Case Management in Common Law Specialist Lists in the Supreme Court of Victoria.[1]

Judicial Registrar Julie Clayton

Remarks by Judicial Registrar Julie Clayton at the Australian Lawyers Alliance Victorian State Conference, Lorne, Victoria

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Introduction

1. Although the Court's physical building has not significantly altered in many decades, and our famously freezing corridors and ornate court rooms could give the impression of an institution that is fixed in the late 1800's, such an impression would be true only to the extent that our mission has always been, and remains, the delivery of justice.

   The Court's key values are:

   - Equality before the law
   - Fairness
   - Impartiality
   - Independence of decision-making
   - Competence
   - Integrity
   - Transparency
   - Accessibility
   - Timeliness
   - Certainty

   The way that we seek to implement these values, however, must be flexible and respond to the needs of a changing Victoria.

   What is Case Management?

2. Case management is not a new idea. It has been around in various forms in various courts for many decades. I am sure I'm not the only person in the room who remembers fronting up to Judge Wodak's Medical Negligence List to be vigorously case managed.

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[1] This is an edited version of a speech delivered by Judicial Registrar Julie Clayton on 5 May 2018 at the Australian Lawyers Alliance Victorian State Conference.

3. However over the past three and a half years, the Common Law Division of the Supreme Court has taken a targeted approach to case management, focusing initially on personal injury cases and extending that active case management system to other common law lists. It is the implementation of this case management procedure that I have been asked to talk about today.

4. The Supreme Court has about 6000 new cases initiated each year, of which about 2000 are in the Common Law Division. Roughly half of those Common Law Division cases are personal injury claims.

5. Of the 1000 new claims we get each year, about 500 are claims relating to workers compensation, transport accident, medical negligence, public liability and, increasingly, institutional abuse. About 250 to 300 cases are commenced in our Dust Diseases List, primarily for asbestos related conditions, and around 150 cases are Civil Circuit List matters.

The Old Way

6. Our current case management system only began about 3 years ago. Prior to that time, the Judge-in-Charge of the list or an Associate Judge would hear directions and fix a timetable, interlocutory applications would be heard by whichever Associate Judge was available on a quasi-practice court basis, consent minutes would be signed by available Associate Judges, and inevitably the real 'case management' would be left to the trial Judge, who might spend the first couple of days of a trial sorting out pleading disputes and discovery fights. This was workable only because so many cases settled and the small percentage that went to trial tended not to create an unreasonable burden on the Court.

7. However the Court recognised that this method could not continue. Initiations in the Dust Diseases List were steadily growing, with the anticipated 'third wave' of dust claims estimated to peak in 2021. The Royal Commission into Institutional Responses to Child Sexual Abuse looked likely to lead to a significant increase in litigation, particularly once limitation of actions barriers were removed by legislation. Indeed our expectations of an explosion in this area have been met, with an increase of about 300% in 3 years, from 20 claims in the 2015 Financial Year, to 90 claims currently. Change was needed.

Reform

In 2014 the Boston Consulting Group was engaged to look at the internal court systems for management and to make recommendations for efficiencies. BCG's review found that the demand on the Court's resources created by caseload growth had been compounded by increasing complexity of litigation. Further, the high volume of 'routine' in-court work diminished the time available for hearing substantive applications and trials and judgment-writing. It concluded that, to maintain current service levels, the Court would need three more Judges and an extra Associate Judge by 2020, unless there were significant productivity improvements. Much as we would welcome those additional judicial resources, it did not seem likely that they were coming our way. We needed to find other ways to cope.

8. The BCG report identified the need for a sharper focus on: specialisation; early intervention; delegation; and collaboration.

   Spurred on by BCG's findings, the Common Law Division piloted a case management model for the Personal Injuries and Dust Diseases Lists. The plan was to use Judicial Registrars, Associate Judges and highly qualified in-house lawyers, who had real practical experience in personal injury litigation, to provide targeted case management.

   The lists would become professional, highly experienced and qualified 'one-stop shops' for all personal injury litigation.

   Common Law Improvement Program -- CLIP

9. These changes came together in the Common Law Improvement Program (CLIP). Its goals are to improve court performance measures; use Court resources more efficiently; and generate savings to Court users and to government by making processes easier and timelier.

   CLIP's key features have been informed by a set of case management principles which have the overarching purpose of the *Civil Procedure Act 2010* (Vic) as a touchstone.

   These principles recognise that there can be no 'one size fits all' solution to case management but that a structured, systematic approach can vastly improve efficiency.

10. The CLIP case management model involves specialised teams of judicial officers, lawyers and registry staff working together to ensure that case management functions are performed by the most appropriate members of the team. This, in turn, frees up judicial officers to perform functions that only they are qualified to do. Legally-qualified Court staff are now performing many of the essentially administrative functions that would once have fallen to judicial officers and their chambers shortly before a hearing or trial.

12. The Common Law Division's case management lawyers perform functions such as:

(a) triaging matters so that they are dealt with by the most appropriate level of judicial officer, and flagging issues for their attention;

(b) scrutinising pleadings and requests for consent orders;

(c) overseeing compliance with orders;

(d) preparing matters for pre-trial directions and applications; and

(e) liaising with practitioners and self-represented litigants.

13. Most First and Post Mediation Directions Hearings and many interlocutory applications are now heard by a Judicial Registrar – currently me. An Associate Judge assigned to the lists also hears interlocutory applications – currently Associate Justice Ierodiaconou. Final Directions Hearings are generally heard by one of the Judges-in-Charge of the lists – currently Justices Zammit and Keogh.

The lawyers working in the team meet with me weekly to go through the cases coming up for directions or applications, and to discuss any particular issues. The wider team - including Trial Judges, Associate Judges and Registry staff - meets monthly. Regular meetings ensure that everyone is kept in the loop. Where practices need to be changed, these can be discussed and implemented in a uniform way.

14. An important part of case management is bringing the profession along with us. This has involved: annual user group meetings with the profession; arranging seminars, together with the County Court, aimed at junior practitioners; updating the Practice Notes regularly; and ensuring that communications with the Court are centralised and responded to promptly.

Our aim is to ensure that a proceeding moves through the Court efficiently and predictably.

Steps in SCV Case Management

First Directions Hearing

15. The 'trigger' to be listed for a First Directions Hearing is the filing of the defence. It is not uncommon in personal injury cases for writs to be filed but not served for a year, or for an extension of the validity of a writ to be sought. There is little utility in the Court listing the matter for directions prior to knowing that the claim is proceeding and the defendant has been served. First Directions are heard every Friday by the Judicial Registrar.

    At that First Directions Hearing, a trial date will be fixed and orders will be made for interlocutory steps, including discovery, interrogatories and compulsory mediation. Often these orders are made by consent with no need for an appearance. Matters in the Civil Circuit List will be listed for a telephone conference in chambers. Circuit directions are held every fortnight.

Post Mediation Directions Hearing

16. We identified key trigger points at which trial dates were being vacated. One of these was after mediation.

    To remedy this, we instituted the compulsory Post Mediation Direction Hearing to keep track of the matter and ensure that it did not become derailed. It is not uncommon after mediation for parties to identify that further expert material must be sought, or that amendments to the pleadings will need to be made. When setting timetables the Court wants to ensure that the mediation occurs sufficiently prior to the trial so that, where the matter has not settled, additional interlocutory steps can be taken without causing a vacation of the trial date.

17. The imposition of a compulsory Post Mediation Directions Hearing was a new step however we thought that, at least in the short term, it was justifiable to ensure that our case management was working as planned.

    What we discovered is that, far from resenting this new directions hearing, practitioners have embraced the Post Mediation Directions Hearing and consider it a very useful case management tool. Feedback to the Court has been that every opportunity that brings parties to Court and provides an opportunity to resolve issues face-to-face - particularly before a judicial officer who will make a decision when parties cannot agree - is welcome. In fact, when we raise with Court users at our annual user group meetings whether the Post Mediation Directions Hearing is considered helpful, not only do we find that it is

resoundingly endorsed, but we are often asked if the Court would consider imposing a compulsory 'pre-mediation directions hearing' as well.

Final Directions Hearing

18. Assuming that matters are on track, the next case management step is the Final Directions Hearing. This is a final opportunity for the parties to raise any matters that might mean that the case cannot proceed on the trial date. Our primary aim is to ensure that we do not waste our scarce resources by allocating a Judge and courtroom and have the Juries' Commissioner summon a jury, for a case that is not ready to start.

    Once a case is allocated to a Judge, the file is sent across to their chambers. The Judge and the Judge's Associates will read the file, prepare to empanel the jury, and the Joint Memorandum will be scrutinised. Relevant legislation will be researched and case law reviewed. A lot of work is done by Judges prior to the first day of trial. Personal injury cases are normally listed on Mondays and Tuesdays, so it is not at all unusual for a Judge to spend the weekend familiarising themselves with the matter. If the case then goes off on the first day because it really is not ready, a Judge has wasted a lot of time that could have been spent working on another matter, or writing judgments. If a trial date is vacated there is no guarantee that it will be allocated to the same Judge next time round, and the work may have to be done all over again. More importantly, the vacated date is a trial day that usually cannot be used for another matter at late notice. Late vacation of trial dates is a significant drain on the resources of the Court and one of the reasons why we try to ensure that it occurs rarely.

19. We understand the desire that practitioners have in maintaining a trial date to 'keep the pressure on'. However by the Final Directions Hearing, which is usually held less than a month before trial, the parties should really know whether the matter is ready. This means:

    - Knowing what witnesses will be called and providing that list to the Court.
    - Identifying whether there will be a View and factoring that into the time estimate. Just last week Justice Keogh was told that a View would be required in a jury trial involving an accident in a bush area, inaccessible by car or bus and a lengthy hike down a bush track from the road. His Honour sent the parties away to consider what arrangements could be made for a jury to view the area - was there closer access that would not involve a long walk? Alternatively, would a detailed video recording be sufficient to demonstrate the terrain where the accident took place? These are the sorts of things that need to be sorted out before the trial, or a day could easily be wasted. Without the

parties identifying this at the Final Directions Hearing, it might not have been raised until the first day of trial.

- Updating the trial estimate. Standard estimates, given 12-18 months earlier, are usually based on a generic case with little regard to the particular features of the specific matter. We recently had a trial that ran so far over its 10 day estimate that the jury had to be discharged, as two jurors were unavailable for what turned into a 17 day trial. Not an ideal outcome for anyone, not least the jurors who gave up their time only to be discharged without seeing the outcome.
- Are interpreters or video links required? Discovering that a key expert is away is a common cause of vacated trial dates.

20. If you stay silent at a Final Directions Hearing when you are aware of matters that should be raised, you put yourself and your client at risk, particularly in relation to costs orders.

Key Documents and Joint Memoranda

21. In the personal injury lists we have done away with Court Books and replaced them with lists of key documents. Parties should consult carefully about what documents constitute 'key documents'. It would be rare, for example, if ten years of tax returns or four volumes of medical records were key documents. Non-inclusion in the list of key documents does not prevent a party from relying on a document or seeking to tender it. The Key Documents Folder is intended to be an aid to the Court, not a burden to the parties.

22. Similarly the Joint Memorandum is an opportunity for the parties to collectively identify to the Court the key issues in dispute. Your pleadings may include a hundred and one allegations of negligence, and a thousand and one breaches of Occupational Health and Safety regulations, but you may know that the case is really about whether the plaintiff was required to lift items that were too heavy, or whether the doctor failed to follow up the pathology results in time. Identification of what is actually in dispute between the parties, including contribution and third party claims, is very helpful to the Court.

<u>Other Case Management Tools</u>

23. These are the steps that practitioners in the area would be familiar with. What you do not see is the work that is being done behind the scenes by our team to ensure that case management continues throughout the life of the proceedings within the Court.

When proceedings are issued, one of our lawyers will look at the pleadings to identify whether:

- this a matter that should be transferred to the County Court;
- a defence has been raised that may need to be dealt with as a preliminary point;
- the identity of the defendant is in dispute;
- it is a novel cause of action that might require special attention.

24. At an early stage the Court is likely to flag an issue with the parties and seek a response. It is not our intention that every issue or potential issue be litigated prior to trial. We know that most cases settle and it is always uppermost in our mind that our job is to achieve the just, efficient, timely and cost effective disposition of the proceeding and not to impose unnecessary work on parties or add to costs for litigants.

    If the matter is likely to resolve without, for example, a limitation of actions defence ever having to be dealt with, the Court is not going to require that the matter be determined as a preliminary point. On the other hand, if that limitation issue is an impediment to resolution, the Court is unlikely to allow the matter to proceed all the way to trial without the parties turning their minds to how to best deal with that defence. Increasingly, substantial applications will not be left to the Trial Judge to resolve.

25. Once the timetable has been set, the Court will usually only see the parties again after mediation. However there are some cases that we will flag for additional follow up. In Medical Negligence claims, for example, we identified that some 40% of cases had one or more vacated trial dates. This suggested to us that the timetables being set were unrealistic. We gave that feedback to the profession and noticed that longer, more realistic timetables were then sought.

26. We also noted that delayed service of particulars of special damages would cause adjournment of mediation dates, and consequently jeopardise trial dates, particularly in cases where quantum was significant. We now identify cases where quantum is likely to be high – catastrophic injury cases for example - and diarise for a team member to contact the parties around the time that special damages were ordered to be provided, to ensure compliance.

27. We also maintain a list of cases which, for one reason or another, present a challenge for case management to the Court. These might be cases where there have been numerous changes of solicitors, or where the timetable has been derailed more than once. Anything that has a vacated trial date is likely to be flagged as needing a bit more attention, and matters where there have been numerous contested applications will also be closely monitored. Those cases will be reviewed more regularly to ensure that parties are complying with orders.

28. After the Final Directions Hearing, our team will ensure that Joint Memoranda and Key Documents Lists are filed, call-over forms will be sent out and the matter will be allocated to a Judge.

Even after allocation, any last minute applications will come through the team. At that point it may be appropriate that the Trial Judge hears the application, but our case management team will still be involved and monitoring the case right up to the start of the trial.

How it is Working in Practice

29. While improved data collection is one of the goals of CLIP, existing measures have shown that, across various Common Law Division lists, the reforms have generated a significant improvement in clearance rates, time-to-trial, and the number of court appearances. This data supports the anecdotal evidence from both internal and external sources about the highly positive impacts of CLIP.

30. In 2012-13, 64 per cent of cases in the Common Law Division were managed in specialist lists. This rose to 90 per cent in 2015-16 as a direct result of better triaging of cases at initiation and the creation of additional specialist lists.

31. As detailed earlier, the Common Law Division needed to meet the increasing demand in the personal injury jurisdiction. Initiations were increasing and clearance rates were declining. This meant longer waiting times for cases to get on, and potentially increased costs as matters took longer to resolve.

32. More intensive case management of the Personal Injuries and Dust Diseases Lists began in early 2015 and gained pace in 2015-16. There was a sharp improvement in the clearance rates in these lists from 68 per cent in 2014-15 to 91 per cent in 2015-16 to over 100% in the last

Financial Year. Projections for the current Financial Year indicate the clearance rate will stay on target at 100%. This is a very pleasing turnaround in a relatively short period.

The Future

33. The success of the CLIP in personal injury cases has meant that the program has been rolled out in other specialist lists. In keeping with our view that there is no 'one size fits all' approach to case management, each list has its own ways of doing things. However they follow the basic concepts of specialisation, early intervention, delegation, and collaboration.

34. The CLIP has now also been implemented in the Civil Circuit List; Major Torts List; Judicial Review and Appeals List; Valuation Compensation and Planning List; Property List; Trusts Equity and Probate List and the Confiscation and Proceeds of Crime List.

35. Finally, in the personal injury space, we are by no means resting on our laurels. We aim to be a responsive, agile Court, able to anticipate change and ensure we can meet new demands. We recently held a very successful forum looking at ways in which the Court could reduce delays in motor vehicle accident litigation. We had representatives from the Transport Accident Commission, insurers, plaintiff lawyers and defendant lawyers present to think about what structural impediments exist and how they can be reduced. A lot of good ideas came out of that forum and some proposal are being developed which could significantly change the way these claims progress through the courts. One of the themes that emerged, and has also been raised at user group meetings, is that practitioners are keen for more court involvement rather than less.

36. Striking the balance between the demands on the Court and the resources available will always be a challenge, but it is a challenge we feel well placed to meet.