CASE FLOW MANAGEMENT IN CRIMINAL LAW

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INTRODUCTION

Case Flow Management was, and is, the popular catch cry of the judicial administrator of the late 80's and early 90's. Broadly, it defines the court's desire to itself take control of the conduct of litigation before it, with a view to eradicating or severely limiting the three evils of the court system; backlog, delay and cost.

It has been eagerly adopted in South Australia, principally in the Civil but more recently in the Criminal Jurisdictions, and on an evaluation of the statistical data available, it can be argued to be a success by those who would promote it.

The purpose of this paper is to examine the principles underlying the concept; to consider the effect that its implementation has had upon the business of the court; to highlight the means by which the principle was implemented and the successes achieved; and to then consider the cost of its introduction, in the non-monetary sense. The paper will concern itself ultimately with Case Flow Management in the Criminal Law, with particular reference to its impact upon :

(a) the right to silence;

(b) the accused's right to a fair trial;and

(c) the presumption of innocence

Finally I would hope that there will be some discussion upon the application of the principle in the Criminal Law and what further amendments or alterations we might expect, or fear, in the future.

CASE FLOW MANAGEMENT

In order to consider case flow management, and in particular its possible impact upon the administration of criminal justice, it is necessary to consider the implementation of this concept within the civil jurisdiction. What is case flow management? The Attorney-General for South Australia, Chris Sumner, in an article in the Law Society Bulletin of September 1992 described it as follows:

> "In essence, case flow management focuses on the efficient use of public funded resources in order to address the cost of justice and thereby improve access to the courts ... Case flow management is but one technique used to ensure that judicial time is used efficiently and that taxpayers' funds are not wasted. I am sure the judges and magistrates will ensure that no injustice is done to litigants."

As with so many ideas that currently seem to find favour in Australia, the concept is American. It appears to emanate from the National Conference of State Trial Judges in the United States which was subsequently approved by the American Bar Association. Headed "Standards Relating to Court Delay Reduction" Section 2.51 provides:

> "Essential elements which the trial court should use to manage its cases are:
>
> 1. court supervision and control of the movement of all cases from the time of filing of the first document invoking court jurisdiction through final disposition;

2. promulgation and monitoring of time standards for the overall disposition of cases;
3. by rules, conferences or other techniques, establishment of times for conclusion of the critical steps in the litigation process, including the discovery phase;
4. procedures for the early identification of cases that may be protracted, and for giving them special administrative attention where appropriate;
5. adoption of a trial settling policy which schedules a sufficient number of cases to ensure efficient use of judges' time while minimising re-settings caused by over-scheduling;
6. commencement of trials on the original date scheduled with adequate advance notice;
7. a firm, consistent policy for minimising continuances (adjournments)."

In South Australia, principles of case flow management in civil actions were incorporated into the District Court Rules in January of 1990. The three principal objectives underlying the introduction of the principles were as follows:

1. to eliminate delay in the civil jurisdiction of the Court by 31 December 1992;
2. to achieve by that date the standards for the disposition of cases in the civil jurisdictions that were then included in Rule 3(2)(e) of the *Local Court Rules* namely:

(1) that 90% of all cases commenced should be finally disposed of within 9 months of the service of the summons upon the defendant;

(2) that 97.5% of all cases commenced should be disposed of within 15 months of the service of the summons upon the defendant; and

(3) that all cases should be finally disposed of within 18 months of the service of the summons upon the defendant;

3. to reduce the costs of litigation, particularly to those litigants whose cases were destined to be resolved short of trial to the stage of final judgment.

Those principles remain the basis of case flow management, and are encompassed in the recently amended Rule 2.01 of the *Supreme Court Rules* which came into effect in July of 1992 (Appendix 1). You will note that the principles present at January of 1990 are incorporated in the new Rule 2, and a specific time limit is established for the proceedings issued within the Supreme Court and District Court to which the rule also applies.

In a practical sense there can be no dispute that as of January 1990 there existed within the civil jurisdiction of the District Court significant backlog and delay. As at January of 1990 there were some 5,687 cases in the District Court trial list. The goal to be achieved was to dispose of this backlog of cases and deal with any new business of the Court by 31 December 1992. Difficulties arose due to an

increase in the Court's criminal workload, and in July of 1991 a task force of four judges assigned to give exclusive attention to the pre-1990 case backlog. The result was that as of 31 December 1992 all of the 5,687 pre-1990 cases had been subjected to the pre-trial conference procedure and only 123 of those cases remained unresolved. This was achieved, while at the same time dealing with the Court's new business which remained considerable. A perusal of the trial list statistics from January of 1991 until April of 1993 clearly indicate the significant impact that the introduction of principles of case flow management has had. (Appendix 2). In January of 1991 the combined list of civil matters for trial was 4,783, whereas in April of 1993 that number was 1,427. A spectacular result on any means of assessment.

How was this achieved? Judge D. M. Brebner, Chief Judge of the District Court, and Mr Richard Foster, Registrar of the District Court, in a joint paper entitled, "Case Management and Delay Reduction in the District Court of South Australia", 31 December 1992 make this observation:

> "The procedures adopted by the Court, coupled with the reduced inflow of work resulting from statutory changes with regard to motor car and workers' cases, have resulted in the Court being in a position where it is now capable of handling its entire caseload in accordance with the standards that have been adopted."

With these observations I have no dispute. Further consideration is required to understand how the reductions have been achieved, and achieved arguably at far too high a price.

Pain and Suffering Restrictions

75% of the proceedings issued in the District Court in its Civil Jurisdiction are claims for damages for personal injuries arising from motor vehicle accidents or work injuries.

In 1987 amendments were brought into effect under the South Australian *Wrongs Act,* limiting the amount that could be claimed for pain and suffering in relation to motor vehicle accidents whereby all awards for pain and suffering had to be graded between 0 and 60 depending upon the severity of the injury. A multiplier was then applied. The multiplier as of 1987 was $1,000.00, which has since been increased in accordance with CPI increases to $1370.00. The effect, therefore, was that the maximum amount awarded for pain and suffering, which was an award for the worst possible case of injury, after February of 1987, was $60,000.00, or about ⅛ of previous awards. Accordingly whiplash type injuries became worth somewhere between $4,000.00 to $8,000.00 for pain and suffering, whereas previously the range was somewhere between $10,000.00 or $20,000.00. Similar amendments were made restricting the amount recoverable at common law for pain and suffering arising from industrial injuries, when the WorkCover legislation was introduced in 1987.

Although these restrictions have doubtless had an impact on the number of actions issued in the District Court for personal injuries, and perhaps to an increased settlement rate of some of those actions, it cannot explain the dramatic effects of the introduction of the principles of case flow

management in 1990. This is particularly so when it is noted that these changes came into effect as early as February of 1987.

The procedures adopted by the Court as part of its case flow management policy have played a far greater part, and these procedures are worth considering, particularly as similar type procedures may be considered by administrators wishing to manage case flow in Criminal Jurisdictions.

Amendments to Pleadings

At the same time that the principles of case flow management were introduced into the Rules of the District Court in early 1990, Rule 89 of the Rules was amended to provide as follows:

> "(1) All applications to a Judge or Special Magistrate other than those made in open court, and all reviews of a client's acts or decisions, and any review of a Magistrate's taxation of costs shall be made by interlocutory summons and, unless it is otherwise provided by these Rules, on notice to the other party.
>
> (2) Unless exceptional and unforeseen circumstances shall be shown to have arisen, no order shall be made later than 14 days prior to the day fixed by the Clerk pursuant to Rule 8(4) for a pre-trial conference upon any application made in accordance with sub-rule (1) in respect of an action in the full jurisdiction trial list."

An application to amend pleadings is such an interlocutory application as is covered by Rule 89, and in the normal course of events if granted, would lead to an order for costs against the party making the application, and the adjourning of the trial to a later date on the application of the other side. Such an application was made before the trial Judge who

refused the application on the basis of the principles of case flow management and Rule 89. The matter was appealed to the Full Court of the Supreme Court of South Australia in United Motors Retail Ltd. v. AGC 163 LSJS at p.1. Chief Justice King at page 2 said:

> "There is no lack of authority for the proposition that an amendment which is necessary to enable a party to present its case properly should be allowed if prejudice to the opposing party can be avoided by means of appropriate orders as to costs and other matters. The leading authority to this effect in Australia is Clough and Rogers v. Frog (1974) 4 ALR 615. The cases which focussed on prejudice to the opposing party were decided, however, before the adoption by accords of modern principles of case flow management to enable them to cope with the volume of judicial business with the limited resources placed at their disposal. ... A central feature of the case management system is the pre-trial conference. That conference is designed to encourage the settlement of cases which are capable of settlement and to ensure that those which proceed to trial are ready for trial on the appointed day. It is therefore essential to the case flow management system that parties fully prepare their cases in good time before the pre-trial conference so that both of these objectives can be achieved. It is also essential to the case flow management system and to the orderly disposal of the business of the court, that parties proceed to trial on the day fixed for trial except in extraordinary circumstances. ... If cases are not ready to proceed on the day fixed for trial, the orderly disposal of the business of the court is disrupted and the opportunity of other litigants to get their cases on for trial is impaired. As has been pithily put, a party is entitled to his day in court but not to somebody else's day in court."

Disclosure of Reports

As was stated by the Chief Justice, a central feature of the case flow management system was the pre-trial conference. The pre-trial conference was initially established in the civil jurisdiction in 1987. I was significantly refined in the 1990 changes, and one of its essential purposes was to endeavour to

settle cases that were in any way capable of settlement at any early stage. To this end rules were introduced requiring each party to a civil action to provide other parties with all medical and other expert's reports by no later than 7 days before the date fixed for the pre-trial conference and the consequence of failing to comply with this requirement was to allow the judge to prevent the adducing of the expert's report at the trial. These rules remain in effect in the civil jurisdiction of both the Supreme and District Court since the 1992 amendments. (Appendix 3).

The effect of non-compliance with these Rules was considered again by the Full Court in Trebilcock v. Nominal Defendant 163 LSJS 28. In that case two medical reports from a plastic surgeon were discovered prior to the pre-trial conference on 9 August 1991. A problem did not there arise. Subsequent to the pre-trial conference however the plaintiff's solicitors arranged for reports to be obtained from an occupational physician, and two podiatrists. These reports were supplied to the defendants in late September/early October, and the trial commenced on 15 October 1991.

When the plaintiff's counsel sought to lead evidence from the experts in relation to the examinations and the reports, objection was taken by the defence counsel on the basis of failure to comply with the Rules. A case was stated to the Full Court.

Justice White in his judgment, with which the other two members of the Court agreed, at page 32 stated:

> "The successful and efficient conduct of pre-trial conferences is fundamental to the efficacy of court controlled case flow management. If all expert reports are not obtained and disclosed to the other side before the pre-trial conference, defendants will not be in a position to consider their liability and base their offers upon full and proper information about the plaintiff's case, and vice versa."

Clearly this is so. Full and proper disclosure of all relevant and available information prior to the pre-trial conference will give the parties the best chance they have of settling the matter if it is capable of settlement. The problem of course may be that all relevant information, particularly in relation to personal injury matters, is often not available at that time, particularly given the speed with which pre-trial conferences are allocated in the civil jurisdiction. The other effect of course is that your case is not going to get any better, certainly by way of experts' reports, following the pre-trial conference and prior to the hearing.

The Filed Offer

The other factor introduced at the stage of pre-trial conference which leads to significant settlement, at least from the individual personal injury litigant's point of view, is the filed offer.

Rules allowing the filing of offers into court have been in existence for some time, but when case flow management

principles were enshrined into the Rules of Court in 1990, SGIC in particular, and many insurers in the work injury arena, began utilising the filed offers as a means to achieve settlement. Also agreement was reached, at least with SGIC, but possibly others, whereby only in the most exceptional circumstances would an offer that has been filed at pre-trial conference be increased leading up to trial or even at trial. Accordingly the plaintiff and his advisers could be sure that if the offer was not accepted, then the matter would proceed to judgment.

The system of filed offers effectively operated so that the defendant would make its best offer at pre-trial conference and, if not accepted, it would be filed. The plaintiff then has 14 days from the date of filing to accept it and if accepted within that time the plaintiff's costs will be paid. If not accepted then the matter proceeds to trial and if the plaintiff succeeds in achieving a judgment in excess of the offer filed, then his costs will be paid. If, however, the plaintiff receives judgment of less than the filed offer at trial, then not only will his costs from the filing of the offer not be paid, but he will have to pay the costs of the defendant from the time that the offer is filed.

It is also noteworthy that the government substantially increased the costs of trial time at about the same time as the concept of case flow management was introduced. For instance, it costs $200.00 per hearing day for the plaintiff to have his day in court. If the plaintiff requires

transcript, which inevitably he will, that will cost him $6.50 per page (100 pages per day - $650.00 per day). This of course is in addition to solicitors' fees and counsel fees and the conduct of the hearing. An unsuccessful plaintiff, therefore, after a 3 to 4 day hearing could likely be met with a bill for costs in the vicinity of $10,000.00. All of this must be seen in the context of the amendments to quantum in relation to awards for pain and suffering for personal injuries in motor vehicle accident and work injuries previously mentioned. Given those amendments, the plaintiff's range in an assessment of damages for pain and suffering may be relatively small, say only $5,000.00 or $10,000.00. The practice of defendants, in my experience, has been to file an offer at the bottom of the range. Given the consequences of failing to beat an offer, plaintiffs are accepting inadequate offers because the risks to do otherwise are far too great.

Case Flow Management in the Civil Jurisdiction - Summary

It is a worthy notion to bring parties to civil actions together at an early stage to see if there is common ground or see if their differences can be settled without the necessity of resorting to litigation and incurring expense on the way. Few would argue otherwise. Sadly, in my view, case flow management as it has operated in South Australia in the civil jurisdiction, goes far further than this, and in reality in denies the individual his basic right to litigate his grievance through the courts. If the individual does not have

ready access to the courts, then his rights are limited to those offered to him by his opposition, whether it be another individual, bureaucracy or government. The current system is such that his position, at least so far as experts' evidence is concerned, is frozen, in effect, at pre-trial conference. Therefore, far from saving the litigant money in avoiding preparation for trial, it forces him to incur that expense well prior to pre-trial conference, as he is barred from doing so after. If an inadequate offer is made, can the litigant afford to pursue the matter further? Can he run the risk of an adverse judgment with the consequential costs orders?

Of more important concern however is how do these principles translate to the system of criminal law, and what concerns do they hold for the criminal lawyer both now and at the hands of future case flow managers.

Case Flow Management in Criminal Law

The Committee of Investigation into Delays in the Criminal Jurisdiction of the District Court presented its first report on 5 October 1990. The committee was constituted by three Judges of the District Court, a solicitor, a barrister, the Director of the Legal Services Commission, the Director of the DPP for the Commonwealth, a representative of the AGS, the Crown Prosecutor, Clerk of Arraigns, the District Court Registrar and the Sheriff of South Australia. The committee was formed because of concerns again in relation to delay in times taken in the prosecution of criminal trials. No

accurate statistics at that time were available but an examination of cases listed for first arraignment and trial during April, May and June of 1989 revealed that less than 20% of cases were coming to trial within one year of the accused person's arrest and the median time appeared to have been a little under 18 months between arrest and trial. There was also concern expressed over the increase in business of the Court which, in one year, had increased by some 33%.

In considering the conduct of the criminal list in the District Court the committee considered what was an acceptable or appropriate period of time necessary for the proper conduct of the "average" criminal trial in the District Court. The committee determined that 90% of cases in the criminal jurisdiction of the District Court could be regarded as "average" cases and further determined that these cases in the past had been taking far too long to come to trial. In its first report previously referred to, the committee stated:

> "After considering all of the facts involved, the committee agreed upon the adoption of the following standards for the disposal of criminal trials in the District Court:-
>
> (a) that 90% of all cases should be tried to verdict within 90 days of the accused's first appearance in the District Court as a result of his being committed for trial;
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> (b) that 98% of cases should be tried to verdict within 180 days of the accused's first appearance in the District Court as a result of his being committed for trial; and
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> (c) that all cases should be tried to verdict within 360 days of the accused's first appearance in the District Court as a result of his being committed for trial."

These principles in relation to the conduct of trials, together with additional time limits in relation to those committed for sentence, together with the general principles of case flow management, have been incorporated in the Supreme Court Criminal Rules which came into effect in July of 1992. (Appendix 3).

Delays in the Criminal Jurisdiction

Having defined the appropriate time for an average case to be determined, the committee then set about determining what was the backlog of cases and the period of delay for the general type of case within the District Court. It appeared as at 31 December 1989 that there were 404 cases pending where pleas of not guilty had been entered. The disposal rate of contested cases since 1988 was calculated as follows:

Mode of Disposal	1988	1989
Tried to verdict	146	151
Nolle Prosequi	42	42
Plea of guilty	140	129
	328	322
Average disposals per month	27	27

From these statistics it could be said that the Court was able to dispose on average of 27 cases contested each month, and taking into account a waiting period of 90 days the average number of contested cases disposed of within that period was 81 cases. The committee calculated the backlog as of 1 January 1990 as being the difference between the number of cases pending and the number of cases which could be expected

to be disposed of was within the waiting period of three months, namely 404-81=323 cases. The delay, being the time necessary to dispose of the backlog of cases, is 323 cases ÷ 27 cases per month = 11.96 months delay. The committee went on to define various matters which caused or contributed to that delay, and, as with the committee investigating delays in civil matters, adopted the formula of the American Bar Association's amended standards relating to trial courts and at the conclusion commented:

> "The real kernel of the nut is court supervision and control of all stages preparatory to, as well as during, trial. This must be coupled with a firm policy against the granting of adjournments."
>
> *(Note: As of December 1991 delay in criminal cases was calculated at 6.8 months and backlog in criminal cases 150 cases.)*

Various changes were implemented within the criminal court system that contributed to achieving these results. One such innovation was the implementation of status conferences.

Status Conferences

Upon the recommendation of the committee the concept of the status conference was introduced, which in effect is a pre-trial conference procedure not dissimilar to that in the civil courts, and in many respects designed to achieve the same result, namely an early detection of matters that were likely to resolve by way of a plea or a nolle prosequi, before those matters were listed for trial. The status conferences were originally held under powers conferred upon the court by

the now repealed *District Court Criminal Rules*, but have since been replaced by the Supreme Court Criminal Rules, which took effect in July of 1992. In relation to status conferences those rules state as follows:

> "6.05 A status conference shall be attended by a representative of the Director of Public Prosecutions of the State of South Australia or of the Commonwealth of Australia duly authorised to enter into the discussions and arrangements contemplated by this rule, by the person committed for trial and by his solicitor or counsel.
>
> 6.06 At each status conference discussions shall be held with a view to ascertaining whether or not the person committed for trial intends to maintain his plea of not guilty on his being arraigned for trial, to facilitate the proof at the trial of any facts which may or may not be in dispute, to facilitate the attendance at the trial of all necessary witnesses and to setting the earliest practicable date for trial.
>
> 6.07 The Judge presiding over a status conference may in his discretion adjourn the conference from time to time and at the conclusion of the conference shall set a date for the commencement of the trial."

From the prosecution's point of view, one suspects, the status conference has taken on the part of the pre-trial conference from the plaintiff's point of view in civil jurisdictions. Following a plea of not guilty at arraignment a date for the status conference to take place is set. This is normally two to three weeks from arraignment. At the time of the status conference the Judge will inquire whether the parties are ready to proceed to trial. The Judge will inquire of defence counsel as to whether any voir dire or preliminary issues are anticipated. The Judge will inquire of the prosecution as to

whether all witness statements have been provided to the defence. The Judge will inquire as to the anticipated length of the hearing, and then if the matter is still to be contested the matter will be set for trial. A specific date for the commencement of the trial will be set, and the trial is anticipated to commence on that date.

It is not unusual for a status conference to be adjourned on one or more occasions, but when the matter is finally set for trial, it is usual for the Judge to require an intimation from the prosecuting counsel that all witness statements have been provided and, upon that intimation being given, the Crown are often prevented by the trial Judge from leading any further evidence at the hearing, similar to the ruling in Trebilcock v. Nominal Defendant.

Voir Dire and other Preliminary Applications

As previously mentioned, at the status conference not only is the Crown required to intimate that all witness statements have been provided to the defence but the defence is required to intimate to the Court as to whether any preliminary applications or voir dire hearings will be sought. An intimation in the negative is not a bar however to such an application being made, but pursuant to Rule 9 of the *Supreme Court Criminal Rules* notice is required. Rule 9 provides:

> "9.01 Where in the course of any criminal proceedings:
>
> (a) a person committed for trial seeks separate trials of different charges

alleged against him in the same information;

(b) a person committed for trial seeks a separate trial from that of another person committed for trial and charged in the same information;

(c) a party seeks to raise any question relating to the admissibility of evidence or any other question of law affecting the conduct of the trial prior to the opening of the case for the prosecution or the calling of witnesses;

(d) a party desires to make an application which, if granted, would have the effect of postponing or delaying a trial which has been listed for hearing;

(e) a party desires to make some other application which cannot reasonably be made without notice to the other party or parties;

(f) a Judge directs that a written application should be made;

the application shall be made by issuing and serving an application in Form number 1 in the Schedule to these Rules.

9.02 Where an application is made under Rule 9.01 it shall state:

(a) the orders or order sought;

(b) sufficient particulars of the grounds relied upon to enable any other party to have proper notice of whether the calling of evidence will be necessary in order to resolve the issues raised;

(c) the nature of any question of law sought to be raised.

9.03 An application under Rule 9.01 shall be filed and served on all other parties <u>not less than 7 days</u> prior to the date fixed for the hearing of the trial in such proceedings.

9.04 The Registrar shall endorse the application with the date, time and place of its hearing.

9.05 Where a date for trial has already been fixed, the Registrar may endorse the application that it is to be heard by the trial Judge at or immediately prior to the commencement of the trial.

9.06 No question or matter of a kind referred to in Rule 9.01 shall be raised at the trial of the proceedings unless application shall have been made in accordance with Rule 9 or unless the trial Judge shall in his discretion consider that there are circumstances which justify his waiving compliance with the rule."

This rule came into operation in July of 1992. It is standard procedure for judges at the status conference to remind defence counsel of their obligations to comply with Rule 9 in the event that there are questions of admissibility or any pre-trial matters to be determined. A similar rule existed prior to July of 1992 in the *District Criminal Court Rules*. In the case of The Queen v. Nankivell 155 LSJS 130 the question of failure to comply was considered. The accused was charged with causing bodily injury by dangerous driving. His trial was to commence on 8 December 1989. Shortly prior to the commencement of the trial the Judge became aware that there was an application for a voir dire in relation to the exclusion of evidence of the accused's blood alcohol concentration. No notice had been given of the voir dire application in accordance with Rule 9. Counsel made oral application for the trial Judge to waive compliance with the rule in special circumstances, which was permitted by sub-rule 3. Counsel for the Crown did not oppose the application.

The facts were that the accused at the committal proceeding was represented by a solicitor other than his present solicitor. The earlier solicitor failed to attend on the last day of the committal proceeding. The new solicitor received the accused's papers from his previous solicitor on 8 November. The accused's new solicitors were advised of a call-over to be held on 20 November where advice would be sought in relation to preliminary applications on behalf of accused persons. That letter also referred to the requirements under Rule 9. The present solicitors did not pay any attention to that letter. The present solicitors instructed agents to appear at the call-over. After the call-over independent counsel was briefed. On 1 December the solicitor arranged a conference with counsel which counsel was unable to attend and other counsel took the brief, and it was at this point that a voir dire was anticipated. The Crown Prosecutor was informed within the next few days. Rule 9 however was not complied with.

In The Queen v. Nankivell Judge Lunn considered the failure to comply with Rule 9 in the light of Rule 18 which at that stage existed within the *District Court Rules*. Rule 18 stated:

> "Nothing in the Rules, or any order made pursuant thereto, shall preclude a trial Judge from making any order or giving any direction at the trial that, in the opinion of the trial Judge, ought to be made in the interests of justice, and in order to ensure that there was a fair trial according to law."

His Honour, in ruling that the voir dire should be allowed, took the following view:

> "There cannot be a fair trial and it is not in the interests of justice, if an accused is to be precluded from raising a ground of defence which may be open to him because of a mistake by his solicitor, and where he personally was not at fault. Therefore, I am compelled by Rule 18 to grant the accused the waiver which he seeks. If that means that solicitors can ignore Rule 9(1) with apparent impunity, regrettably that must be the case if justice is to be done for an accused.
>
> My ruling is based solely on Rule 9(3) and 18."

Since the enactment however of Rule 9 in the *Supreme Court Criminal Rules* in July of 1992, experience shows that strict compliance has been insisted upon by the bench. There is no corresponding Rule 18. Legitimate voir dire hearings, and rulings on the admissibility of evidence even where no delay in the trial would be caused by the calling of evidence, have been refused repeatedly because notice has not been given on time, or the particulars within the notice have been ruled to be insufficient. It appears that the principles of case flow management which prevent a plaintiff in a civil action from amending particulars close to trial after a pre-trial conference, act similarly in preventing an accused from legitimately raising a point of admissibility of evidence simply because the particulars have not been sufficiently pleaded or pleaded within time, prior to the trial.

The Plea of Guilty

If, in the civil jurisdiction, the filed offer with the consequent cost penalties is one of the principal tools of the case flow manager, then, it is submitted that in the criminal

jurisdiction, the benefit for a plea of guilty is similarly the case flow manager's tools in trade.

A person charged with a criminal offence who pleads guilty and thereby shows contrition and remorse has, for many years in South Australia, been given the benefit of that plea. This principle has been affirmed in Section 10 of the *Sentencing Act*, which directs that the court must have regard for the plea of guilty; the degree to which the defendant has shown contrition for the offence; and the degree to which the defendant has co-operated in the investigation of the offence, among other things. It is therefore a significant factor, and appears to be becoming more of a significant factor, at the stage at which the plea of guilty is entered.

Since the changes to the criminal jurisdiction in July of 1992, the accused is required to enter a plea of either guilty or not guilty upon a case to answer being found at committal. No longer can he reserve his defence. He is then again required to plead either guilty or not guilty at the arraignment within 28 days of him being committed. At the status conference his position is again enquired of through his counsel as to whether the matter will be defended.

So important is the early plea of guilty to the achieving of the principles of case flow management, that its importance arguably was recently recognised, in R. v. Harris and Simmons 167 LSJS 146. This was a matter on appeal to the Court of Criminal Appeal. It involved an accused charged with

possessing heroin, who had pleaded guilty at the first opportunity and given evidence against his co-accused. In reducing the sentence which had been imposed by the sentencing Judge, the Full Court went on to say that a Judge, when sentencing people who had been of great assistance to the authorities and who had pleaded guilty, should state what sentence would otherwise have been given to the accused had they not so pleaded guilty and provided assistance.

If such an inducement had been offered to an accused to confess it would arguably be grounds for a voir dire hearing in challenging its admissibility at law. Apparently not so in sentencing.

R. v. Shannon 21 SASR recognised that a plea of guilty could be taken into account in mitigation. Justice Cox in his dissenting judgement made this observation : -

> "What is more to the point, in my opinion, is the effect upon the mind of a defendant who is considering a plea of not guilty. I return to my tow indistinguishable jointly-charged defendants, and I assume this time that the evidence against them is identical. One pleads guilty, and if Mr Waye's submission to us is correct, that defendant is entitled for that reason alone to expect a lighter sentence. The other defendant pleads not guilty, being assured (in accordance with such authorities as Harris) that he has nothing to fear from doing so, so far as any question of sentence is concerned. However, he is convicted by the jury, and in accordance with the submission he will get a longer sentence than his colleague for no other reason than that his colleague pleaded guilty. He will need a very subtle mind, unusually sympathetic to the ways of the law if he is to understand that he is going to prison for a longer term, not because he pleaded not guilty, but because he failed to plead guilty. For that, in my view, is what the effect of the proposed change will be. It will be seen, very reasonably, as an inducement not to plead not guilty, with a longer sentence as its sanction, because

> to do so will inevitably deprive the defendant of an argument in mitigation of sentence that would otherwise have been available to him. In my opinion, that is wrong.
>
> Nothing I have said, of course, is intended to detract from the power, and duty, of the court to take into account everything favourable to the defendant, including his contrition or regret. A genuine desire to spare, say, a victim in a rape case the ordeal of giving evidence is something from which repentance may readily be inferred. However, I would not include among the relevant considerations the mere fact that the defendant has taken a course that happens to have save the time of the court and the prosecutor, and has refrained from unnecessarily burdening the public purse in the form of the legal aid scheme. The proper detachment of the courts towards such governmental or organisational considerations is better served, in my opinion, by ignoring them altogether."

Sadly, although Justice Cox suggested that governmental and organisational considerations should altogether be ignored, quite the contrary is now the case with the early plea of guilty being a very significant factor in the sentencing process. There is also a factor, which in my experience, is readily brought to the attention of accused persons at every opportunity by certain magistrates and judges.

For the Future

If an accused person is given credit for an early plea of guilty due to the fact that he saves the authorities time and money in the conduct of a trial, should credit also be given for an accused person who agrees the bulk of the evidence against him at trial, but runs the trial on a single issue? Is it a significant factor, given principles of Case Flow Management, that an accused instructed his counsel, in writing, prior to the commencement of the trial that all but a certain witness would be agreed? What effect does that have

on our notions of a right to silence or a presumption of innocence?

In South Australia under the Evidence Act there exists a section which as far as I am aware has not been used to date. Section 59J provides as follows : -

1. The court may at any stage of a civil or criminal proceedings -
   (a) dispense with compliance with the Rules of Evidence for proving any matter that is not genuinely in dispute; or
   (b) dispense with compliance with the Rules of Evidence where compliance might involve unreasonable expense or delay.
2. In exercising its power to sub-section (1) the court may, for example, dispense with proof of -
   (a) a document or the execution of a document;
   (b) handwriting;
   (c) the identity of a party;
   (d) the conferral of an authority to do a particular act.
3. A court is not bound by the Rules of Evidence in informing itself on any matter relevant to the exercise of its discretion under this section.

How is a court to determine at any stage of a criminal proceeding whether a matter is genuinely in dispute? I suspect that it will not be too long before a keen prosecutor decides to argue at a status conference stage that certain

matters which he seeks to prove are not genuinely in dispute therefore formal proof should be dispensed with at the trial. The judge at the status conference will have to inquire of the defence counsel as to whether or not these matters are genuinely in dispute. Will an affirmative indication from counsel suffice? Will counsel be required to explain upon what basis there is a genuine dispute? How does that impact upon our notion of a right to silence?

There has been discussion about an accused in effect pleading their defence. I note that Clause 4 of the Crimes (Criminal Trials) Act (1983), the Victorian Bill, provides that an accused must file a Statement of his Defence indicating which of the elements of the offence charged are admitted. Is this the next step for those who would seek to manage case flow?. It is worthwhile noting that it is already required in South Australia if an accused seeks to challenge the admissibility of evidence by the filing of a Rule 9 Notice. It is also required in South Australia that if an accused seeks to call alibi evidence, a notice must be given to the prosecution at least 14 days prior to trial or comment can be made by the judge. Is it therefore unreasonable that an accused should formally file a defence?

Conclusion

It would be naive to think that the tide could be turned and that Case Flow Management was not here to stay. We can reasonably expect in my view, that there will be more court intervention in the conduct of litigation, and particularly

Criminal litigation, in the future. The Criminal Lawyer's brief is to be aware of the direction in which the administrators are moving, to anticipate the effects that future amendments will have upon the rights of the accused, and do what we can to prevent or abate those consequences.

ATTACHMENT 4.

Case Flow Management

2.01 These Rules are made for the purpose of establishing orderly procedures for the conduct of litigation in the Court and of promoting the just and efficient determination of such litigation. They are not intended to defeat a proper claim or defence of a litigant who is genuinely endeavouring to comply with the procedures of the Court, and are to be interpreted and applied with the above purpose in view.

2.02 (1) With the object of -

(a) promoting the just determination of litigation;

(b) disposing efficiently of the business of the Court;

(c) maximising the efficient use of available judicial and administrative resources; and

(d) facilitating the timely disposal of business at a cost affordable by parties;

actions in the Court will be managed and supervised in accordance with a system of positive case flow management. These Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the above objects.

(2) The system of case flow management is directed towards achieving the disposal of actions in accordance with the following standards:-

(a) That 90 per centum of all actions commenced in the civil jurisdiction should be finally disposed of by settlement or judgment within nine months of the service of the summons upon the defendant or within 12 months of the commencement of the action (whichever be the lesser period);

(b) That 97.5 per centum of all actions commenced in the civil jurisdiction should be finally disposed of by settlement or judgment within 15 months of the service of the summons upon the defendant or within 18 months of the commencement of the action (whichever be the lesser period);

(c) That all actions commenced in the civil jurisdiction should be finally disposed of by settlement or judgment within 18 months of the service of the summons upon the defendant or within 21 months of the commencement of the action (whichever be the lesser period).

2.03 (1) The practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for pleadings, discovery and other interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties, and the preparation of the case for trial.

(2) In order to achieve that goal, it is required that the great majority of actions are conducted in accordance with the following prescriptions as to time and that extensions of such times should only be permitted in exceptional circumstances:-

Activity	Maximum Elapsed Time from Service of Summons
Filing and serving appearance	21 days
Filing and serving defence	28 days
Filing and serving defence to a further statement of claim served pursuant to Rule 9.02	42 days
Making mutual discovery of documents	63 days
Filing and serving details under Rule 46.15 in claims for or in respect of personal injury	63 days
Pretrial Conference	152 days
Commencement of trial	212 days
Delivery of judgment	275 days

(3) Nothing in this Rule shall be construed so as to limit the powers of [illegible] enlarge any of the above prescriptions as to time in an appropriate case or [illegible]

2.04 To these ends

(a) Parties to proceedings are required to be ready to proceed to trial by the date of the pre-trial conference referred to in Rule 56.01.

(b) Parties to proceedings are required to be ready to proceed with the hearing of any application at the time fixed for the hearing, or any adjourned hearing, of such application.

(c) A trial date which has been fixed will not be cancelled or postponed unless the justice of the case, assessed having regard to the obligations of the parties pursuant to paragraph *(a)* hereof, so requires.

(d) A trial will proceed on the date fixed, to conclusion, so far as practicable without interruption, unless the justice of the case, assessed having regard to the parties' obligation pursuant to paragraph *(a)* hereof, requires such interruption.

2.05 Each party is required positively to review the pleadings filed in the proceedings prior to the pre-trial conference referred to in Rule 56.01 so as to ensure their adequacy in light of the issues known to be in contention at that time. Such steps as may be necessary to effect necessary amendments must be taken prior to the pre-trial conference. In the event that any application is made at trial for leave to amend the pleadings the Court may, if the amendment would cause the postponement or adjournment of the trial, refuse such application, if it sees fit, in order to protect the integrity of the case flow management system and to implement the Court's requirement that trials proceed at the time appointed for trial, notwithstanding that any injustice to the opposing party might have been avoided by an order for costs or some other order.

2.06 Notwithstanding the provisions of Rules 2.02(2) and 2.03(3) and notwithstanding the times limited by these Rules for taking the various steps in an action the Court may from time to time, as necessary and desirable for the most efficient disposal of its business, establish and promulgate case listing tracks on a differential case management basis and, by written practice direction, publish time performance standards related to them which differ from the times limited by these Rules. Interlocutory orders shall thereafter be made and requisite status, pre-trial or other conferences be scheduled and steps taken in the action in accordance with such standards.

2.07 The Court may, at any time, of its own motion on notice to the parties review the progress of proceedings and make such orders or give such directions to lead to their efficient and timely disposal and concerning time defaults committed by any party as it may consider just and expedient.

2.08 The Court may from time to time provide or facilitate alternative dispute resolution options to aid the efficient and early disposal of appropriate cases.

2.09 Where any party does not proceed with the hearing of an action or application therein at the time fixed for such hearing, the Court may, on the application of the opposing party or of its own motion, revoke any order to proceed to trial, strike out the action or application or dismiss such action or application for want of prosecution, and may do so in order to protect the integrity of case flow management system and to implement the Court's requirement that matters proceed at the time fixed for hearing notwithstanding that any injustice to the opposing party might have been avoided by an order for costs or some other order.

Appendix 2.

TRIALS LIST STATS

		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
POST 1989 ACTIONS	:1991	1457	1503	1635	1802	1915	2018	2076	2028	2038	1933	1875	1806
	:1992	1867	1803	1792	1777	1795	1805	1790	1735	1585	1523	1375	1196
	:1993	1085	928	1279	1266								
		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
PRE-1990 ACTIONS	:1991	3326	3200	3063	2855	2672	2494	2251	1971	1714	1478	1241	1052
	:1992	954	760	563	374	298	234	203	188	158	151	139	123
	:1993	116	107	166	161								
		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
COMBINED LIST	1991	4783	4703	4698	4657	4587	4512	4327	3999	3752	3411	3116	2858
	1992	2821	2563	2355	2151	2093	2039	1993	1923	1743	1674	1514	1319
	:1993	1201	1035	1445	1427								

DISTRICT COURT CRIMINAL LODGEMENTS

		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
MONTHLY	1991	169	86	127	158	96	124	147	124	125	183	151	100
MONTHLY	1992	162	112	192	136	144	162	117	162	212	155	137	154
MONTHLY	1993	151	115	164	141								
% CHGE 92-93		-7	3	-15	4	50	31	-20	31	70	-15	-9	54
		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
CUMULATIVE	1991	169	255	382	540	636	760	907	1031	1156	1339	1490	1590
CUMULATIVE	1992	162	274	466	602	746	908	1025	1187	1399	1554	1691	1845
CUMULATIVE	1993	151	266	430	571								
% CHGE 92-93		-7	-3	-8	-5	17	19	13	15	21	16	13	16

APPENDIX 3.

Caseflow Management

5.01 These Rules are made for the purpose of establishing orderly procedures for the conduct of the business of the Court in its criminal jurisdiction and of promoting the just and efficient determination of such business. They are not intended to defeat a proper prosecution or to frustrate a proper defence of a person who is genuinely endeavouring to comply with the procedures of the Court and they are to be interpreted and applied with the above purpose in view.

5.02 With the object of:

(a) promoting the just determination of the business of the Court;

(b) disposing efficiently of the business of the Court;

(c) maximising the efficient use of the available judicial and administrative resources; and

(d) facilitating the timely disposal of business at a cost affordable by the parties and the community generally;

proceedings in the Court will be managed and supervised in accordance with a system of positive caseflow management. These Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the above objects.

5.03 The system of caseflow management is directed towards achieving the disposal of the business of the Court in accordance with the following standards:

(a) That 90 per centum of the cases of persons committed for trial should be tried to verdict within 90 days of that person's first appearance in the Court.

(b) That 98 per centum of the cases of persons committed for trial should be tried to verdict within 180 days of that person's first appearance in the Court.

(c) That all of the cases of persons committed for trial should be tried to verdict within 365 days of that person's first appearance in the Court.

(d) That 90 per centum of all persons committed for sentence should be sentenced within 60 days of that person's first appearance in the Court.

(e) That all persons committed for sentence should be sentenced within 90 days of their first appearance in the Court.