom was insufficient to provide the necessary elbow room but where both cost and character were transforming a complex commercial case into a major Hollywood production. I may remark, in parenthesis, that it is somewhat ironic that at the end of the day, the presentation of the case having called for this battery of talent, one person, the judge, is required to produce an answer, which will then be subjected to searching analysis by the same battery of lawyers and their associates for flaws and blemishes. To

adapt the cry from the witness to the charge of the Light Brigade "It is magnificent but is it justice?"

To me, one of the most interesting feature of the argument on managerial judging is the view, advanced by Professor Elliott "Managerial Judging and the Evolution of Procedure" (33 U.Chicago L.Rev 306, 320 (1986)), that, in at least a certain category of cases, managerial judging enhances substantive justice.

In order to ensure that the dispute resolution system was not strangled by sheer volume, it became necessary to undertake what has become known as case management.

It impacts at two levels. At one level, it seeks the speedy and just determination of the individual dispute, from the time of its commencement, until its disposition. The extent of the management designed to achieve this goal may range from participation by the court in giving the dispute shape at Directions Hearings, through the speed and manner of its preparation to the actual hearing itself. The very notion of Directions Hearings is an affront to opponents of managerial judging. They are used as a vehicle to define issues, control discovery, interrogatories and admissions, arrange for conferences between experts and generally drive the progress of the dispute at a speed which accords with the presumed wish of the actual parties, excepting only those who desire delay for ulterior reasons. As well as narrowing the

areas of disagreement the process seeks to eliminate any unnecessary steps, whether due to abuse of process or inadequate thought. This may be thought of as the micro level of intervention. At the other level, the court management is guided by the interests of the community generally and the demands of the general state of the court's business, the macro level.

The interesting proposition has been advanced that due to the very strict standards applied to remove issues by summary judgment, that work is being increasingly performed through managerial judging but without the usual formal procedures and safeguards (see Elliott supra p 320).

The macro function of managerial judging was highlighted by Sheppard J, (with whose remarks Burchett J agreed), in Du Pont de Nemours v Commissioner of Patents (1988) 83 ALR 499, 500 where he said:-

> "Courts are publicly funded institutions. Except for a nominal filing fee, they provide their facilities free of charge. The judges who preside over them have a duty, consistently with their primary duty to administer justice, to do their utmost to prevent waste of public time and money. The days when parties were left at leisure to pursue private litigation in the way that they

thought best suited their purposes have long gone. Courts have an overriding obligation to see to it that those using their facilities are proceeding in a way best calculated to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of."

A stark example of macro level management is the refusal to grant an amendment or to vacate a date for hearing because of the effect that may have on the court's list generally. A balance has to be struck between, the demands of justice in the particular case and the interest of the community generally. It is only in the last few years that appellate courts were prepared to countenance the possibility that it was permissible, indeed necessary, that the general public interest and the interests of litigants with cases awaiting hearing may properly be taken into account in exercising a judicial discretion. When the House of Lords performed this volte face in Ketteman v Hansel Properties Ltd (1987) AC 189, the first reaction of the New South Wales Court of Appeal was that this approach was not open in this country (Nominal Defendant v Cameron (unreported 2 August 1988)). For the legal historian, the recanting by Samuels JA of the view he expressed in Cameron (supra) is of considerable interest. (G.S.A. Industries Pty Ltd v N.T. Gas Ltd (1990) 24 NSWLR 710,716). In the event, one would think that the question has now been put beyond

doubt by the decisions of the Full Court of South Australia in United Motors Retail Ltd v AGC Ltd (unreported 24 December 1991) and the New South Wales Court of Criminal Appeal in State Pollution Control Commission v Australia Iron & Steel Pty Ltd (unreported 15 June 1992). In the latter case, the prosecution failed to comply with an order for exchange of witness statements. The judge found that, if the evidence were permitted to be lead, the resulting prejudice to the other party could only be cured by an adjournment. There was no evidence that the adjournment would occasion prejudice not curable by an order for costs. The judgment of the Court was delivered by the Chief Justice who said (p 13):-

> "Far from being an extraneous consideration, the regard which Cripps J had to the requirements of the efficient despatch of the business of the Court was entirely proper, and in keeping with modern principles of case management. The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an increasing responsibility on the part of judges to have regard, in controlling their lists and cases that come before them, to the interests of the community, and of litigants

in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs. There are a number of Practice Notes issued in relation to the business of the Supreme Court making that perfectly clear. The flow of cases through the courts of this State is now managed by the judiciary, and not left to be determined by the parties and their lawyers."

The Chief Justice quoted with approval from United Motors where King CJ said:-

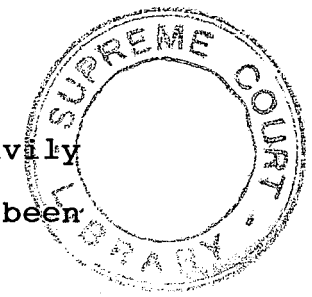
"Where there is a late application to amend which, if granted, would necessitate postponement of the trial or there is an application for the postponement of the trial whether made at or shortly before trial, the case flow management principles adopted by the court as the basis of its procedures will be an important and often the dominant consideration in considering the application. It will always be necessary for the court, however, to take all factors into account. The necessity for the amendment or postponement

may arise from causes which involve no fault on the part of the applicant or its legal representatives. In such cases the need to do justice to the party will ordinarily take precedence over policy considerations. The necessity for a late amendment or a postponement of the trial may result from circumstances which are genuinely, to repeat the language of rule 89(2) 'exceptional and unforeseen'. Here again the need to do justice to the party will ordinarily prevail. There are other cases in which the impact upon a party of a refusal of an amendment or an adjournment, may be so severe, particularly when considered in relation to the nature of the neglect or other conduct which has brought the situation about, that the court will feel it necessary to subordinate the policy considerations to the need to avoid such impact. Clearly, too, even where a postponement, or an amendment which would necessitate a postponement, of the trial is refused, all such considerations will be relevant to the court's decision as to the nature of the order which will be made if a party is unwilling or unable to proceed. There are alternatives to the extreme step of dismissal for want of prosecution of non-suit, which may be adequate in the circumstances of certain cases."

Courts in almost all of the Australian States have recognised the need to refuse to grant an adjournment where the legal advisers for one party, or another, have neglected to either prepare, or prepare adequately, notwithstanding a recognition that the party may be detrimentally affected in the presentation of its case.

It is appropriate to note the formulation of the task of appellate review in such circumstances. In Bank of New Zealand v Spedley Securities Ltd (in liq) (unreported 1 May 1992) Mahoney JA (Hope AJA expressly agreeing, Kirby P to similar effect) said:-

> "It is part of the duty of a trial judge to endeavour so to arrange the disputes before him for decision that, subject to proper qualifications, they be dealt with efficiently and effectively and with the least cost and delay to the parties. An appellate court should, in my opinion, intervene in what he has done to this end only if there is real injustice or the proper principles have not been observed.
>
> I do not mean by this that the discretionary orders made by trial judges to this end are not to be the subject of scrutiny or that, for the reasons relevant in the review of such orders, they may not be put aside. But the pressing need



to determine such disputes should weigh heavily against a discretionary reversal of what has been done."

Full effect to such approach was given by the majority of the Full Court of the Federal Court in Bomanita Pty Ltd v Slalex Corp Aust Pty Ltd (1991) 104 ALR 165. I might add that Sheppard and French JJ expressly adopted the approach of Lord Griffith's in Ketteman (supra).

With this attitude may be contrasted the recent statement of the English Court of Appeal in Boyle v Ford Motor Co Ltd (1992) 2 AER 228.

Judge Peckham, a strong proponent of managerial judging described the bedrock difference between his approach and that of Professor Resnik, one of the foremost critics of the process thus "Professor Resnik placed the onus of responsibility for the orderly and prompt disposition of the litigation with the bar, whereas I place that responsibility equally, if not primarily, on the shoulders of the judge." ("A Judicial Response to the Cost of Litigation; Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" 37 Rutgers L. Rev. 253). Professor Resnik's response is that to focus on "the volume of case dispositions (rather than the substantive law in general, the merits of a particular case, improved techniques for fact finding) has become the be-all and end-all of many within the

federal judiciary." ("Failing Faith; Adjudicatory Procedure in Decline" 53 U.Chi.L.Rev 494, 535 (1986)). The opponents and proponents shout at each other from opposite hilltops without truly listening.

In what follows I am posing questions without venturing the answer, if there is one. I rather doubt that there are any right or wrong answers in this field. Yet, if we do not get the process of litigation into the shape the community expects, we shall be damaging the fabric of society. If the community were to conclude that the court's are failing to deliver a just result, at a reasonable cost and within a reasonable time, resort to other methods of resolving disputes will be only moments away.

Party control over litigation commences with a decision by one party to institute proceedings and the other to oppose them. Probably one of the most extreme manifestations of managerial control was the disinclination by Wootten J to allow the parties to bring proceedings to an end when there was an apprehension that, if the proceedings were to continue, the Commissioner of Taxation might take an interest in the matter (Kelly v Raymor (Illawarra) Pty Ltd (1982) 13 ATR 592). Again my willingness in AWA v Daniels to call certain witnesses who the parties. for forensic reasons, did not wish to call, was not a response to the parties' wish but to what I regarded as the demands of justice.

An interesting problem was recently confronted by a judge, which raised in a stark form all of the problems encompassed by the heading to this paper. In a dispute, involving a multiplicity of parties, all agreed on the form and nature of discovery. No formal order of any kind was required from the Court. Indeed the only reason why the judge even became aware of the immensity of the task which the parties, by consent, had agreed to undertake was that there was an application for security for costs. One quarter of a million dollars was sought for the costs of discovery. To say that the judge was concerned was to put it mildly. The immediate question which confronted the court was what could be done, if the judge were otherwise minded to intervene. The parties were represented by experienced senior and junior counsel and by experienced firms of commercial litigators. If they could see nothing inappropriate in engaging in discovery at such a cost what business of the Court was it to intervene? It had to be assumed that the client had been advised that this interlocutory step was being undertaken and its approximate cost. The problem lay in the apprehension that, the client may not have been told that the process was not one that was ordered by the Court. The client would have been entitled to assume that the discovery was undertaken pursuant to some order of the Court. Was it at least appropriate that the judge should ensure that the client was aware that the discovery was being undertaken at the cost involved and

in the depth which such cost would entail by agreement between the parties rather than pursuant to any order of the Court? Was it appropriate to say anything, or do anything which could conceivably create friction between the client and its legal advisers? Could or should the Court go further? Should it require to be satisfied that discovery was undertaken at the least cost and to the minimum extent consistent with a fair presentation of the case? After all, if discovery was more extensive than necessary and cost more than it should have, the losing party would be entitled to taxation of the costs and the winning party also, if it desired, could insist on its own costs being taxed by its own solicitors. Should the Court do anything to draw attention to this fact? Alternatively, should the Judge require that evidence be given in some shape or form justifying the discovery? It is difficult to imagine that a judge could confidently expect to know, or learn, enough about a complex dispute, prior to the hearing, to be confident in refusing to allow discovery of the size and shape agreed on between the parties to take place. If the parties consent to an order, what power has a judge to refuse to act on such consent?

Recently Young J was faced with a situation in which the legal advisers for one party insisted that discovery of a particular extent was required. The judge did not think that was correct but felt unable to conclude, in the face of assertions to the contrary by senior counsel for the

party in question, that such discovery was not necessary. He consoled himself with the thought that, if ultimately found to be inappropriate, taxation would take care of the difficulty. I am not certain that a judge should accept that costs are a sufficient sanction and safeguard.

The difficulty arising from the fact that counsel and solicitors do, or at the very least should, know more about the case at any given point of time prior to its conclusion than the judge, has a pervasive effect on the conduct of the case from beginning to end. It is not only in relation to interlocutory steps that at various stages problems arise. The conduct of the trial is the very best illustration of the difficulties confronting a judge. In Banque Financiere de la Cite v Skandia (UK) Insurance Co Ltd (1991) AC 249 Lord Templeman, disturbed as he was by the length of time a hearing took before the trial judge and in the Court of Appeal and indeed in the House of Lords, sought to lay down a menu of suggestions for the conduct of complex cases to restrict them to manageable bounds. It is interesting to contrast the advice he gave with the course taken by the Family Court in this country.

In Skandia, the hearing before the primary judge Steyn J, "endured" for 38 days. The appeal occupied 23 days before the Court of Appeal. Lord Templeman mentioned the array of authorities that were cited. There was then an

appeal to the House of Lords which occupied six and a half days. The primary judge's judgment was 36 pages in Lloyds Law Reports, Lord Justice Slade in the Court of Appeal delivered a 58 page judgment. Lord Templeman said this cannot go on. He referred to earlier cases where judges had complained of the lengths of cases and the number of judgments cited. He went on (p 280):-

> "Proceedings in which all or some of the litigants indulge in over-elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent which threaten to rival the excesses of Jarndyce v Jarndyce must perforce compromise or withdraw with a real grievance. In the present case, the burdens placed on Mr Justice Steyn and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the lengths of the hearings or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the Courts below to alleviate the ordeal, but the history is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to

conduct their case in all respects in the way which seems best to them. The results, not infrequently, are torrents of words, written and oral, which are oppressive and which the Judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the Judge taking time to read in advance pleadings, documents certified by Counsel to be necessary, proofs of witnesses certified by Counsel to be necessary, and short skeleton arguments of Counsel, and for the Judge then, after a short discussion, in open court, to limit the time and scope of oral evidence, and the time and scope of oral argument. The appellate Courts should be unwilling to entertain complaints concerning the results of this practice."

He said this in mid-1990.

Just about the same time, the Full Court of the Family Court gave judgment In the Marriage of Collins (1990) 14 Fam.LR 162. At first instance, Nygh J, with a real purpose in ensuring fairness in the litigation, felt that he had to limit the time that would be taken by the case, and did substantially what Lord Templeman suggested should be done, although he could not possibly have read the judgment which came out only at the same time as the Full Court's decision. After it had been proceeding for some time he limited the time for further cross-

examination and for the totality of the hearing. The Full Court said (ib p 174) that the "imposition of an arbitrary time limit on one or both of the parties is however quite a different matter.... The question of a time limit in Court proceedings has, naturally enough, rarely if ever arisen as it would normally be out of contemplation." (my emphasis). Their Honours continued (p 175) "In ordinary circumstances the imposition of an arbitrary limit upon the presentation of a party's case would amount to such a fundamental denial of natural justice as to lead inevitably to an order for a retrial." With very great respect, no doubt because it is somewhat obscurely reported, their Honours' attention was not drawn to the speech of Lord Wright in Vassiliades v Vassiliades (1941) 18 Cyprus L.R. 10, 22 where he said:-

> "Now cross-examination is one of the most important processes for the elucidation of the facts of a case, and all reasonable latitude should be allowed, but the judge always has a discretion as to how far it may go, or how long it may continue. A fair and reasonable exercise of his discretion will not generally be questioned by an appellate court." (my emphasis).

It is instructive to see the difference in approach between the Templeman view of how one needs to proceed, and the view that was taken in the Full Court of the Family Court. Nygh J was upheld only because in the view

of the Full Court, the Counsel who was appearing before him did not object sufficiently strenuously. There was an application for leave to appeal to the High Court. In the course of argument, Deane J said:-

> "Well perhaps the Full Court of the Family Court needs to take a new look at limiting the length of these types of proceedings".

The proceedings throw up quite vividly the collision that exists between the traditional concept, that it is part of requirements of natural justice that a judge allow a party to present its case in full, no matter what, and the demands of ordinary justice that a litigant should not be allowed to be bled white, or to be oppressed by a wealthy party, taking as long as it likes in the conduct of the litigious process.

The understandable anxiety of judges to keep the hearing of cases within manageable proportions and to require parties to address only matters in real dispute have resulted in more and more challenges to the authority of judges. As well, the pressure of work has led to an increasing tendency on the part of judges to participate in the conduct of cases and the eliciting of evidence. As Kirby P mentioned in Galea v Galea (1990) 19 NSWLR 263, 281:-

"The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change. But there is no unchanging formulation of them. Thus, even since Jones, and Tousek, at least in Australia, in this jurisdiction and in civil trials, it has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists. In part, it reflects an increase in specialisation of the judiciary and in the legal profession. In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party affected then has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of the injustices than can sometimes occur from undue delay or unnecessary prolongation of trials deriving in part from new and different arrangements for legal aid."

Is case management appropriate to the ordinary running down case, or industrial accident, or a dispute not involving very large sums of money, or important commercial considerations? There is no more vehement

critic of case management than the current President of the Law Society of New South Wales. His contention is that case management is an unwarranted intrusion in the ordinary run of litigation because of the attendant cost. The argument is that, of their very nature, the vast majority of cases will settle without a judgment being required. Why then, the argument goes, should one not allow the disputes to progress without any attendance at court and allow settlement to take place in the "normal course"? The recent Common Law offensive undertaken by the Supreme Court of New South Wales provides at least a partial answer. 1200 cases were selected for special treatment. Most of these were old actions, in some instances the date of injury went back prior to 1980. The disputes had been languishing in the list for one reason or another. The first comment is why were these cases not settled in the "normal course"? Worse, even given the fact that the disputes had been subjected to call over on a number of occasions, and subjected to special treatment many of them were ill prepared or unprepared. I had listed before me for hearing a case stemming from an industrial injury which I was told was not ready to proceed because doctors required to attend from Queensland were not available. On inquiry, it emerged that every single person involved in the case came from Queensland. Why the dispute had not been cross vested for hearing in the Supreme Court of Queensland was a question to which no-one could offer an answer. The saving in costs by a hearing in Queensland would have

been nothing short of enormous bearing in mind the requirement for the attendance of doctors from that State.

Prior to the commencement of the two weeks of special sittings, 700 cases were disposed of. Over the period of the two weeks, the remaining 500 cases were disposed of. There is not the slightest doubt that there were costs incurred which the parties would not have been involved in had the disputes not been subjected to this special treatment. On the other hand, it is the sad, but inevitable, conclusion that had this not been done the cases would have continued to languish in the list for ever and a day. Nonetheless, it is a legitimate question to ask whether case management procedures, conducted by courts, impose upon litigants unnecessary additional costs or whether such procedures do in fact save costs. Against the fact that additional costs are incurred by parties in those matters that do proceed to a hearing there has to be taken into account the costs saved in matters which produce earlier settlements than would otherwise be the case. Where the balance lies is not established by any research. It is hoped that the Civil Justice Research Centre, established by the Law Foundation of New South Wales, may undertake some research into this question.

One of the most controversial questions today is the role that a judge may play in achieving a settlement of the

dispute between the parties. One of the justifications for the paper work which is currently required to be exchanged between the parties in commercial matters is that it more fully and adequately exposes the strength and weaknesses of the case for each party and therefore enables settlement discussions to take place, both at an earlier point of time and in a much more informed atmosphere. However, assuming that this is still insufficient to induce settlement discussions to be brought to fruition, what ought a judge to do? We have all had the experience where counsel have said to the judge that a few appropriate words might achieve a settlement. No doubt, if counsel so request, there is absolutely no reason why a judge should not make a short appropriate speech. Should the judge always wait for counsel to request assistance?

The problem which confronted me in AWA Limited v Daniels is another striking illustration of the difficulties which arise. On the twelfth day of hearing, of my own motion, and over the evident disinclination of one of the parties, I ordered the parties to undertake mediation. It was unsuccessful. The hearing went on for over sixty days simply on the question of liability. All I succeeded in doing was to involve the parties in the cost and expense of paying a mediator and spending a day or two in front of him. Was that appropriate? Was it justified?

In 1986, the then Chief Justice of New South Wales, wrote to the Attorney-General, saying in part:-

> "Expressions of concern regarding the length of Court proceedings continue to escalate. As things stand at present, the Courts do not really have effective control over the time taken by the profession in the varying aspects of a hearing. At the same time, the public perception is that the Court, and to some extent the Government, is responsible for the cumbersomeness with which litigation proceeds on its stately way.
>
> Our Court facilities are an expensive resource and I feel that it is uneconomic simply to deliver our facilities up to the hands of the profession once a case is called on for hearing. Judges and magistrates need positive powers to control the scope and length of proceedings,this requirement having become particularly relevant in the modern climate of legally aided litigation."

The Attorney-General referred the suggestion to the New South Wales Reform Commission. It reported in 1988 (L.R.C 56) that judges probably have the powers proposed but simply do not use them. The powers were said to be part of the inherent powers of the Court. The Commission concluded that the express provisions in the terms sought

by the Chief Justice required "a detailed examination of the nature and function of the adversary system - - -As the Commission has had neither the time nor the resources to undertake such a study in the course of this reference we make no recommendations on the issue raised." (par 6.31).

One of the great challenges to the legal profession in this country and indeed in the common law world generally, is to identify the best features in other systems of dispute resolution in order to introduce and adopt them as part of the adversary system. I do not for a moment suggest that wholesale adoption of civil law procedures would be either feasible or responsive to the problems that we experience. The recent moves by civil law countries to adopt features of the adversary system suggest that. Even from other common law countries there are interesting provisions which could be considered for utilisation with considerable advantage. Thus Rule 430 of the American Federal Rules of Evidence provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The umbrella provision in Rule 102 requires the trial judge, while securing fairness "to eliminate unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined." That is the unspoken assumption that underlies judicial activism. The question at the end of the day is how well we fulfil that task.

Very recently the Law Foundation offered a grant to a newly retired member of the New South Wales Court of Appeal to examine the feasibility of importing into the trial of complex commercial cases features of the civil law or inquisitorial system. At the end of the day the ultimate question to ask is whether the adversary system of litigation is consonant with, and acceptable to, today's realities and demands.

As Resnik observed ("Managerial Judges" 96 Har.L.Rev 376 (1982) "Managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent....Because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority". (ib pp 378; 380). There is undoubted substance in this apprehension. Restricting discovery, at a time well before the judge may be expected to have a full grasp of the issues, may serve as an illustration. There is a

delicate balance and my support for judicial activism does not blind me to the dangers.

*****