

ANN EYLAND*

I INTRODUCTION

In his address at the Opening of the Law Term Dinner 2004, Chief Justice Spigelman discussed the issue of legal costs. On case management, his Honour commented:

I recognise that some of the case management practices that the courts have adopted, in order to reduce delays, may have resulted in increased costs. In particular, they have resulted in the front loading of costs by bringing forward expenditure that may not occur if a case settles, as most do. Some aspects of court practice may show insufficient regard for the costs that are imposed on others.¹

What is the evidence to support Chief Justice Spigelman's comments? Is there evidence from overseas studies? Have Australian practices been evaluated?

II FINDINGS FROM OVERSEAS STUDIES

On the matter of costs, there is little hard evidence about the effectiveness of case management. For example, Professor Cranston concludes after his excellent summary undertaken originally for Lord Woolf's inquiry into the English and Welsh civil justice system, that 'I think it can be said that there is some evidence that court control expedites cases; its impact on the private cost of litigation is, however, speculation'.²

* Statistician, formerly Principal Researcher (Statistics and Design) Law and Justice Foundation of NSW. I worked under the direction of Professor Ted Wright at the Law and Justice Foundation. As a statistician, my knowledge of legal practice was minimal when I was first employed by the Justice Research Centre in 1997. I am indebted to Professor Wright for instructing me about the world of courts, the fundamental legal principles which guide their processes, and for inviting me to participate in the challenging world of socio-legal research. The kernel of the ideas in this article came from Professor Wright but I take full responsibility for the article itself and the statistical analyses which highlighted some of the issues.

1 The Hon J J Spigelman, Chief Justice of the Supreme Court of NSW, 'Opening of the Law Term 2004' (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004) <http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/Spigelman_040202> at 6 July 2004.

2 Ross Cranston, 'The Rational Study of Law: Social Research and Access to Justice' in A A S Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure* (1995) 31, 42.

comprehensive study of case management to date. This was the study by the RAND Corporation's Institute for Civil Justice³ which evaluated the case management reforms implemented in the US Federal Court by the *Civil Justice Reform Act of 1990*⁴ ('*CJRA*'). The Institute evaluated the reforms implemented by the *CJRA* through the use of a design that the statistician would refer to as a 'controlled experiment'. The findings were summarised as follows:

- Early judicial case management significantly decreased time to finalisation by about 25 per cent⁵ but significantly increased litigant legal costs by about 30 per cent.
- Of the range of early judicial case management strategies or techniques, simply fixing an early date for final hearing had by far the most significant effect, and did not affect litigant costs.
- Managing discovery by imposing a short discovery 'cut-off' date significantly decreased case processing time and litigant costs. However, a leave procedure limiting the number of allowable interrogatories had no effect on case processing time or cost.
- Neither early judicial management nor discovery management had any impact on lawyer or litigant satisfaction and the perception of the fairness of judgments.
- Where alternative dispute resolution ('ADR') procedures were voluntary they were used in only about 5 per cent of cases; even where mandatory there was no statistical evidence that ADR affected case processing time or litigation cost one way or another.
- The time spent by judges on cases under the *CJRA* regime was the same as the time spent prior to the *CJRA* reforms.

These findings need interpretation. By 'early judicial case management' the authors of the study meant 'any schedule, conference, status report, joint plan or referral to ADR within 180 days of initiation'.⁶ The decrease in time and litigant cost resulting from the management of discovery by imposing a short discovery 'cut-off' date occurred in cases taking more than nine months to finalise. What the Americans call 'discovery' is (as may be well known) a beast of an entirely different order of magnitude compared to the Australian procedure. In general terms, the American document discovery procedure is more complex and liable to be more contentious.

Furthermore, the Americans have a procedure for 'deposing' both parties and witnesses in an oral examination. This process is said to represent the major cost

3 RAND Corporation, Institute for Civil Justice, James S Kakalik et al, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996).

4 28 USC §§ 471–482 (1990).

5 In cases taking overall more than nine months to finalise.

6 Kakalik et al, above n 3, 1.

of the deposition procedure, interrogatories are a comparatively unimportant procedure in American litigation. One of their practices affected the measuring process: costs were measured by the number of billable hours. So their findings are not necessarily applicable to the Australian system.

III FINDINGS FROM AN AUSTRALIAN STUDY

It was also possible to evaluate a natural, controlled experiment in case management that occurred in Australia. In NSW, after piloting procedures with motor accident cases, the District Court introduced a case management regime for virtually all civil matters. At the same time, similar action was taken by the Victorian County Court which had also experimented with case management for a subset of cases: miscellaneous causes cases (which have been subsumed under the current Business List). The new procedures for both courts commenced on 1 January 1996. In both courts, the changes were part of a five-year strategic plan which aimed to reduce delay whilst simultaneously maintaining fair procedures and enhancing accessibility.

Timeliness and cost are two major factors affecting the decision to litigate. Not only do they affect the initial decision, they are often the reasons behind the decision to terminate proceedings. So even though the primary aim of each court was to address the problem of delay, one can argue that the courts were also interested in reducing, or at least containing, litigant costs. The Chief Judge of the Victorian County Court, Waldron CJ, saw the problem of delay as being one of costs in general, far beyond the cost of litigation. His Honour wrote in the introduction to the 1988 Annual Report of the County Court:

Adverse consequences flow to all users of courts when excessive delays are experienced in cases getting to court. These effects may be psychological, stressful and costly to individuals, many of whom ... are innocent parties. Court delays carry a heavy economic penalty for the community.⁷

For Waldron CJ, reducing the specific costs of litigation was an important aim and the possibility of achieving such a reduction was one reason for choosing the particular form of case management implemented by the County Court.

Whilst the two courts adopted similar goals, they had different ways of achieving them. The District Court's case management can be described as 'default based' and 'rule driven', whereas in the County Court, each case is actively managed by a Judge through directions hearings. Both reforms commenced on the same day: 1 January 1996.

Professor Ted Wright, Dean of Law at the University of Newcastle, recognised the serendipity of this situation. Here was a naturally occurring experiment with built-in controls, with two different kinds of case management being used, within the same social and economic environment.

7 County Court of Victoria, *Annual Report 1989-90* (1990) 'Introduction §3.4'.

and Justice Foundation of NSW), and with the agreement of both courts, he took the opportunity to evaluate the new regimes. The purpose was to find out if case processing time had been reduced, if the pattern of resolution type had shifted to less costly forms, if litigant costs had been affected and if there had been, in the eyes of the legal profession in particular, a loss of quality of process.

IV THE LAW AND JUSTICE FOUNDATION STUDY

The data for the study (with which I was involved) was obtained from the court databases and from a survey of solicitors involved in cases conducted both before and after the reforms. In particular, questionnaires were sent to the solicitors, both plaintiff and defendant, for all cases filed in the first quarter of 1994 and in the first quarter of 1997 which met certain criteria. Each solicitor was asked to complete the questionnaire with reference to the identified case, which was the reason for his or her selection in the survey.

The questionnaire was used to survey litigant costs, and perceptions about the complexity and difficulty of each case together with factual details about the procedures used to reach resolution. It was the only source of information about costs. Details about the cost agreement, the method of charging and the actual amount billed were sought. Solicitors were also asked questions about the quality of the process. The survey sampling was carried out over one month from mid-November 1998. Details can be found in the report of the study published by the Law and Justice Foundation of NSW.⁸

V LITIGANT COSTS

The results regarding litigant costs differed between the States. In NSW, the data showed that costs had risen by a quarter on average whereas in Victoria, costs were contained.

These figures represent the raw data without controlling for factors known to influence the level of costs. Such factors include the type of case, the method of resolution, the use of counsel and experts, the number of visits to the courthouse, and perhaps the method of charging and the nature of the cost agreement. In fact adjustment for these factors marginally increased the average difference in NSW to 27 per cent. The increase applied to both plaintiff and defendant costs, and to both motor accident and non-motor accident cases. This is significant because motor accident cases were case managed under a similar regime before 1996.

In Victoria, costs differed only in one respect: the costs of cases for which the method of charging was based on the court scale as a rule or guide decreased by

8 Law and Justice Foundation of NSW, Ann Eyland, Ted Wright, Maria Karras and Natalina Nheu, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (2003).

charging was either time-based or for stages. This was after controlling for factors known to affect costs as outlined above.

VI INTERPRETATION OF THE RESULTS

Can these results be explained by the different methods of case management implemented in the two States? They are certainly consistent with the RAND Corporation findings (even to the estimate of the size of the increase in costs).

In NSW, case management can be described as 'rule-driven and default-based'. The Court sets a timetable and 'penalties' for defaulters. How the parties conduct the case is in their hands provided that they meet the deadlines. The Court uses its arbitration scheme as an alternative method of dispute resolution. An important change in this scheme occurred in 1996 – a fee was charged on referral to arbitration. In Victoria, case management is judge-managed. An important feature is the early directions hearing within 45 days of service on the defendant. The rules give explicit authority to the Directions Judge 'to give any direction which he or she considers is conducive to the effective, complete, and prompt determination of each proceeding'.⁹ In particular, the rules are explicit about court control over the extent of discovery and interrogatories in Victoria. Part of the purpose of the directions hearing is to respond to requests for discovery and interrogation. Practitioners are encouraged to co-operate informally with each other. At the directions hearing, a timetable is agreed including a date for final hearing. The court uses mediation as an alternative method of dispute resolution and this is essentially compulsory. This style of case management incorporates the feature found to have most effect on costs in the RAND study.

However, it would have been remiss not to have considered alternative explanations of the different results for litigant costs. First, we considered inflation. Second, we considered the changes to legal practice brought about by the *Legal Profession Reform Act 1993* (NSW) and the *Legal Practice Act 1996* (Vic).

First, inflation could be dismissed for two reasons. It was essentially the same in both States, at about 10 per cent over the period using the Consumer Price Index ('CPI') for capital cities. Hence it does not explain the difference between the results of the two States. We tested the contribution of inflation by analysing total costs adjusted for CPI and obtained similar results. Given that we did not know when and if solicitors adjusted their fees in accordance with inflation, this method seemed somewhat artificial.

The impact of the legal practice reform Acts could not be dismissed as easily. The problem with our sampling method was that pre-reform cases in both States did not come under the requirements with regard to costs of the new practice Acts whereas post-reform cases did. Moreover, the Victorian Act came into

9 *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) O 34A, r 19.

from an earlier NSW study of motor accident cases showed that the new practices took a while to settle in. So it is possible that the Victorian cases were not subjected to the full implications of the *Legal Practice Act 1996* (Vic). There is some hint of this from the data.

Both Practice Acts set out requirements for entering into cost agreements and for freeing up methods of charging for legal services.

In Victoria, the distribution of 'type' of cost agreement was essentially the same in both years for plaintiffs but changed for defendants for whom the percentage of agreements requiring payment in stages increased from 75 per cent to 92 per cent. This is unlikely to have affected costs.

In NSW, the distributions changed for both plaintiffs and defendants. There was an increase in contingent agreements with plaintiffs from 50 per cent in 1994 to 78 per cent in 1997, the increase being due to 'success premium' agreements. This may have affected total costs. The change in agreements with defendants was to increase the percentage paid on completion – from 18 per cent to 43 per cent – and to decrease the percentage paid in stages from 82 per cent to 56 per cent. This may provide a vehicle for inflation to have an impact on costs if they are assessed at the end of the case. The hypothesis that the nature of the cost agreement affected costs was tested statistically. The conclusion was that there was no impact, but sometimes statistical tests fail because of insufficient data, what the statistician calls a lack of power in the procedure. That was the case for these data.

There were changes in both States in the method of charging. In NSW, plaintiff's bills were more likely to have been calculated by time-based billing, and the use of this method increased from 44 per cent of bills in 1994 to 73 per cent in 1997. A similar change occurred in plaintiff bills in Victoria but the percentage of cases in both years was lower: 21 per cent in 1994, 39 per cent in 1997. More Victorian plaintiff bills were determined by reference to the Court scale: 70 per cent of bills in 1994 and 37 per cent of bills in 1997. In NSW, the corresponding percentages were 30 per cent in 1994 and 9 per cent in 1997, which can be explained by removal of the scales by the 1993 Act for all but a few practice areas.

Defendant solicitors behaved differently. In NSW, the incidence of time based costing reduced from 72 per cent to 48 per cent, but fixed prices for different stages increased in use from 5 per cent to 24 per cent. In Victoria, there was no change from 1994 to 1997 with time based costing being used for 37 per cent of bills and reference to the court scale being used in 54 per cent.

Did the change in the use of time-based costing contribute to increases in costs? In both States, there was no reported change in the clerical or paralegal rate but the rates for employed solicitors and for partners changed. These changes are summarised as follows:

	Hourly Rate	Hourly Rate	% change
Solicitor	\$162	\$187	15.0
Partner plaintiff	\$274	\$291	6.2
Partner defendant (NSW)	\$274	\$254	-7.0

On the assumption that there was no change in workload, we estimated that the increase in costs of professional fees because of changes in the rates for partners and solicitors represented an increase of between 7 per cent and 12 per cent – the first assumes that the only charge is for a partner, the second assumes that a partner's fee accounts for 50 per cent of the total professional fee. Professional fees accounted for approximately 60 per cent of the total bill. Therefore, we estimated that in NSW plaintiff bills and in all Victorian bills, increased charges for partners and solicitors resulted in increases of between 4 per cent and 7 per cent for bills charged by time. Time-based costing applied to 59 per cent of bills in NSW and to 34 per cent in Victoria. We concluded that the impact on costs overall resulting from increases in payment rates for solicitors and partners was at most 4 per cent.

In Victoria, we were able to test whether charging using the court scales in some fashion either as guide or rule had an effect. The results showed that when this factor was taken into account, the estimated change in costs was a decrease of 25 per cent. Unfortunately such a test was not possible for the NSW data because of the few cases in which such a method was used – the test lacked power.

Whether cost agreements and charging methods have driven the increase in costs in NSW remains an open question. One anomaly is that the increase applied to both plaintiffs and defendants and yet, as has been shown above, plaintiff and defendant solicitors behaved differently. There was no increase in Victoria and yet there were similar cost pressures.

VII SUMMARY

The case management reforms in Victoria appear to have contained costs. There are two important features of the Victorian case management system which the RAND study had also identified as contributing to reductions in litigant costs. These are fixing an early date for final hearing and managing the discovery process. At the first directions hearing, a timetable for the case is agreed between the Judge and the parties. The timetable includes setting a date for final hearing. This first (and usually only) directions hearing must occur within 45 days of the statement of claim being lodged. Also at this directions hearing, an agreement is reached about the extent of discovery and interrogatories. The results also showed that charging according to a scale either as rule or guide was associated with a reduction in costs.

contributed to this increase including changes in cost agreements and charging methods together with inflation. But these affected Victoria as well as NSW in all except one respect – contingency agreements. Does part of the explanation lie in the nature of the case management regime introduced in NSW? Has workload been increased by this particular regime as suggested by Chief Justice Spigelman in his speech at the Opening of the 2004 Law Term Dinner? We could not provide any evidence to illuminate Chief Justice Spigelman's suggestion that there has been a front loading of costs with expenditure brought forward; expenditure which would not occur if a case settles, as most do. We note that the same percentage increase in costs applied to motor accident cases as well as to non-motor accident cases. This is significant because motor accident cases were case managed in a similar fashion before 1 January 1996. In fact, this last observation is probably the main argument against the view that the new civil case management regime contributes to increased costs. Nevertheless, we erred on the side of caution and remained ambivalent about the contribution of case management to the increase in litigant costs.

VIII POSTSCRIPT

In both NSW and Victoria, the new civil case management regimes resulted in significant reductions in case processing time. In NSW, our conclusion was based on data from the Court's database. Figure 1 illustrates clearly the impact of the changes. It shows two series: one for motor accident cases and one for non-motor accident cases filed at the Sydney Registry of the District Court of NSW. The variable is median case processing time for all defended cases filed in a given month. The time period covered is from January 1990 to June 1998. The fact that motor accident cases had been case managed from July 1992 under a similar regime provided a benchmark.

The two series behave similarly at the points of introduction of case management – a sharp drop followed by a steadying. In the motor accident series ('mal'), the drop occurs in July 1992. In the non motor accident list series ('non-mal'), the drop occurs in January 1996. (Statistical modelling confirms this description). The change in the level of the motor accident series post-January 1996 resulted from the tightening of the timetable governing the case management regime, an expected decrease in time of two-and-a-half months on average. The results in Victoria were similar but relied more strongly on the sample of cases surveyed because of the restricted coverage of the Court's database before 1994.

This is of relevance to the general issue of costs. Speedy resolution of disputes is important in order to reduce the economic burden to litigants. The more speedily the courts can handle their workload, the more likely litigation will be timely and therefore cost effective.

Figure 1 Median Case processing time by List - NSW

