CASE ALLOCATION IN ENGLAND

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INTRODUCTION

> Some laws are designed to control us, the Crown's subjects, other laws are designed to protect us from the Crown and Her Majesty's Government…and yet others are designed to regulate judges.[1]

Our report is concerned with the laws as they regulate judges with regard to case allocation and considers this in relation to four fields of practice. The first is commercial law where we investigate allocation in the Commercial Court and the Court of Appeal. Next is criminal law where we investigate allocation in a magistrates' court and the Crown Court. Thirdly we examine welfare law and the Social Security Appeal Tribunal and finally family law, where we consider the High Court Family Division and the Inner London Family Proceedings Court.[2] Before commencing our report on these four fields, we explain the general jurisdictional and administrative context within which the judges operate, and look at the general principles which shape the relationship between judicial integrity and case management and allocation.

OVERVIEW OF THE CIVIL AND CRIMINAL JUSTICE SYSTEMS

The present English court system remains the product largely of 19th century rationalisations of a much older structure. To a lawyer from outside England and Wales the structures will almost certainly seem complex and confusing. Jurisdictions divide and sub-divide according to sometimes very general, sometimes highly specialised distinctions; first instance and appellate functions are often shared by the same court, as are civil and criminal jurisdictions, and routes of appeal are also more highly differentiated than is common in many Civilian systems.

The Court System

Numerically, the most important courts in the civil justice system are the County Courts and the High Court. These have more or less concurrent jurisdiction, though procedural rules ensure that only high value and complex litigation commences in the High Court. Consequently the great bulk of civil litigation is now conducted in one of the 218 County Courts in England and Wales. Criminal

[1] Burrows, D. (2005) "Respect procedural rules—or go to the Devil!" 19 *Family Law News* January 2005 at 4.

[2] The bulk of the research is based on documentary data, but it also includes a small amount of material from interviews conducted with senior judges having 'managerial' responsibilities over the civil and criminal justice systems, presiding judges and tribunal members, and court/tribunal administrators.

jurisdiction is also primarily divided between two courts – the magistrates' court, which deals with less serious offences – about 95% of all criminal trials take place before magistrates, and the Crown Court which deals with the more serious crimes. Appeals from first instance decisions lie chiefly to the Court of Appeal, though some appeals, under special procedures, lie to the Divisional Courts of the High Court. The High Court is composed of three divisions. They are the Queen's Bench Division, the Chancery Division, and the Family Division. The Court of Appeal also sits in civil and criminal divisions. Administrative Law proceedings must all be commenced in the Administrative Court of the High Court (Queen's Bench Division). The current court structure for the civil and criminal justice system respectively is shown in Figures 1 and 2.

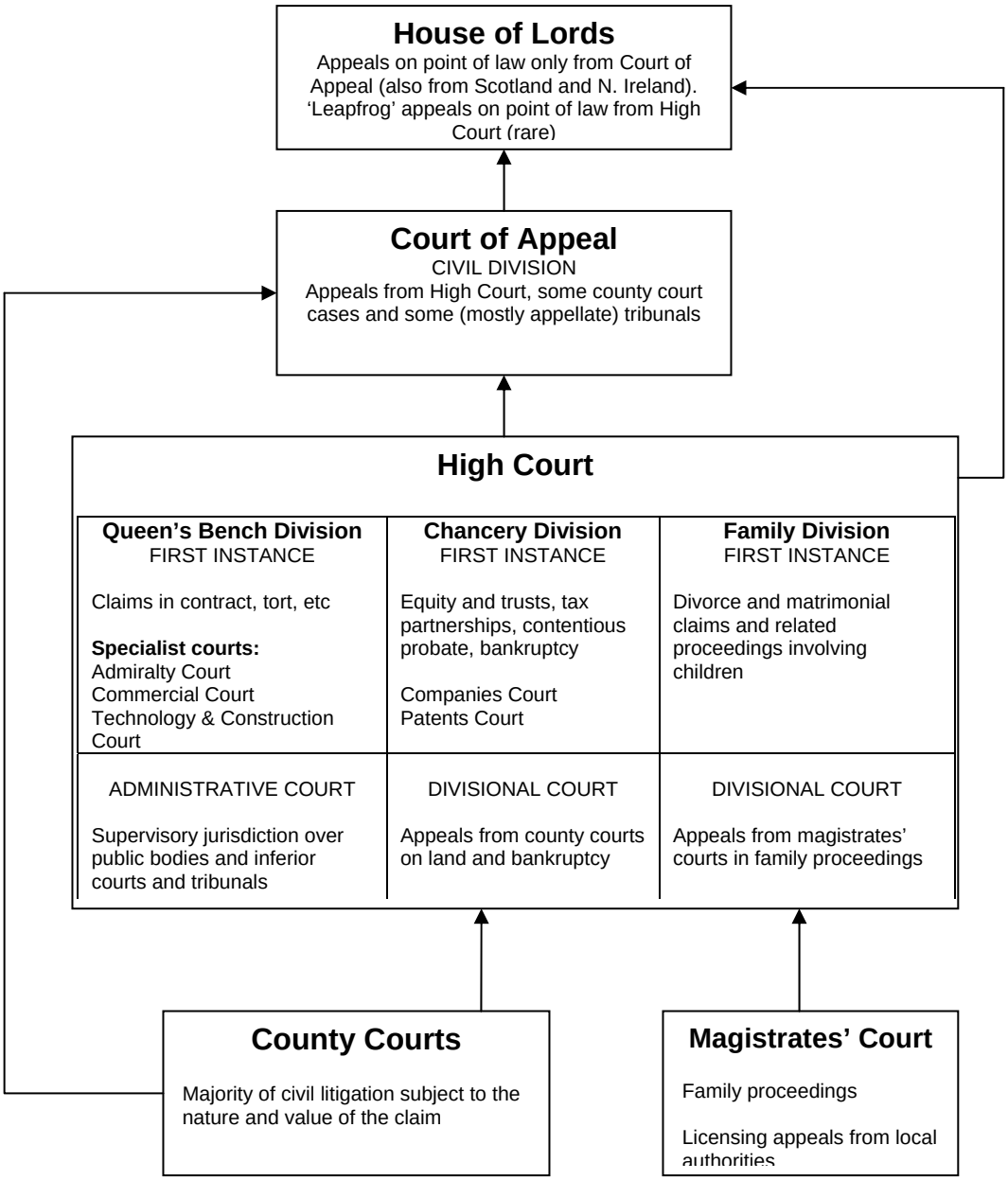

Figure 1: The Civil Court System

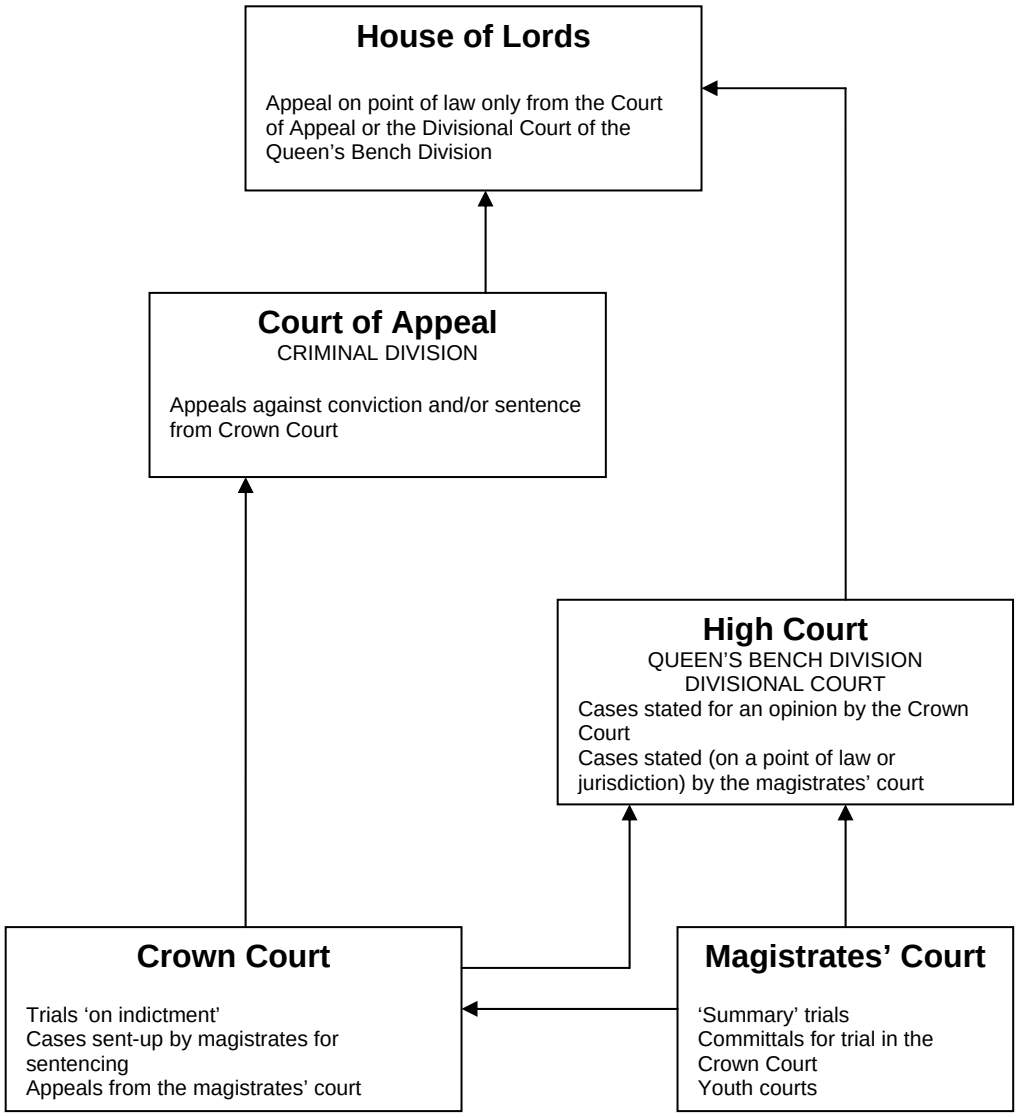

Figure 2: The Criminal Court System

Confusingly, the High Court of Justice and the Court of Appeal together constitute what is formally called the Supreme Court of Judicature. It is not, of course a 'supreme court' in the sense used in the USA and many other legal systems, and is not the final court of appeal. The final appellate jurisdiction for England and Wales is in almost all circumstances exercised by the House of Lords (more properly, the Judicial Committee of the House of Lords), though legislation has been introduced to abolish the Judicial Committee and replace it with a new judicial body which will be called the Supreme Court.

Administrative Tribunals

It will be apparent from Figure 1 that administrative tribunals, such as the Social Security Appeals Tribunal, discussed below, sit outside of the general civil justice system. Tribunals remain a distinctive and important feature of the English Legal System. There are currently some 70 different tribunal jurisdictions in the UK.[3] Most are of relatively recent origin and the majority were created to deal with issues raised by the wide range of social legislation passed in the latter half of the nineteenth and twentieth century. The tribunals and courts systems will interact where rights of appeal lie from a tribunal (usually an appellate tribunal) to the Court of Appeal. Tribunal decisions are also subject to judicial review by the Administrative Court where there are allegations of procedural impropriety or irrationality in decision-making.

Judicial Inquiries

Before leaving this general introduction, one other aspect of UK judges' work ought to be mentioned, namely, heading official public enquiries. There is a long history of this activity, one which brings judges very close to political activity. Governments establish enquiries and commissions for a number of reasons, e.g. the Saville enquiry is investigating the "Bloody Sunday" shootings by the British Army in Northern Ireland in the 1970s, the Butler-Sloss enquiry into child abuse in Cleveland in the late 1980s, or the Hutton enquiry into the death of David Kelly, an Iraq weapons inspector, in 2004. Judges take on these duties out of a sense of public duty, although they are not compelled to do so. In one respect judges are cheap to use as their salaries are already paid, however, this type of use does deplete the stock of judges available for hearing cases. Some critics believe that the use of judges to conduct enquiries may undermine their independence and impartiality by politicising them.[4]

The Courts' Administration

There is a unified court administration service, Her Majesty's Court Service (HMCS) which is part of the Department of Constitutional Affairs. HMCS administers the entire range of civil and criminal courts, and includes:

- Details on all courts and how to find them
- Hearing lists for the Supreme Court offices and some Crown Courts
- Information to the public on procedures and processes
- Forms and guidance to help litigants when using the courts
- Annual reports and business plans[5]

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[3] Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (London: TSO, 2001), p.5; Leggatt also reports that a number of these are defunct and "only 20 each hear more than 500 cases a year" – *id.*

[4] J. Beatson, "Should Judges Conduct Public Inquiries?" (2005) 121 *Law Quarterly Review* 221.

[5] HMCS <http://www.hmcourts-service.gov.uk>. Inaugurated 1 April 2005.

JUDICIAL APPOINTMENTS, TRAINING, ACCOUNTABILITY AND DISCIPLINE

The number of professional full-time judges in England and Wales is relatively small though it has grown in recent years. The numbers tend broadly to reflect the caseload of each court. The current number of judges appointed to each superior court is shown in Figure 3:

Figure 3: Judicial Appointments – Superior Courts (as at 1st June 2005)[6]

			In Post
House of Lords: Lords of Appeal in Ordinary			**12**
Heads of Division	Lord Chancellor Lord Chief Justice Master of the Rolls President of Family Division Vice-Chancellor		**5**
Court of Appeal: Lords Justices of Appeal			**37**
High Court Judges	Chancery Division Queen's Bench Division Family Division	17 72 19	**108**

Unsurprisingly the majority of judges are appointed to sit in the inferior courts where the volume of work is at its greatest; many of these are part-time appointees, usually drawn from the practising legal profession. The system's heavy reliance on part-time judges obviously has practical implications for case listing.

The Appointment Process

Judges in England and Wales are normally appointed to a specific court or division (e.g. the County Court, the Court of Appeal, or the Chancery Division of the High Court), but a few of these appointments carry an entitlement – indeed an obligation - to sit in other courts as well. For example, a judge of the Queen's Bench Division will be expected to sit as judge at first instance and on certain appeals in the Crown Court, and is also entitled to sit on criminal appeals in the Court of Appeal. These apparent jurisdictional anomalies are largely historical. Most judicial appointments also carry a national rather than local commission. This has always been true of the superior courts, but a few lower courts and tribunals still appoint only to a local jurisdiction; lay justices in the magistrates' courts are the primary example of this.[7]

The English do not have a 'career judiciary' in the Civilian tradition. Judicial appointment is still primarily dependent upon experience of legal practice and

[6] Department of Constitutional Affairs <http://www.dca.gov.uk/judicial/judapp.htm>.
[7] The jurisdiction of legally-trained full-time magistrates, now called District Judges (magistrates' courts), was converted from local to national by the Access to Justice Act 1999, Part V.

particularly the exercise of rights of audience in the superior courts (Crown Court and above). Until the passing of the Courts and Legal Services Act 1990, barristers had held an historical monopoly over higher court advocacy, and hence had also monopolised the upper echelons of the judiciary. The 1990 Act both enabled solicitors to obtain rights of audience in the higher courts, and opened-up to them the possibility of more senior judicial appointment.[8] Nevertheless concerns are still expressed that the judiciary, particularly in its higher strata is insufficiently diverse in terms of ethnicity gender and disability. Recent proposals have been put out to consultation by the Lord Chancellor to further extend eligibility criteria, notably by moving the emphasis away from the amount of time applicants have exercised 'rights of audience' to focus more generally on the amount of post-qualification experience the applicant possesses. While these have been welcomed by a number of the professional bodies, there are signs that the senior judiciary itself harbours concerns that the proposals might undermine the quality of judicial appointments.[9]

In 1992, *Justice,* the British section of the International Commission of Jurists recommended the creation of a judicial commission as an independent body responsible for all judicial appointments, training, the specification and maintenance of performance levels and the handling of complaints. While responsibility for some of these functions is gradually being handed over to new and independent bodies,[10] the framework remains relatively piecemeal.

Training

Judicial training, managed by a body called the Judicial Studies Board (JSB) has increased substantially in recent years, and is a testament both to the success of the JSB in delivering high quality training, and to a marked shift, over the last 20-30 years in judicial attitudes to the need for training.[11] The JSB draws its membership chiefly from the judiciary but also has on its committees a number of senior academics and other professionals. All new judges are now required to attend JSB training seminars on issues of practice and procedure, and on diversity issues. In addition 'continuation training' is provided amounting to five days per year per judge.[12] The JSB also publishes "Bench Books". These are essentially guides to procedure and to good judicial practice. There is a generic bench book on Equal Treatment, and others geared to the practice in specific courts. We discuss these as relevant in the substantive sections of this report.

[8] Lawrence Collins was thus the first solicitor to be appointed directly to the High Court bench in 2000.
[9] See "Lord Woolf expresses concern over controversial judicial eligibility plans, 149(29) *Solicitors' Journal* 866 (22 July 2005).
[10] An independent Judicial Appointments Commission will commence operation in April 2006.
[11] See K. Malleson, *The New Judiciary: The effects of expansion and activism* (Aldershot: Ashgate, 1999) pp.161-2.
[12] *Id,* p.168.

Closely related to the question of training is the sensitive matter of judicial competence. Historically, judges have been appointed more for their general 'judicial qualities' than for specific competences. This has led to instances where judges have been appointed to courts with jurisdiction over areas in which they have had limited professional experience, in some cases this has in turn raised question about the nature and extent of judicial competence and thence also growing concerns about judicial accountability.[13]

Accountability and Discipline

As Andrew Le Sueur has recently observed, the issue of accountability inevitably begs the question of accountability for what? Le Sueur distinguishes four 'levels' of accountability, which he describes as probity, performance, process and content accountabilities.[14] The most relevant to our analysis are probity and process accountabilities. Probity accountability is, in many respects, the least controversial. It concerns basic financial audit of the courts, and also systems for ensuring the probity of individual judges, such as registers of financial and other interests, rules requiring disclosure of conflicts of interest, etc. Process accountability, by contrast, includes such matters as the methods of selecting and allocating cases to judges, and rules for the selection of judges to courts which do not sit *en banc.*

Although, performance standards for courts are monitored by the Courts Service, these are essentially administrative as opposed to judicial targets; judicial standards in other respects are little regulated, and there is little in the way of formal process or probity accountability. There is no judicial council; no formal code of judicial ethics, and, at present, no judicial ombudsman.[15] There is an established rule against bias, which obliges judges both to disclose conflicting interests when they arise and to recuse themselves from cases in which, objectively, an informed observer might perceive that there is a real possibility of bias.[16] But only the Law Lords are obliged formally to register their financial and other interests. As David Pannick QC observed in 1988, judicial performance in

[13] The editor of *Archbold* (one of the most respected practitioner texts on criminal law and practice) commented in the preface to its 1995 edition that "Some of those who sit hearing criminal appeals have little or no practical experience of criminal law… the judgements get longer, authorities of apparent relevance are not cited or are overlooked…". The appointment earlier in 2005 of Lord Justice (Sir Mark) Potter, a well-respected commercial specialist, as President of the Family Division, also raised some concerns among family lawyers.

[14] A Le Sueur, "Developing mechanisms for judicial accountability in the UK" (2004) 24 *Legal Studies* at 73-98.

[15] It is proposed that there will be a new Judicial Ombudsman overseeing the process of judicial appointment, and new procedures for investigating matters of judicial conduct and discipline (DCA Departmental Report 2003-2004 www.dca.gov.uk/dept/report2004/04.htm).

[16] There have been a number of recent decisions reviewing the nature of this test in the light of the Human Rights Act 1998; see notably *Magill v Porter and Weeks* [2001] UKHL 67; *Lawal v Northern Spirit* [2003] ICR 856 – see also K. Malleson, 'Safeguarding judicial impartiality' (2002) 22 *Legal Studies* 53-70.

England and Wales depends largely on "judicial self-restraint and self-control".[17] Judges are also protected by a long-established and widely drawn Common Law immunity from civil suit in respect of decisions made in their judicial capacity.[18]

Relevant process accountabilities will be discussed in more detail in the following sections of this study. Nevertheless, it can be said that such are few and far between. There are few generic rules governing case allocation within courts in England and Wales. The principle of *ius do non evocando,* or the 'right to the natural judge' has no formal basis in English Law.

There are also few disciplinary powers that may be exercised over judges. Formal complaints against judges must be made to the Lord Chancellor. So far as we are aware, they are relatively uncommon, however, this is in a context where complaints are not publicised (unless the complainant goes to the press) and no statistics on complaints, or their resolution, are compiled. The Lord Chancellor has the power to admonish the judge, or, in extreme cases may dismiss him/her. The power to admonish is based on convention rather than statute, and, again, there is little or no evidence on the circumstances in which it is used, as such rebukes are rarely publicised.[19] Dismissals are rare, but not unknown, though anecdotal evidence suggests 'failing' judges may more often be 'encouraged' to retire rather than be removed (with consequent loss of valuable pension rights).

JUDICIAL INDEPENDENCE AND CASE MANAGEMENT—AN IMPORTANT CONTEXT

There has been a marked move towards increased judicial case management in the English legal system over the last twenty years. This has reached a (temporary?) apotheosis with the introduction of the new 'codes' of civil and criminal procedure in 1999 and 2005 respectively (discussed below). This change of approach requires a much more 'activist' style of judging than English judges have been used to. It also requires the deployment of a new set of judicial case management skills (necessary to plan case progression, and develop a more collaborative approach with both parties and support staff), and "a more flexible and integrated approach to the organisation of judicial time".[20]

The drive to greater case management represents a response to a number of trends: the perceived growth in the volume of litigation and the consequent problem of delay; concerns at the use of unnecessarily adversarial tactics by

[17] D. Pannick, *Judges* (Oxford: Oxford University Press, 1988) p.76.
[18] The *Marshalsea Case* (1613) 77 ER 1027 linked judicial immunity to the jurisdictional limits of courts, guaranteed by Article 39 of Magna Carta, when it recognised that judges lost immunity from suit for acts clearly beyond their jurisdiction.
[19] See Malleson, *op.cit.* p.217.
[20] Quote from J. Plotnikoff & R. Woolfson, *Judges Case Management Perspectives: The Views of Opinion Formers and Case Managers* (2002) DCA Research Series No 3/02 p.iii.

partisan advocates, and the growing costs of the administration of justice. The reforms are thus, broadly driven by concerns of both efficiency and fairness, and in many respects they place the judge in the role of arbiter, determining on a case by case basis where the balance between (systemic) efficiency and fairness (to the parties) lies.

This balancing act is apparent in the continuing characterisation of listing as a *judicial* function in the English court system (the same is not necessarily true of tribunals). As the Civil Bench Book observes:

> No administrator should… attempt to influence a judge as to the decision which is to be made on the merits of a particular case. It goes without saying that any such attempt would raise a most serious constitutional issue.[21]

As this quote makes apparent, administrative interference in listing decisions is potentially an interference with the overriding principle of judicial independence. But efficient listing is also an administrative – and increasingly a governmental – priority for the court system. To this extent then, there is a potential tension between process accountabilities (and particularly those which are influenced by the need to ensure financial control of the court budget) and conventional notions of judicial independence and integrity.[22]

This is an important context in which our findings should be understood.

[21] JSB, Civil Bench Book, section 3.4.
[22] See Sir Nicholas Browne-Wilkinson, "The Independence of the Judiciary in the 1980s" [1988] *Public Law* 50; Le Sueur, *op. cit.*

COMMERCIAL LAW

1 FORMAL RULES AND PRACTICES

Which are the rules to enhance and protect judicial integrity and impartiality in relation to case assignment?

Commercial Court: Structure and Jurisdiction

The Commercial Court is one of three special civil courts in the High Court Queen's Bench Division (QBD) and is recognised by statute.[23] The Commercial Court enjoys high status and esteem both in the United Kingdom and elsewhere. It hears cases with a commercial element of more than €1 million.[24] A "'commercial claim' means any claim arising out of the transaction of trade and commerce and includes any claim relating to –"[25]

- a business document or contract;
- the export or import of goods;
- the carriage of goods by land, sea, air or pipeline;
- the exploitation of oil and gas reserves or other natural resources;
- insurance and re-insurance;
- banking and financial services;
- the operation of markets and exchanges;
- the purchase and sale of commodities;
- the construction of ships;
- business agency; and
- arbitration.

The court operates a selection system whereby claimants' suits are examined by the presiding judge to determine their eligibility for hearing.[26] If they are deemed eligible then they are subject to a rigorous case management process including alternative dispute resolution. The most significant point about the Commercial Court is that the litigants *choose* this jurisdiction; they are not compelled to select this court. It is in competition with similar courts in Paris and New York and various arbitral tribunals. In 2002 in 80% of the Commercial Court's cases one of the parties was from overseas; in 52% of the cases both parties were.[27]

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[23] The other two specialist courts in the division are the Admiralty Court and the Technology and Construction Court. There are other specialist courts outside the QBD including the Patents Court, the Mercantile Court, the Administrative Court, the Companies Court and the Bankruptcy Court. Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at para. 46.

[24] There is some overlap with the work of the Chancery Division.

[25] Civil Procedure Rules, Part 58.1 (2).

[26] Civil Procedure Rules, Practice Direction—Commercial Court 58.

[27] W. Blair, "A Judicial Appointments Commission: A Commercial Perspective" <http://www.law.cam.ac.uk/docs/view.php?doc=878>.

The judges, 12 in all, chosen to sit in this court are former commercial barristers with extensive experience of appearing before the Commercial Court and the Chancery Division, although only 9 are available for hearing cases at any one time. Their commercial law advocacy expertise is a *sine qua non* for membership of the Commercial Court bench. The result is that *all* judges in the Commercial Court are able to hear *all* types of cases. There may be an occasion when a particular case demands a certain expertise offered by specific judges.

They will additionally have spent time as part-time deputy district judge or recorder hearing small cases, which engages them with the judicial experience. The following comment of Sir Frank White in the *Civil Bench Book* is telling:

> 'There is no better jurisdiction in which to gain judicial experience. The variety and immediacy of the work can be both testing and invigorating. A quick reaction with little help is frequently called for, requiring not only a wide knowledge of substantive law and procedure, but a well developed judicial instinct. This is not the place to attempt a definition of this elusive quality, but nowhere will its absence be more sorely felt, both by judge and litigant, than on the county court bench. There are main streams of work, but over the years there are very few corners of the law into which the county court judge will not have to peer as the lists unfold before him.'[28]

There are elsewhere within England and Wales courts known as Mercantile Courts. These courts are equivalent to the commercial list of the QBD and hear commercial claims that require the expertise of a mercantile judge (who have similar expertise to Commercial Court judges) although the minimum amount of the claim can be less than that of the Commercial Court. They are found in large metropolitan areas such as Birmingham and Leeds.[29] It is possible for cases to be transferred from the Mercantile Court to the Commercial Court and vice versa. In addition, cases can be transferred from other courts to the Mercantile Court. Commercial Court judges can also request cases to be transferred from other courts to their list. It is considered essential that the judges of the Commercial Court should only hear cases that require their level of expertise: all other commercial-type cases should be assigned to other courts.

The administrative office for the Commercial Court is the Admiralty and Commercial Registry in the Royal Courts of Justice, which handles the forms and their filing and the listing of cases is performed by the Admiralty and Commercial Court Listing Office next door to the Registry.

The Registry undertakes the following functions:

- Issuing Claim Forms and applications;
- Issuing Warrants of Arrest for the arrest of vessels and lodging cautions against arrest or release;

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[28] *Civil Bench Book,* Judicial Studies Board <http://www.jsboard.co.uk/civil_law/cbb/mf_01.htm>.

[29] For example, see the *Mercantile Court Guide for the Birmingham Mercantile Court,* <http://www.hmcourts-service.gov.uk/docs/mercguide_birm.pdf>.

- Entering default judgments;
- Lodging all other documents for filing;
- Lodging without notice applications, consent orders and draft orders for approval of judiciary, and collecting thereafter;
- Getting copies of approved orders sealed;
- Requesting certificates for use abroad. Inspection of documents and photocopying requests;
- Fixing hearings before Master Miller (the Admiralty Registrar) in Admiralty or Commercial cases unless the estimate is more than one day in which case apply to the Master himself in Room E121;
- Lodging bundles for hearings before Master Miller. Paying setting down fees.

The Listing Office undertakes to:

- Fixing hearings and trials before Judges;
- Lodging Case Management Bundles, and other papers/bundles for hearings and trials before Judges;
- Updating Case Management Bundles and Hearing Bundles;
- Doing searches on the public search computer.[30]

Case Management

Once an application has been accepted to the Commercial Court, it falls within the remit of the particular parts of the Civil Procedure Rules. Case management is an integral part of the process within the Commercial Court. All proceedings in the court are part of the multi-track and two sections of Part 29 apply, the main one being that legal representatives must attend case management conferences and pre-trial reviews. The use of the multi-track here means the court has the power to be flexible in its management of the case.[31] If a case is deemed to be of such size or complexity a two-judge management team may be assigned to it, though only a single judge will hear the case. The initial stage after the filing of the claim and defence is for the judge to call a case management conference to determine the range of issues relevant to the case. Clients are not normally expected to attend case management conference unless the judges orders it, but at least one representative from the solicitors and at least one advocate from each party must attend. This normally must take place within six weeks of the defence being filed; ideally the claimant should request one 14 days after the defence is submitted. At this stage a judge will not give permission for expert evidence to be used. If a party does obtain expert evidence before the court directs, then that party will not necessarily be able to recoup the costs of the expert. One important aspect of the conference is that the claimant should

[30] Her Majesty's Court Service: The Admiralty and Commercial Courts <http://www.hmcourts-service.gov.uk/infoabout/admiralcomm/index.htm>.

[31] Civil Procedure Rules, Practice Direction—Multi-Track 29.3 (2). There are within the CPR three tracks: small claims (for amounts less than £5000), fast track (for amounts less than £15000, multi-track (those that are neither small claims nor fast track).

produce a 500 word case summary, in agreement with the other parties, that should assist the judge in understanding the claim. When the case management conference has been held, the parties move to a pre-trial review at which the judge lays down the timetable of the trial. This occurs four to eight weeks before trial. If a case is to go to trial, it is given a fixed trial date. If a case contains many parties, then the judge will attempt to consolidate the claims if possible.

Listing Cases

This is where the Listing Office plays the major role. Since settlement rates are so high in this court (see Figure 3), the listing office always "overlists", rather like overbooking flights. Usually 14 cases are listed for trial in the secure knowledge that settlement will occur. According to the listing officer, current listing of cases is occurring for 2006 and further ahead. The aim is to give a date for trial within 12 months. More minor cases are allocated to deputy judges sitting in the court for that term. But between then and the present, new cases will enter the court and urgent cases will need to be heard. Planning in the interstices allows for considerable flexibility in the listing of cases.

The actual fixing of the trial date is done by the listing officer in conjunction with the barristers' clerks on both sides of the case.[32] The clerks come to the listing office and discuss the fixing with each other and when they are in agreement, they meet face-to-face with the listing officer and agree a date with the court.[33] There could be anywhere between two and six clerks because of the number of counsel and parties in the case. According to the listing officer, "Because we are such a small community (i.e. the commercial bar), it's very easy to manage the listing. They [the clerks] keep me informed of any changes, possible or otherwise." On occasion, difficulties can arise on listing and then the matter is transferred to a judge for determination. The listing officer commented that "He usually backs me up!"

Because of the small size of the Commercial Court bar and community, communication between the court and the bar is vital. The listing officer carries most of the diaries in her head and relies on a continuous stream of information being relayed from the barristers' clerks: "One may call and say, 'I know the parties have been talking recently,' which means to me, more than likely that the case is going to settle and I can pencil that in the diary with a view to knowing I will have an available space."

[32] J. Flood, *Barristers' Clerks: The Law's Middlemen* Manchester University Press, 1983.
[33] Where counsel is located outside London, the listing is performed by email. Face-to-face listing takes place on three days a week. Sometimes, because of the peculiarities of the English legal profession where barristers from the same set of chambers can be representing both parties, a single clerk only will agree the dates.

At present all listing is performed through the use of diaries and computer records. The HMCS is expected to introduce a computerised court listing system in October 2005.

Alternative Dispute Resolution

A key component of civil procedure is the attempt to use alternative dispute resolution (ADR), usually mediation, to resolve the dispute or narrow the range of issues at an early stage without the trauma of a full trial. In the commercial arena, ADR has become normal. During the case management conference the judge may feel that the case is susceptible to ADR and invite the parties to consider using it. If they agree, the case is adjourned while it takes place. Using or not using ADR may incur costs consequences. The parties will be expected to set up their own ADR arrangements with private providers such as the Centre for Effective Dispute Resolution. The requirement is that the ADR step does not take out too much time from the progress of the case. A typical arrangement would look like this:

Figure 4: Steps in a typical Mediation
Day 1 - Commercial Court ADR Order.
Days 1-5 - Discussion between the parties and their lawyers and consultation with a mediation institute produces a short-list of three suitable Mediators.
Day 6 - Parties agree on one of the three.
Day 10 - Preliminary meeting of the parties, their lawyers and the Mediator when the Mediator suggests a timetable for subsequent meetings, a form of mediation agreement, an exchange of background information and a short summary of each side's case. The procedure is agreed.
Day 15 - Parties exchange a 10 page summary of each other's position with copies of a core bundle including pleadings in the action.
Day 20 - Mediation, Day 1. Mediation commences, lasts all day and part of the evening. Parties attend with their lawyers.
Day 21 - Mediation, Day 2. Settlement reached, documented by the parties and their lawyers.
Day 22 - The Court is informed of the settlement with a draft Tomlin Order putting the settlement into place and a request to vacate the trial date.[34]

Alternatively, the judge may consider the case could be resolved by early neutral evaluation (ENE). If the Judge in Charge of the List agrees, he will assign another judge to undertake ENE. If the ENE fails to succeed, that judge will take no further part in the case.

It is also possible for a Commercial Court judge to sit as an arbitrator under s.93 of the Arbitration Act 1996.

Genn's study of ADR orders in the Commercial Court showed overall there was a positive reaction to ADR and that it did induce settlement. She distinguished

[34] Working Party on ADR, *Second Report of the Commercial Court Committee*, <http://www.hmcourts-service.gov.uk/publications/misc/admiralcomm/working_party.htm>.

between the commercial sector and others where ADR was not so welcomed. Where an order was made, just over half of the cases settled through ADR. But although ADR is not mandatory in the court, there is considerable pressure to comply with the suggestion when made.[35]

Expert Witnesses

The Civil Procedure Rules require the use of expert witnesses to be kept to a minimum. In the Commercial Court the case management judge will decide if an expert is necessary and, if so, how many. If there is to be more than one, the judge will call a meeting between them to determine the key issues and those that they can agree on. The procedure of the meeting is to be determined by the experts themselves not the legal representatives. The aim is to erase as much difference of opinion as possible in order to progress the trial.

2 PRACTICAL OPERATION OF FORMAL RULES

What kind of practices are used based on the day-to-day operations of these formal rules as perceived by court manages, judges and stakeholders (members of the bar, public prosecutors, repeat players, other)? Are there other circumstances or measures than just rules, by which judicial integrity is enhanced and protected.

The allocation of resources, especially judge-time and availability, is acutely important for the Commercial Court. Take for example, the Commercial Court List for June 15 2005.

Figure 5: Commercial Court List[36]

Court 11
Before Mr Justice Cresswell
Wednesday 15th June 2005
At half past 10
Robed
FOR TRIAL
2002/502 AIC Ltd v ITS Testing Services (UK) Ltd Pt Hd

Court 76
Before Mr Justice Langley
Wednesday 15th June 2005
At half past 10
Robed
FOR TRIAL
2002/339 The Equitable Life Assurance Society v Ernest & Young (a firm) & Another Pt Hd

St Dunstans House
Court 4
Before Mr Justice Aikens
Wednesday 15th June 2005
At half past 10

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[35] H. Genn, *Court-Based Adr Initiatives For Non-Family Civil Disputes: The Commercial Court And The Court Of Appeal* Department of Constitutional Affairs, 2002.
[36] "Robed" refers to a trial and "Unrobed" refers to interlocutory matters.

Unrobed
2004/68 National Westminster Bank v Rabobank Nederland Pt Hd

Court 73
Before Mr Justice Tomlinson
Wednesday 15th June 2005
At half past 10
Robed
FOR TRIAL
1993/1309 Three Rivers District Council & Ors v The Governor & Company of the Bank of England Pt Hd

Court 25
Before Mr Justice Cooke
Wednesday 15th June 2005
At half past 10
Unrobed
2005/384 Kyrgyz Mobil Tel Limited v Fellowes International Holdings Limited

St Dunstans House
Court 5
Before Mrs Justice Gloster
Wednesday 15th June 2005
At half past 10
Unrobed
FOR TRIAL
2003/344 Socimer International Bank Limited v Standard Bank London Limited Pt Hd

St Dunstans House
Court 8
Before Mr Teare Qc
(Sitting as a Deputy Judge of the Queens Bench Division)
Wednesday 15th June 2005
At half past 10
Unrobed
IN PRIVATE
2005/280 Naftomar Shipping & Trading Company Limited Inc v JLM Europe BV

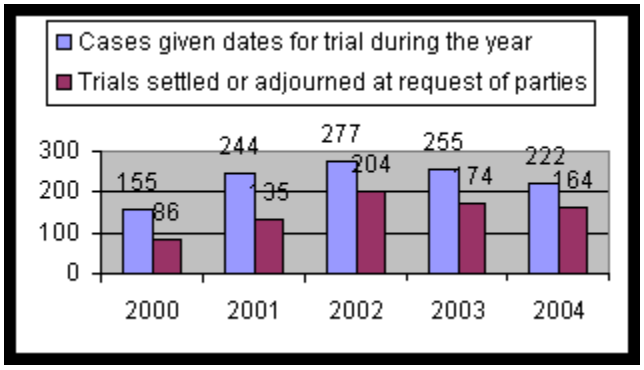
Seven cases are listed of which two are long-running cases, that is over a matter of months, while three others are continuing. The *BCCI v. Bank of England* trial took over a year and the *Equitable Life* case could take as long. The court has to sit in two buildings because of shortages of space and is also using a part-time judge because of an insufficient quota of Commercial Court judges. The Commercial Court is under intense pressure. The Commercial Court Report for 2003-2004 reinforced the point, "[a]lthough out-dated technology, very poor accommodation and a scarcity of resources continue to impede the ability of the Court to serve its users in the way in which those users expect and the Court would wish, there are grounds for optimism that the improvement in technology will continue. We cannot do more to stress the urgent need for an improvement in the accommodation for the Court."[37] Although the court has a complement of 13 judges, one is assigned to the Law Commission. Altogether about eight judges have been available to hear cases.

[37] Her Majesty's Court Service, *Commercial Court Report 2003-2004* <http://www.hmcourts-service.gov.uk/publications/misc/admiralcomm/03-04.htm>.

One problem with High Court judges is that they have responsibilities to the court circuits in the country. Some of them preside over circuits. This may mean that they have to spend up to half a term on circuit, hearing other cases than commercial ones. The effect for litigants is that their trials will be become episodic depending on the judge's availability. They will have to fit in around that. This episodic aspect also arises in conjunction with the availability of courtroom space. Courts have to be booked in advance. And as several courts may be bidding for the same courtroom, the amount of time the court is available may be limited. Trials have to fit in with the availability of room space. It is especially taxing for the Commercial Court because the paperwork involved in cases is usually enormous, so the court needs the larger courtrooms to hear cases in.

The caseload fluctuates and is not a true measure of the court's work because the length of trials can vary considerably. Perhaps a more telling measure is the rate of settlement of cases filed with the court. The settlement rate tends to run at around 70%, as Figure 6 shows.

Figure 6: Commercial Court Settlement Rate



Case management is vital to the operation of the Commercial Court, especially the devising of timetables including the provision of time for ADR. The Commercial Court decided that ADR should not be compulsory. However, the court has agreed with the Court of Appeal that where, upon judgment, a party decides to appeal to the Court of Appeal, encouragement should be given for ADR in order to lessen the burden of the Appeal Court. In addition, the Commercial Court has attempted to provide stable lead times for trials by complexity and length, which are generally adhered to. Figure 5 shows the lead times, i.e. how long it will take a case of certain length to come to trial. A case lasting one week, therefore, will have to wait between 7 and 8 months before it comes to trial.

Figure 7: Commercial Court Lead Times

Duration	Lead Time
1-2 days	4-5 months
1 week	7-8 months
2-3 weeks	9-10 months
4 weeks or longer	11-12 months

The mix between the judicial and administrative functions of the Listing Office and the Registry show a high degree of interdependence. The Judicial Studies Board has recognised that the relationship can at times be fraught:

> Perhaps most difficult of all is the question of listing. It is sometimes cynically said that listing is treated as an administrative function when things go right and a judicial function when things go wrong. The judge is the person who, with the assistance of the parties, is best placed to decide how long a particular case is likely to take. If it is the considered view of a judge that a case will take (say) a day, and that this will have unfortunate consequences for the listing of that case or other cases, that view must prevail. Such a view should, however, only be formed after taking account of the input of an experienced Listing Officer or Diary Manager, who will have acquired an accurate 'nose' for predicting the duration of hearings and the likelihood of cases collapsing.[38]

The Commercial Court has managed a good working relationship between its administration and judiciary, which in part results from the use of an active and longstanding Users' Committee. The committee has 36 members, not including judges, and is made up of 13 City of London solicitors, 10 barristers, and 11 members from companies, trade associations and groups like the Commercial Bar Association (COMBAR), whose secretary is the Listing Officer for the court. The Users' Committee analyses problems and provides feedback, for example, how do electronic documents fit within the general rubric of documents, given the extent to which commerce is conducted electronically. Indeed, the court hopes to conduct its case management conferences online from 2005 and later to introduce electronic filing, listing and diary management.

In general users remarked that the Commercial Court worked well. They speak of the Commercial Court's desire to have most cases, if possible, settle through ADR. This upsets some litigators since their aim is to litigate not mediate. However, they all believed the pressure was such that they could not ignore the pressure to use ADR.[39] As one interviewee put it: "It's not the selection of the judge that's important anymore, but choice of mediator. And the problem with this approach is that it works! I'm not a litigator anymore; I facilitate mediation." Another interviewee talked about the struggle for control over the progress of the

[38] *Civil Bench Book, Judges and Administrators* Judicial Studies Board <http://www.jsboard.co.uk/civil_law/cbb/mf_03.htm#judgesandadministrators>.
[39] Interviews with three litigators who use the Commercial Court, May 2005.

case, saying that in his estimation the court was sometimes too slow to respond to his queries.

A significant number of the court's cases are long, a year or more. The knock-on effect of lengthy cases is that the judge requires extensive time to write judgments. Some judgments can be over a thousand pages in length. The judge has to tell the listing officer how long he or she expects to need to write the judgment: it could be a matter of days, weeks or possibly months. This obviously can take a judge out of circulation for a considerable time. However, ultimately the judge has to negotiate with the listing officer for time. Since the listing officer—a non-lawyer—can not determine what time a judge will need to compose a judgment, it is something that only emerges during the trial. Nevertheless, the listing officer is already booking the judge for trials after the culmination of the present one. Judgment writing may have to be squeezed in around various other cases, with the listing officer keeping a look-out for slots of time to give to the judge.

A key complaint concerns the court's accommodation, which is considered poor. One senior judge remarked that "We cannot expect top-flight businessman from Korea or Japan to be told you have a wonderful, efficient, incorruptible judge then stick him in a room with his counsel where the other side is listening in. They won't do it and perfectly reasonable too."[40] The court has for some years been trying to persuade government to provide appropriate accommodation for the court with proper IT facilities. It has had the support of the City of London, which sees the court as part of the features that makes the City so attractive to finance. The government has yet to decide if it will commit resources to the court.

One other difficulty with the Commercial Court which is peculiar to it, is the problem of conflicts. As the case are so complex, large and lengthy, they can employ many barristers over some years. As these are the source pool for the bench in the Commercial Court, the likelihood of a judge having acted in a particular matter before becoming a judge is quite high. Commercial Court judges are therefore often conflicted out of cases because of having acted as counsel.

1 FORMAL RULES AND PRACTICES

Which are the rules to enhance and protect judicial integrity and impartiality in relation to case assignment?

Court of Appeal Civil Division: Structure and Jurisdiction

The Court of Appeal is one of the most important courts in the English court hierarchy. Its caseload is not the largest; between 2000 and 2003 the number of appeals set down has declined from 1316 to 1101. These were based, however, on an increase in the number of applications from 3035 in 2000 to 3143 in

[40] Interview with senior judge, May 2005.

2003.[41] Its importance derives from the constitutional significance of its judgments. Although it is below the House of Lords in the judicial hierarchy, it hears considerably more appeals than the House of Lords (approx 60 a year), which intensifies its impact. The common law system of precedent also means that the Court of Appeal's decisions affect the decision-making of the courts lower in the hierarchy. To this end the court hears appeals with a bench of three lords justices of appeal. The Court of Appeal hears appeals from a wide range of courts including many tribunals (see table 1 above).

The Court of Appeal functions within a delicate network. It relies for its administrative support on the Civil Appeals Office (with approx 70 staff, lawyers and administrators and a budget of about £3 million a year), and it has a users' committee to advise it. The court employs judicial assistants who differ from US court clerks, but appear to be playing a larger role each year. Interestingly, the court works with the Citizens Advice Bureau, based in the Royal Courts of Justice, which offers help to litigants in person, and also the Pro Bono Unit.

Apart from the changes introduced by civil procedure reforms, the single biggest impact on the court has been the introduction of the Human Rights Act 1998,[42] which has sparked a new wave of appeals.

In order for an appeal to be made, permission must be granted, in general, by the original court or the Court of Appeal. Usually, appeals have to be lodged within 14 days of the original decision. The court has wide-ranging powers, which include those specified below:

Figure 8: Powers of Appeal Courts[43]

The appeal court has power to –

(a) affirm, set aside or vary any order or judgment made or given by the lower court;
(b) refer any claim or issue for determination by the lower court;
(c) order a new trial or hearing;
(d) make orders for the payment of interest;
(e) make a costs order.
(f) In an appeal from a claim tried with a jury the Court of Appeal may, instead of ordering a new trial –
    (a) make an order for damages; or
    (b) vary an award of damages made by the jury.
(g) The appeal court may exercise its powers in relation to the whole or part of an order of the lower court.

Appeals can additionally be made from case management decisions that occur in courts such as the Commercial Court. This demonstrates that the philosophy of case management has percolated through the entire civil court structure.[44]

[41] Court of Appeal—Civil Division, *Review of the Legal Year 2003-2004* p 25.
[42] The HRA 1998 came into effect in October 2000.
[43] Civil Procedure Rules, Part 52.10.

When permission to appeal has been granted, the appropriate papers of the appellant must be served on the respondents within seven days of the grant. The court requires an Appeal Questionnaire to be completed by the appellant's advocate and it must include a realistic time estimate of the length of the appeal. If the requirements are not complied with, the court can order costs sanctions to penalise the non-compliant party.

Listing is essentially easier in the Appeal Court as its high status demands deference from others, lawyers and courts. This means the listing aspect is more a matter of declaring when a hearing will take place rather than negotiating with counsel and the parties as to what would be the best date.

2 PRACTICAL OPERATION OF FORMAL RULES

What kind of practices are used based on the day-to-day operations of these formal rules as perceived by court manages, judges and stakeholders (members of the bar, public prosecutors, repeat players, other)? Are there other circumstances or measures than just rules, by which judicial integrity is enhanced and protected.

Court of Appeal Civil Division

A large number of the applications for appeal are made by litigants in person, up to 40% of the total.[45] Most of these are doomed to fail since the applicants do not understand the distinction between appeals on points of law (where the court can help) and on points of fact (where the court is limited). In this respect the Court of Appeal works closely with the Pro Bono Unit and the Citizens Advice Bureau which attempt to steer applicants in the right direction. Nevertheless each applicant is entitled to an oral permission hearing which takes half an hour, using up scarce judicial time.[46] The remaining 60% are channelled through the Civil Appeals Office. The office functions as an administrative authority in the court, and part of its role is to attend to the allocation of cases and listing. Apart from some slowness the interviewees found the court to operate fairly efficiently.

Since 1996 the Court of Appeal offered alternative dispute resolution without charge to the parties. According to Genn, the scheme has operated well when

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[44] Plotnikoff and Woolfson caution us not to be too sanguine on the acceptance of the principles of case management and the need for training in this area. They further indicate that there is a felt need for joint training in case management between judges and administrators. J. Plotnikoff and R. Woolfson, *Judges' Case Management Perspectives: The Views of Opinion Formers and Case Managers* Department of Constitutional Affairs, 2002. Moreover, in an interview with Lord Justice Judge he made the point strongly that case management would be introduced into the criminal justice system (20 May 2005).

[45] Court of Appeal—Civil Division, *Review of the Legal Year 2003-2004* p 8.

[46] Two Deputy Masters also have to spend up to two hours a day on Registry matters that usually result in refusals because they are out of the court's jurisdiction. Court of Appeal—Civil Division, *Review of the Legal Year 2002-2003* p 7.

the parties agreed to ADR.[47] The Court of Appeal, however, does not select cases as does the Commercial Court. Instead, it makes a general offer. Genn concluded that there would be greater success if the court were to be more selective in its choice of cases proposed for mediation. In 2003 the scheme was changed. A new mediation service was brought in to be run by CEDR. A charge of £850 per party was introduced and a choice of three potential mediators are offered by CEDR. In the 15 month period since the scheme was introduced 63 cases were referred for mediation by CEDR. Of these 38 were mediated, six settled before mediation, and 14 did not proceed. Of the 38, 23 settled after mediation and 15 did not. The range of disputes mediated covers insurance, real property, personal injury, professional negligence, and wills and inheritance. Family mediations are, however, not handled by CEDR as they do not appear to respond to the same dynamics as commercial or tort disputes. These are instead run by a combination of the Civil Appeals Office and the UK College of Mediators in conjunction with the Solicitors Family Law Association.[48]

Although the Court of Appeal through the Civil Appeals Office has brought in increased use of IT resources, it fails to coordinate these with those being used outside the courts. The consequence is that the system has limited use unless government is willing to fund a new system. If it does, it will take about five years before it is running. However, the Courts Service, in conjunction with the Civil Appeals Office, has introduced new interactive online routes of appeal that enables potential appellants to determine if they have valid grounds of appeal.[49]

COMMENTARY

The two courts analysed here give an impression of efficiency and integrity despite resource scarcities. Courts are now part of the economic structure of society as well as its social. A court such as the Commercial Court contributes to invisible earnings. It recognises its role in the ways it coordinates its activities with those who use it. The Court of Appeal is a court that must be all things to all before it. Not only must it possess specific skills but have generalist features. Its caseload stretches from asylum to reinsurance. Perhaps the most serious deficiencies in the courts are the lack of proper IT resourcing and inadequate accommodation, especially in the case of the Commercial Court.

[47] H. Genn, *Court-Based Adr Initiatives For Non-Family Civil Disputes: The Commercial Court And The Court Of Appeal* Department of Constitutional Affairs, 2002.
[48] Court of Appeal—Civil Division, *Review of the Legal Year 2003-2004* pp 11-12.
[49] Her Majesty's Court Service <http://www.hmcourts-service.gov.uk/infoabout/coa_civil/routes_app/index.htm>.

CRIMINAL LAW

The Criminal Justice System of England and Wales was reviewed in 2001, when some three hundred and eight recommendations were made to reform and improve access and efficiency".[50] It continues, however, to undergo substantial reform especially in regard to the way cases are managed within and between courts. *Criminal Case Management Framework* issued on 21 July 2004 placed the issue of case management on top of the reform agenda of the criminal justice system. Attempts to consolidate this reform were made in Criminal Procedure Rules 2005, which came into force on 4 April 2005, introducing new rules on case management. The Criminal Procedure Rules 2005 have been designed to bring about a culture change in the management of criminal cases coming to the courts. Under these new rules, everyone involved is made responsible for helping to make the case go ahead efficiently, under the supervision of the court.

This section starts with a brief presentation of the general rules of case management within the Criminal Justice System and the structure of criminal courts. It then discusses the rules which are used for internal case management at the magistrates' and Crown Courts. Special attention will be paid to the listing process at these courts. It concludes with a discussion on the impact of the new criminal Procedure Rules on the judiciary.

The Structure of Criminal Courts

How criminal cases are heard is determined by a set of rules and procedures which reflect the seriousness of the crime as it is indicated by "the maximum sentence that the court can hand out to the defendant".[51] These rules and procedures are based on a number of Primary legislation, such as Acts of Parliament, and Secondary legislation, which are generated on the basis of the authority of Primary legislation. "The level at which a defendant is tried, and thus whether s/he is tried by a jury…becomes an administrative question of 'case allocation".[52] It also means that the issue of the right to elect jury trial will be transmuted into a question of efficient case management.

The criminal justice system of England and Wales does not allow defendants to choose who hears or deals with their case. In specific and prescribed circumstances a litigant may propose or indicate a preference as to whether his

[50] In July 2002 the three Ministers with responsibility for the Criminal Justice System, the Lord Chancellor, the Home Secretary and the Attorney General, jointly published a White Paper – *Justice for All*. This followed Lord Justice Auld's *Review of the Criminal Courts of England and Wales* which was published in October 2001, John Halliday's report on sentencing *Making Punishment Work* published in July 2001 and the Government's own report *Criminal Justice: The Way Ahead* presented to Parliament in February 2001.

[51] Menzies, Christopher, 1994, International Comparative Study on The Allocation of Cases to and Within Courts: the Case of England and Wales, ibid., 111.

[52] LAG Policy, September 2001, p.2-3.

or her case is heard by the magistrates' or the Crown Courts. Where the accused stands trial depends partly on the type of offence he or she is accused of and their age.

The Magistrates' Court

Each year almost two million cases are heard by the criminal courts in England and Wales. In most cases, the prosecution is undertaken on behalf of the Crown by the Crown Prosecution Service (CPS).[53] The first stage of this process consists of deciding whether there is a *prima facie* case. This decision is made by a magistrate on the basis of evidence disclosed by the prosecutor. Virtually all criminal cases start in the magistrates' courts. The less serious offences are handled entirely in the magistrates' court. Over 95% of all cases are dealt with in this way. The more serious offences are passed on to the Crown Court, to be dealt with by a judge and jury.[54]

The magistrates deal with three kinds of cases:

1) Summary offences. These consist of less-serious criminal offences and are heard in one of over 400 local magistrates' courts either by a panel of lay magistrates assisted by a legally-trained clerk, or by a legally-trained district judge sitting alone. A summary trial means there is no committal and the defendant is not entitled to trial by jury. The trial is before a bench of magistrates.

2) Either-way offences. These can be dealt with either by the magistrates or before a judge and jury at the Crown Court. A suspect can insist on his or her right to trial in the Crown Court. Similarly, magistrates can decide that a case is sufficiently serious to be dealt with in the Crown Court.

3) Indictable-only offences, such as murder, manslaughter, rape and robbery. These must be heard at a Crown Court.

Crown Courts

The more serious offences, i.e. indictable-only offences, are passed on by the magistrates' courts to the Crown Court, which sits at around 90 locations in England and Wales, to be heard, usually, by a judge and jury. Some cases fall in between, i.e. the either-way cases, and may be heard in either court.[55] Only Crown Court judges have the power to pass sentences above a certain level of severity, and so some cases may be transferred from magistrates' courts for

[53] The CPS is an independent judicial agency responsible for reviewing the evidence against the accused and deciding if it is sufficient for proceeding which leads to possible conviction.
[54] There is only one Crown Court but it has about 70 centres around the jurisdiction.
[55] The Crown Court is a unitary court but currently sits, as mentioned above, at around 90 centres throughout England and Wales.

sentencing once a verdict has been reached. In short the Crown Court deals with:

- Indictable-only offences such as murder, manslaughter, rape and robbery;
- Either-way offences transferred from the magistrates' court;
- Appeals from the magistrates' court;
- Sentencing decisions transferred from the magistrates' court.

Court of Appeal

Her Majesty's Court of Appeal is the second most senior court in the English legal system (with only the judges of the House of Lords above it). The Court is divided into two Divisions: the Civil Division and the Criminal Division. The Master of the Rolls presides over the Civil Division, while the Lord Chief Justice does the same in the Criminal Division. Since the Lord Chief Justice is also the highest judge of a different court, he is assisted by a Lord Justice of Appeal with the title of "Vice-President of the Criminal Division". In the Civil Division, the Master of the Rolls or a Lord Justice of Appeal may hear appeals. However, in the Criminal Division, in addition to the Lord Chief Justice and the Lord Justices of Appeal, a circuit judge may also hear an appeal. (The mixing of the Court of Appeal and the High Court is permissible since, technically, both are parts of one larger court referred to as the *Supreme Court of Judicature*. The Crown Court is the third member court of the Supreme Court.)

House of Lords

The House of Lords is the final court of appeal in the United Kingdom of Great Britain and Northern Ireland. The judicial function of the House is exercised by twelve Lords of Appeal in Ordinary ("law lords"), together with other Lords of Appeal as required. The House hears appeals on arguable points of law of general public importance which ought to be considered by the House at that time, bearing in mind that the causes will have already been the subject of judicial decision. The judicial business of the House is administered by the Judicial Office, which is part of the House of Lords administration.

The Criminal Case Management Framework—July 2004[56]

The Lord Chief Justice, the Attorney General, Lord Falconer and Baroness Scotland issued the Criminal Case Management Framework (CCMF) on 21 July 2004. The Framework provides operational practitioners with guidance on how cases might be managed most effectively and efficiently from pre-charge through to conclusion. It describes case management procedures and the roles and

[56] The report is published by the Department of Constitutional Affairs and is available at <http://www.dca.gov.uk/criminal/ccm/framework.htm>.

responsibilities of administrative staff operating those procedures, and of the defence. It also sets out the expectations of the judiciary.

The Framework follows case management through the whole of the criminal justice process. It starts with pre-charge activities, contains charge, magistrates' courts and crown court process and concludes with sentence or other outcome.

The Framework also includes references to new practices for charging and for witness management that are being delivered through the Criminal Case Management Programme (CCMP). CCMP brings together three major elements of Criminal Justice reform: Charging, the Effective Trial Management Programme and No Witness, No Justice. The Framework was closely aligned with the Criminal Procedure Rule Committee which was established in June 2004 to make rules of procedure for all criminal courts in England and Wales, up to and including the Court of Appeal (Criminal Division).

Case Management and Listing within the Crown Court and the Magistrates' Courts

In the remaining part of this section we shall consider the significance of the Criminal Procedure Rules 2005 for case management within the magistrates' court and the Crown Court. The focus will be on the rules which are used for internal case management at the magistrates' and Crown Courts. Special attention will be paid to the listing process at Crown Courts.

An improved case management of criminal proceedings, which amended the Consolidated Criminal Practice Direction of 8 July 2002 in the Crown Courts and the magistrates' courts in England and Wales, was announced on 22 March 2005 Lord Chief Justice. At the same time, a new practice direction was handed down to support the new Criminal Procedure Rules which have been drawn up as a result of Lord Justice Auld's 2003 review of criminal courts. Amendment number 11 supplemented the case management rules in Part 3 of the Criminal Procedure Rules and introduced five case progression forms, each with notes for guidance, which for the first time described in detail the steps involved in pre-trial criminal case management.

This Practice Direction took effect on 4th April 2005, when the new Criminal Procedure Rules came into force. These rules apply to the sending, committal or transfer of cases by magistrates' courts to the Crown Court and to the subsequent management of those cases in the Crown Court. In cases to be tried in the magistrates' court this Practice Direction applies where a defendant pleads not guilty on or after that date.

The form for use in cases to be tried summarily in magistrates' courts provides a convenient method of recording essential information relating to the progress of

the case and largely comprises directions which will apply by default. The directions that all the forms contain for the most part are dictated by the requirements of legislation, including the Criminal Procedure Rules themselves (two of these forms are enclosed in the appendix). The case progression forms for use in cases to be sent, committed or transferred to the Crown Court also contain directions that will apply by default, subject to any contrary direction by the court.

According to the new Rules, judges play an effective role in listing and will be required to exercise an extensive managerial role at the Plea and Case Management Hearing (PCMH) which is to take place in every Crown Court case. Together with Justices' Clerk, they will decide on local listing practice.

The Rules

The Criminal Procedure Rules 2005 provide that at every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that. At every hearing the court must, where relevant:

1. if the defendant is absent, decide whether to proceed nonetheless;
2. take the defendant's plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty;
3. set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial or (in the Crown Court) the appeal;
4. in giving directions, ensure continuity in relation to the court and the parties' representatives where that is appropriate and practicable;
5. where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action.

In addition, the participants must expect the court actively to manage the case in accordance with the Criminal Procedure Rules 2005 and, where appropriate, to:

1. order that a plea be taken at the first hearing after service of documentation on accused has been proved;
2. fix a trial date at the first hearing;
3. list the case for a pre-trial review in complex cases;
4. pass sentence.

Case Progression Roles and Responsibilities

Each party must prepare and conduct the case in accordance with the Criminal Procedure Rules 2005 and actively assist the court in fulfilling its duty under those Rules, and must:

1. comply with directions given by the court;

2. take every reasonable step to make sure his witnesses will attend when they are needed;
3. make appropriate arrangements to present any written or other material;
4. promptly inform the court and the other parties of anything that may affect the date or duration of the trial or appeal or significantly affect the progress of the case in any other way.

There are also additional responsibilities for advocates, administrative staff and the defence. The Police is to serve evidence and documentation prior to the first hearing, provide a file to the prosecution team to enable the prosecutor to the present case at the first hearing, and to provide the prosecution team with witness availability etc. The CPS is to ensure the file is provided to prosecution advocate in readiness for first and any subsequent hearings etc.

The only significant change that the practice direction introduced was the replacement of what was known as "plea and directions hearings" in the Crown Court with "plea and case management hearings". The 'PCMH' takes place later than the plea and directions hearings to encourage the fully effective use of that hearing and to discourage unnecessary and ineffective case management hearings in the Crown Court. Magistrates' courts order such a hearing in all cases that they send or commit for trial, in accordance with listing arrangements with the Crown Court, just as they were doing previously.

On 22nd March 2005, the Lord Chief Justice announced also an important new protocol for the control and management of heavy fraud and other complex criminal cases. As part of case management, the judiciary can be expected to exercise their discretion in following the guidance contained in the Protocol. The Protocol is designed primarily for jury trials and will ensure that trials are conducted in a way that will enable juries to retain and assess the evidence which they have heard.

In addition, the amendment rationalised arrangements for allocation of business in the Crown Court. Prior to this amendment there were, for historical reasons, four classes of criminal offence. This amendment merged Classes 3 and 4. It also classified, for the first time, the new offences contained in the Sexual Offences Act 2003 and makes other alterations to the classification of offences – the most significant being that manslaughter and infanticide move from Class 2 to Class 1.

Listing of Cases at the Crown Court and the Magistrates' Court [57]

Listing is a judicial responsibility and function. Its seeks to ensure that all cases are brought to a hearing or trial in accordance with the interests of justice, that the resources available for criminal justice are deployed as effectively as

[57] The Crown Court Manual, May 2005.

possible, and that, consistent with the needs of the victims, witnesses of the prosecution and the defence and defendants, cases are heard by an appropriate judge or bench with the minimum of delay.

The Concordat[58] states that judges are responsible for deciding on the assignment of cases to particular courts and the listing of those cases before particular judges, working with HMCS. Therefore:

1. The Presiding Judges of the Circuit have the overall responsibility for listing on each Circuit/Region. Certain cases in the Crown Court must be referred to the Presiding Judges for directions; the Presiding Judges will be supported by a Regional Listing co-ordinator.
2. In the Crown Court, subject to the supervision of the Presiding Judges, the Resident Judge at each Crown Court is responsible for listing at his/her Crown Court centre; the Resident Judge is responsible (following guidance or directions issued by the Lord Chief Justice and by the Senior Presiding Judge and Presiding Judges under paragraph IV 33 of the Consolidated Practice Direction) for determining the Listing Practice to be followed at that centre, for prioritising the needs of one case against another and deciding upon which date a case is listed and before which judge.
3. The Listing Officer in the Crown Court is responsible for carrying out the day-to-day operation of Listing Practice under the direction of the Resident Judge. The Listing Officer at each Crown Court centre has one of the most important functions at that Crown Court and makes a vital contribution to the efficient running of that Crown Court and to the efficient operation of the administration of criminal justice.
4. In the Magistrates' Court, the judicial members of the Justices Issues Group for each Area are responsible for determining the Listing Practice in that Area. The day-to-day operation of that Listing Practice is the responsibility of the Justices' Clerk with the assistance of the Listing Officer.

Principles of Listing

Lord Steyn summarised the guiding principle which must be followed:

> There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public [59]

When setting the Listing Practice, the Resident Judge (in the Crown Court) or the judicial members of the Justice Issues Group (in the magistrates' court) should, in

[58] The agreement reached between the Lord Chief Justice and the Secretary of State for Constitutional Affairs and Lord Chancellor set out in statement to the House of Lords on 26 January 2004.
[59] House of Lords, Attorney General's Reference No. 3 of 1999 [2000] UKHL 63.

addition to taking into account the overall purpose of listing, also address the following principles:

1. Meet the needs of victims and witnesses.
2. Ensure the timely trial of cases so that justice is not delayed.
3. Providing for certainty, and/or as much advance notice as possible, as to the trial date.
4. Seeing that a judge or bench with any necessary authorisation and of appropriate experience is available to try each case and, wherever desirable, there is judicial continuity.
5. Taking into account the position of the defendant as to whether he/she is in custody or on bail.
6. Striking a balance in the use of resources by, for example, taking account of such factors as the efficient deployment of the judiciary in the Crown Court, and in the magistrates' court the proper and efficient deployment of the judiciary as is consonant with the need for magistrates' competences to be maintained and the Venne criteria to be followed. Attention should also be paid to the proper use of the courtrooms available at the court, providing for adequate reading time for the judiciary in long cases and so on.
7. Providing.
    - the defendant and the prosecution with the advocate of their choice where this does not result in undue delay to the trial of the case;
    - or the efficient deployment of advocates, lawyers and designated case workers of the Crown Prosecution Service, and other prosecuting authorities, and of the resources available to the independent legal profession, for example by trying to group certain cases together.
8. Meeting the need for special security measures for category A and other high-risk defendants.
9. Taking into account the impact of policies, targets and initiatives of:
    - Her Majesty's Government and its agencies;
    - Local Authorities, the Criminal Justice Board for the Area, the Chief Constable or Chief Crown Prosecutor for the Area and other local bodies.

Although the Listing Practice at each court centre will take into account these principles, the practice adopted will vary from court to court depending particularly on:

- The number of courtrooms and the facilities available
- Location
- Workload – its volume and type
- The available number of advocates and lawyers
- The proximity of the prison, particularly for women, juveniles, and young offenders
- The surrounding geography and public transport facilities
- The effective trial rate, after allowing for cracked, ineffective and vacated trials

What is plain is that a Listing Practice that will operate successfully in a small two-court centre is unlikely to suit the needs of a metropolitan multi-court centre and vice versa. It may also mean that on occasion the Listing Practice set may result in the judge working in chambers on his judicial work.

Setting the Listing Practice at Each Court

The Resident Judge at each Crown Court and the judicial members of the Justices Issues Group in each Area will, in relation to the Crown Court and magistrates' court respectively, set overall Listing Practice in a local area in accordance with the objectives and considerations set out above. The Resident Judge, or the judicial members of the Justices Issues Group, as the case may be, will consider representations made by local criminal justice agencies and representatives of the defence and witnesses, in the setting of the Listing Practice and in the periodic reviews of that Listing Practice. Consultation with Local Criminal Justice Boards regarding local listing issues and the impact on cracked and ineffective trials should also take place.

The Court Manager, Listing Officer and/or Case Progression Officer should each month, or at such other period as may be specified by the Resident Judge or Bench Chairman and Justices' Clerk review the causes of ineffective, cracked and vacated trials and provide to the Resident Judge (or the Bench Chairman and Justices' Clerk and district judge, as the case may be) an analysis of each case or specified categories of case and the lessons to be learnt. In the Crown Court, they need to provide and discuss with the Resident Judge the list of any outstanding cases which are older than 20 weeks, or such other shorter period as is specified by the Resident Judge.

Similar periodic meetings should be also arranged between the Court Manager, Listing Officer or Case Progression Officer and local court users (including the CPS, Witness Care Unit, the Witness Service, police and defence solicitors (where possible)) and representatives of the Local Criminal Justice Board to discuss issues and analyse such issues as cracked, ineffective and vacated trials. Also they need to discuss the action that might be taken to address any similar problems in advance of the trial and to improve the provisions for witnesses. The discussion of the analysis of the reasons for cracked, ineffective and vacated trials should be minuted, and copies of the minutes should be sent to all the parties to the cases discussed. The outcome of these discussions may provide information for the Resident Judge and judicial members of the Justices Issues Group respectively to contribute to his/her/their review of Listing Practice.

The Resident Judge or the representatives of the Justices Issues Group respectively (such as the Justices' Clerk and/or legal advisers) will hold periodic court user meetings with representatives of local prosecutors or other criminal justice agencies and representatives of the defence. One of the agenda items will normally be the operation of the Listing Practice.

Where difficulties arise, whether around listing generally or regarding specific cases, which cannot be resolved by the Listing Officer, the matter should be referred for consideration:

- In the Crown Court, to the Resident Judge or the judge assigned to a specific case;
- In the magistrates' courts, to the Justices' Clerk, if it relates to a specific case, or, if it relates to more general issues, to the judicial members of the Justices Issues Group and then, if necessary, to the Area Judicial Forum.

Where resolution of disagreement, either in relation to the Crown Court or magistrates' court cannot be reached locally, as set out in sub-paragraph (i), the issue should be referred without delay to the Presiding Judges or the Senior Presiding Judge.

COMMENTARY

The new Criminal Procedure Rules 2005 operate in the criminal division of the Court of Appeal, the Crown Court and all magistrates' courts in England and Wales, allowing for more consistency and simplicity in the way cases are managed. The Rules and the Practice Direction make it explicit that judges and magistrates are to be responsible for case management and, for the first time, give the necessary powers which will apply to the Crown Court and magistrates' courts.

The practice and procedure in criminal courts were previously, i.e. prior to the Criminal Procedure Rules 2005, governed by some 50 sets of rules and almost 500 individual regulations. These rules have now been condensed into one unified structured set corresponding with the various stages of a criminal case, such as custody and bail, sentencing and appeal. The main benefits of one set of rules covering criminal justice will be accessibility, consistency and to provide a culture change in how cases are managed.

Case Management has admittedly been an established part of the criminal justice systems. However, the extent to which cases were managed previously in the criminal part of the system has very much depended upon the individual judge. It is too early to assess the true impact of the new case management reforms, but the indications are that the new rules of procedure and case management will have a lasting influence on the operations of the criminal court system. The introduction of case progression forms (a copy is enclosed), to give an example, which are prescribed by the rules and amount to a series of questions which the parties need to answer and the steps they need to take in order to prepare their case, have already made its mark across the court system. Magistrates forms, for example, amount to standard directions, checklists, or steps that the parties need to take in every case. They promote effective case preparation and result in the

saving of time and significant reductions in unnecessary and wasted hearings of all kinds. This, in turn increases public confidence in the administration of criminal justice.

These forms facilitate the pre-trial reviews made by the Justices' Clerks at the magistrates' courts and hearings at crown court, where the parties need to demonstrate that they are ready to answer the questions that case management forms pose. The aim of the new Criminal Procedure Rules is to change the culture of criminal courts in many significant ways.

However, Judge Wide QC, the Resident Judge at Northampton Crown Court, explains that using case management does not amount to "a cultural revolution", because many courts (including his) were already, that is before the introduction of the forms, operating along the same lines. But the formalisation of these rules reinforces across the court system the good practice of those courts which have been operating efficiently. Having said that, Judge Wide admits that various courts will interpret and implement these rules differently, because their problems and strengths are different, they have different resources, but also and because "the personality of Resident Judges are different". As he puts it: "In the end it comes down to the personalities and abilities of the people who operate the system".

In short the rules of case management and the forms are designed to reinforce a change of culture towards the proper case management of cases by parties including the judges. They help judges to identify and refine the real issues so that the court can address the disputed issue and the case is dealt with efficiently. In that sense the actual process of case management must be seen as a matter which does not have any impact on the integrity of the judiciary as such. But since it uses practices which were developed by courts which worked efficiently, it is likely that it will have a positive effect on due process. It clearly aims at reducing the number of ineffective and cracked trials and delays.

The overall attitude of the judiciary toward the changes appears to be positive and supportive of the new rules. Some judges would, admittedly, find the introduction of the forms an imposition and feel that the rules do not address their specific needs and problems. After all, practices that operate successfully in a small two-court centre are unlikely to suit the needs of a metropolitan multi-court centre and vice versa. In that sense, it is somewhat unrealistic to design a set of standard forms which is, on the one hand, brief, simple and user friendly and, on the other hand, can be applied effectively by all courts irrespective of their size, location and workload. But on the whole the belief is that since the forms reflect good practices they are likely to result in the more efficient running of the court system.

The attitude of the Criminal Bar Association towards the new case management reform has been some what guarded. From the Bar's point of view active case

management required the Prosecution and the Defence to be "(nearly) trial ready" at a far earlier stage than had been the case before. This meant additional work for the Bar at a much earlier stage. In addition the Bar was concerned about the replacement of the PDHs with Plea and Case Management Hearings (PCMHs). In an article in the Criminal Bar Association expresses this view in the following way:

> It is likely that there will be a 20-page checklist of matters that the judge must consider at such a hearing. PCMHs are likely to take appreciably longer (perhaps four times longer) than existing PDH's. The preparation required for them will be far more significant than has been required for PDH's and will require detailed preparation by, and the personal attendance of, the trial advocate. At the PCMH the judge will want to know which witnesses are required to attend and why. It will be necessary to justify the attendance of each witness. A trial timetable may also be drawn up at this stage. The work involved in preparing to address such questions speaks for itself. The increased length and complexity of the pre-hearing discussions and the hearings themselves will prohibit the number of cases that any one advocate can do on any one day.[60]

Judge Wide QC argues that the Bar's initial reaction was caused by the fact that they had misinterpreted the extend of the changes and expected a more radical reform. Since then the Bar has changed its views and become supportive of the new rules.

In contrast to the rules of case management, listing is a sensitive issue for the judiciary and an issue which from their standpoint concerns their integrity and autonomy. The changes made emphasise the fact:

- that judges will be required to make firm arrangements for the listing of cases at the Plea and Case Management Hearing (or earlier),
- that parties must comply with the directions and timetable then set so that cases are ready to be heard in accordance with that timetable,
- that cases commence promptly at the appointed hour in accordance with that timetable.
- It sets out the new arrangements for the assignment of judges to cases.
- It emphasises the importance, recently stressed by the Court of Appeal, of ensuring that no short hearings in other cases interrupt the prompt commencement or continuation of trials each day at the time appointed.

Judges also believe that the government wishes to exercise greater control of the listing practices. But their professional integrity requires that they continue to exercise total control of the listing process. In this connection the "ticketing" can be mentioned, which allows a Crown Court judge to trial murder, rape and fraud.

[60] The Criminal Bar Council, *The Criminal Procedure Rules 2005 – Impact on the Bar and the Graduated Fee Scheme*. At http://www.barcouncil.org.uk, January 2005.

Ticketing too is a decision made internally within the judicial structure and without any external interference.

In short, although issues such as case management, listing and ticketing are closely linked, the judges regard case management as an organisational issue which aims to promote a culture of efficiency and good practices and which, in turn, advances the cause of justice. Listing and ticketing, on the other hand, is understood strictly as a judicial responsibility and upheld as an activity central to the autonomy and integrity of the judiciary. It is a matter of principle that the judges alone decide which cases are heard, and if a case is to be heard, it is the judges alone who should decide how and by whom.

SOCIAL SECURITY APPEAL TRIBUNALS

1 FORMAL RULES AND PRACTICES

Which are the rules to enhance and protect judicial integrity and impartiality in relation to case assignment?

The Context: Tribunals in the English Legal System

Most tribunals deal with areas of law where citizens (or potential citizens) come into conflict with organs of the state, such as social security, immigration, special educational needs, taxation and so on, but even this does not hold entirely true. Employment Tribunals, for example, are one of the largest tribunal jurisdictions, and yet they deal with the great majority of private law employment-related disputes, and so have jurisdiction akin to most labour courts in the Civilian tradition. Similarly, while tribunals have conventionally been distinguished from ordinary courts on the basis of their greater informality of procedure, their relative speed, cheapness and accessibility,[61] even these advantages can only be claimed as a generalisation. Some, such as the Employment Tribunals and the 'new' Asylum and Immigration Tribunals, [62] are highly legalistic in their approach; many deal with very technical bodies of law and some have built up an extensive case law of their own, which has (at least quasi-)precedential value and thus limits not just their informality, but the ability of citizens to represent themselves effectively before such *fora*.[63] Hence, relatively little has changed in systematic terms from the situation found by the Franks Committee in 1957;

> the most striking feature of tribunals is their variety, not only of function but also of procedure and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfil their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of the application of general and consistent principles.[64]

[61] See, e.g. M. Sayers & A. Webb, "Franks Revisited: A Model of the Ideal Tribunal" (1990) 9 *Civil Justice Quarterly* 36.

[62] The latter were re-constituted under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 from the Immigration Appellate Authority, which involved a two-tier system of appeals to Immigration Adjudicators and the Immigration Appeal Tribunal. The new system of tribunals came into operation on 5 April 2005.

[63] H. Genn & Y. Genn, *The Effectiveness of Representation at Tribunals* (London: Lord Chancellor's Department, 1989).

[64] *Committee on Administrative Tribunals and Enquiries,* Cmnd. 218 (London: HMSO, 1957), para. 128.

In the light of this complexity we have chosen to analyse the functioning of one of the largest tribunal jurisdictions in the UK, that of the Social Security Appeals Tribunal (SSAT). [65]

Social Security Appeals Tribunals: Structure and Jurisdiction

SSATs are part of an adjudicative system that can be traced back to the original National Insurance Act of 1911, which created a three-tier structure of an initial decision-maker (the 'insurance officer' under the 1911 scheme) with appeals to a local tribunal, backed up by a second tier of appeals (before the 'umpire'). For practical purposes, however, the present structure derives more from fundamental reforms introduced in 1984 and then substantially revised by the Social Security Administration Act 1992 and the Social Security Act 1998. The latter, for our purposes is the more significant. The 1998 Act was more than just a tidying-up exercise, it was a key part of a more general policy initiative aimed at reducing the costs of administering the social security system.[66] Moreover it was no coincidence that these reforms also followed on the heels of the Woolf review of civil justice, with its emphasis on resolving disputes more quickly and cheaply.[67] In essence, the 1998 reforms:

- shifted the balance of responsibility for decision-making, with the emphasis on increasing the opportunities for administrative review of decisions by decision-makers in the various state agencies (chiefly the Department for Work and Pensions),
- introduced more case management before tribunal hearings, and
- allowed certain cases to be dealt with by a single tribunal member rather than a conventional panel.

Jurisdictionally the SSAT today remains a first-tier appellate tribunal. Its jurisdiction is extremely wide,[68] with relatively few legal restrictions on access, as there is (for most intents and purposes) a general right of appeal against an official benefit determination,[69] subject only to an absolute time bar of 12 months

[65] In 2003-04 235,000 appeals were received by the Appeals Service; 53,000 tribunal sessions were held, and 269,000 appeals resolved: The Appeals Service Agency, *Annual Report and Accounts 2003–2004,* HC 795; London, TSO, July 2004).

[66] See generally M. Adler & R. Sainsbury (eds.) *Adjudication Matters: Reforming Decision Making and Appeals in Social Security,* New Waverly Papers on Social Policy, (Edinburgh: University of Edinburgh, 1997) for a discussion of the issues.

[67] See H. Genn, "The Social Security Bill in the Context of Changes to Civil Justice" in Adler & Sainsbury, *id.*

[68] See Social Security Act 1998, ss.4, 6, 7 and Schedule 1. There had been a proliferation of social security related tribunals in the late 1980s and early 90s with the jurisdiction spread across SSATs (responsible for the main insurance-based and means-tested income-replacement and incapacity benefits) and also Medical Appeal Tribunals, Child Support Appeal Tribunals, Disability Appeal Tribunals and Vaccine Damage Appeal Tribunals.

[69] Rights of appeal are laid down in detail in the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (hereafter 'Decisions and Appeals Regulations').

following the determination. A second-tier jurisdiction also exists, with cases going from the SSAT to Social Security and Child Support Commissioners.[70] Links to the ordinary court system, through rights of appeal from the Commissioners to the Court of Appeal (in England and Wales),[71] and in the possibility of judicial review of tribunal or Commissioner decisions, based on the original jurisdiction of the Administrative Court of the High Court, also exist.

The SSATs are organised regionally across the country so that members are able to sit within their locality. Each region is headed-up by a legally-qualified Regional Chairman and a number of full-time District Chairmen – also legally qualified. Other members sit on a part-time basis at tribunal suites which are based usually in the larger towns and cities of each region.

The work of the SSATs is supported by a body called the Appeals Service. This is currently an executive agency of the Department for Work and Pensions (DWP), but will transfer in due course to the Tribunals Service which is currently being established as an agency of the Department for Constitutional Affairs. The Appeals Service is headed-up by a President, currently Judge Michael Harris.[72] The Service is made up of a judicial arm (the salaries of salaried tribunal members are also met by the DWP[73]) and an administrative arm. In addition to its judicial functions, the Service provides training and administrative support for and monitors performance standards within the tribunals. There is a judicial support team allocated to each tribunal suite (or "operational site" in the jargon of the Service), to deliver a range of functions, including:

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[70] Social Security Act 1998, s.14. Such appeals are permitted on a point of law only. Following the Leggatt Report, a White Paper (*Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243, July 2004) proposed wide-ranging reforms to the whole scheme of Government decision-making. As regards benefits adjudication, it proposed that the Commissioners are abolished in 2007, in favour of a new second-tier tribunal that will also incorporate the Lands Tribunal and Transport Tribunal, as well as some of the work of existing finance & tax tribunals.

[71] Social Security Act 1998, s.15. The ordinary courts, however, are somewhat reluctant to intervene: "The ordinary courts should approach [appeals from Commissioners] with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it right. The Commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court …" *Cooke v The Secretary of State for Social Security* [2001] EWCA Civ 734, *per* Hale LJ).

[72] The President must be a lawyer of at least 10 years standing (Social Security Act 1998, s.5); conventionally the appointment has (in respect of the Appeals Service and its predecessor, the Independent Tribunals Service) always gone to a sitting District Judge.

[73] Following the decision in *Starrs and Chalmers v Procurator Fiscal, Linlithgow* (2000) SLT 42 (which found that temporary Sheriffs appointed to the Sheriff's Court in Scotland did not constitute an impartial and independent tribunal as required by Art 6(1) of the European Convention of Human Rights, since their appointment lacked security of tenure and sufficient financial and statutory safeguards to assure their appearance of independence) the terms of appointment of part-time SSAT chairmen were amended to avoid a similar legal challenge.

- The allocation of individual panel members to appeal hearing sessions;
- The maintenance of judicial libraries and the panel-members' database;
- Practical arrangements for the appraisal of panel-members and the processing of interlocutory work; and
- Compilation of statistical information and support for evening meetings of panel members and other judicial training events.[74]

The Appeal Service is required to provide clerks to the tribunal who are responsible for arranging all hearings and issuing correspondence on behalf of the tribunal.[75] The main responsibilities of the clerk are spelt out in regulations.

SSAT hearings are heard by a tribunal made up of three, two or one member(s).[76] These members are drawn from a panel of persons appointed by the Lord Chancellor under s.6 of the 1998 Act, and, under s.6(5), once appointed they can only be removed by the Lord Chancellor on the ground of incapacity or misbehaviour.

Members are appointed on the basis of a legal or other relevant qualification. A legally qualified member serves as chair whenever there is a two or three person tribunal sitting. Non-legally qualified members are appointed to the panel on the basis of specific expertise, that is either a medical qualification, a financial qualification or direct experience of disability issues (e.g. such as experience as a carer). This is a major change from the pre-1999 system in which 'lay members' were appointed to tribunals more by virtue of their representativeness of the local community than any special knowledge or expertise.

The regulations on the composition of tribunals are complex. Whether a hearing is listed before a one, two, or three member tribunal depends on the nature of the matter, as some matters (such as incapacity benefit cases) can only be listed before a three person tribunal having both medically and disability qualified members alongside the legally qualified chair.[77] As a consequence, although a one (legally qualified) member tribunal is prescribed as the default position by the Regulations,[78] two or three person panels remain the norm in practice because of the predominance of incapacity and disability benefit claims among appeals.

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[74] Taken from Appeals Service, *Annual Report and Accounts, 2003-2004,* p.8.
[75] Social Security Act 1998, Sched. 1, paras 11 and 12.
[76] Social Security Act 1998, s.7.
[77] In simple terms, two or three person tribunals are always required when the claim involves a medical or disability issue, in which case at least one member of the panel will be medically qualified, in addition to the legally qualified chair. Where there is a third panel member s/he will be either medically qualified or have experience of disability issues, depending on the nature of the benefit involved. Child support cases, similarly require at least a two person tribunal, which must include a financially qualified member on the panel.
[78] Reg. 36(1), Decisions and Appeals Regulations 1999.

Allocation of Cases to Tribunals

The allocation of cases is best understood in the overall context of the appeals process (fig. 9).

Appeals are generated initially by appellants notifying the relevant agency office handling their claim of their intention to appeal. The appeal at this point is not notified to the Appeals Service, because all requests for an appeal are subject first to administrative review by a decision-maker (i.e. in the relevant local office of the Department for Work and Pensions, Child Support Agency office, etc).[79] If the decision is not revised in favour of the appellant, then the papers will be sent to the Appeals Service, together with the decision-maker's appeal submission, giving his/her reasons for the decision. This is copied and sent to the appellant and any representative (if one has been identified at this time), together with a pre-hearing enquiry form which requires the appellant to identify whether s/he wishes a paper or oral hearing of the appeal, and, if appropriate, to identify dates when s/he would not be available for an oral hearing.[80] If the appellant fails to return the enquiry form the appeal may be struck out.[81] Where an appellant requests a paper hearing, the tribunal chairman can direct that an oral hearing be held if this is deemed necessary to enable the tribunal to reach a decision in that case.[82]

[79] Reg. 30(1), Decisions and Appeals Regulations 1999.
[80] See Reg. 39(1) and (3), Decisions and Appeals Regulations 1999. The Secretary of State (i.e. the relevant decision-maker) may also request an oral hearing under this same provision.
[81] Reg. 46, Decisions and Appeals Regulations 1999.
[82] Reg. 39(5), Decisions and Appeals Regulations 1999.

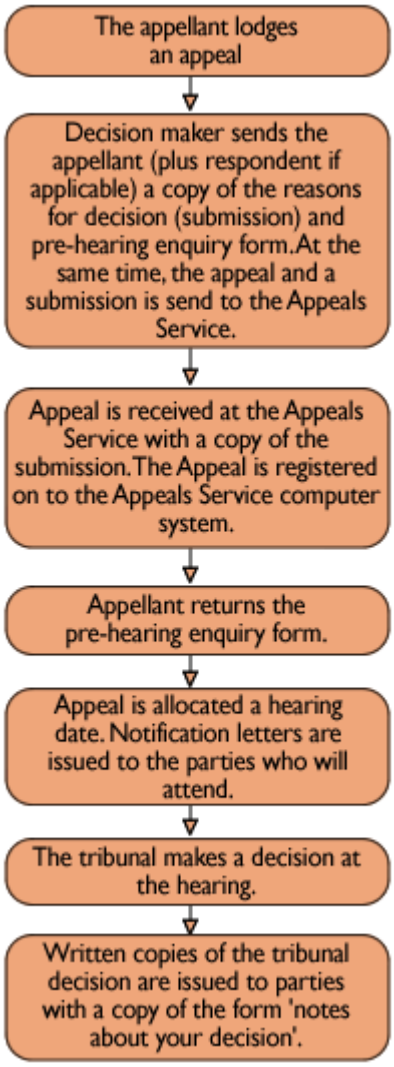

Figure 9: The appeals process[83]

Appeals are allocated a hearing date by the clerk. This decision is notified to the appellant at least 14 days before the proposed hearing. The appellant may request a postponement in advance of the hearing, though this request will not necessarily be granted. Even where an appellant has requested an oral hearing the tribunal has the authority to proceed with the hearing in their absence.

The allocation of cases is normally performed by the clerk. Unlike the ordinary courts, listing itself is not treated as a judicial function (we return to this in the next section).[84] In allocating cases the clerk must ensure that the actual

[83] Taken from www.appeals-service.gov.uk/479.htm

[84] See Reg 51(1) Decisions and Appeals Regulations 1999 (on the application of a party, the decision to postpone lies with the clerk to determine as he sees fit, or to pass to a legally qualified member to determine) under reg. 51(3) a panel member or clerk can also postpone a hearing on their own motion.

composition of tribunals satisfies both the formal requirements for panel composition laid down by the regulations and that all members are 'ticketed' by the Appeals Service for the appeals they are scheduled to hear. Tickets for different types of appeal are awarded to members by their Regional Chairman. These tickets are categorised as follows:[85]

- Non-medical benefits (Income Support, Jobseeker's Allowance etc)
- Child Support
- Housing Benefit / Council Tax Benefit
- Disability Living Allowance / Attendance Allowance
- Incapacity Benefit
- Medical benefits (Industrial Injuries Disablement Benefit, Severe Disablement Allowance, etc)
- Interlocutory work
- Commissioners re-hearings

Tickets are initially allocated to new members on the basis of their (prior) experience and training as members. They will normally be ticketed for one or two areas of work only. The 'standard' ticket covers Disability Living Allowance and Incapacity Benefit cases – the bulk of the SSATs work. More experienced members may apply for, or may be invited to apply for, additional tickets which are awarded on the following criteria:

- Geographical location (tickets are matched to local need)
- Expertise in the subject area
- Previous monitoring / appraisal reports
- A good record in terms of complaints (see below)
- Availability to sit

Interlocutory matters in practice are normally handled by salaried members, that is the Regional and District Chairmen.

Procedure at the appeal itself is very much within the discretion of each tribunal chair.[86] This obviously has implications as regards judicial standards. Proceedings are intended to be informal and inquisitorial in nature, and the chair has a pivotal role in ensuring that appellants, about half of whom are likely to be unrepresented, have had (and perceive themselves to have had) a fair opportunity to present their case. Qualitative research into SSATs in the early 1990s, however, uncovered a wide variety of practice by chairmen, some of whom clearly adopted a facilitative, inquisitorial approach, while others employed quite formal, almost accusatorial procedures. Some chairs did very little to facilitate the presentation of evidence by unrepresented appellants; indeed in

[85] Appeals Service, President's Protocol No. 13 (2 August 2001).

[86] "The procedure in connection with the consideration and determination of an appeal or a referral shall, subject to the following provisions of these Regulations, be such as a legally qualified panel member shall determine" – reg. 38(1) Decisions and Appeals Regulations 1999.

some instances the researchers felt that the chairmen gave the impression of being strongly anti-appellant. The research was also, in the light of these findings, critical of the relative lack of training given to chairs and members.[87]

A number of these issues have been formally addressed. The amount of judicial training has increased since the early 1990s, a Bench Book for tribunal members has been published, a greater level of monitoring of decisions is undertaken, and members are subject to formal appraisal. The Appeals Service also operates a complaints service. In 2003-04 a total of 932 complaints were received, 168 of these (18%) concerned judicial as opposed to administrative matters.[88] The nature and outcome of such complaints, however, is not reported.

Finally, it should be noted that, unlike the initial (administrative) decisions on listing and postponement, adjournment is clearly a judicial decision exercised by the tribunal as a whole.[89] Tribunal case law makes it clear that, although adjournment decisions are within the discretion of the tribunal, that discretion must be exercised judicially, in the light of the appellant's absolute right to a fair hearing.[90]

2 PRACTICAL OPERATION OF FORMAL RULES

What kind of practices are used based on the day-to-day operations of these formal rules as perceived by court manages, judges and stakeholders (members of the bar, public prosecutors, repeat players, other)? Are there other circumstances or measures than just rules, by which judicial integrity is enhanced and protected.

The relative absence of formal rules of case allocation makes this something of a non-issue as regards SSATs. Nevertheless, there are some important points to observe about SSAT practice.

Case allocation as an administrative function

Allocation and listing is viewed in practice as well is in law as an administrative matter. The two part-time legally qualified members we spoke to acknowledged that they had no involvement in initial listing decisions. Cases are generally allocated to tribunals long before the members see the papers; as one observed "the whole thing's a bit of a mystery".

The Appeals Service is working to increase the amount of notice appellants receive. Listing is currently being completed up to three months in advance in

[87] J. Baldwin, N. Wikely & R. Young, *Judging Social Security* (Oxford: Oxford University Press, 1992).
[88] Appeals Service, *Annual Report and Accounts, 2003-2004,* p.12.
[89] Reg. 51(4), Decisions and Appeals Regulations 1999.
[90] *R v Social Security Commissioner ex parte Bibi* (unreported) and Commissioner's Decision *CIB/1009/2004.*

order to give appellants or their representatives greater time to plan and prepare. Where cases withdraw or fall out of the list, gaps are filled by the clerks wherever possible; as a result, while chairs may experience some vacant 'slots', it is very rare for an entire 'session' (i.e. a half-day) to be cancelled. This system is managed without use of specialist IT at present. An electronic documents system is being developed as part of the Service's on-going 'Modernising Appeals Programme' (MAP). The extent to which the paperwork for appeals is managed outside of the Appeals Service, and the fact that the appellant has the right to elect for an oral hearing are said to be factors which may militate against the use of electronic case management systems.

As a matter of practice cases are generally allocated the same portion of tribunal time (40 minutes is the norm), except where it is known that an interpreter will be required – this automatically attracts a "double slot". Chairs seem rarely to interfere with the listing; it is possible for chairs to ask for a case to be taken out where it is clear that the tribunal would be unable to clear the list, but this is uncommon in the experience of those chairs we spoke to. Some overrun of the schedule is seen as fairly inevitable.

In practice a 'judicial' aspect to listing emerges in two ways. First, where a case is likely to be highly complex, the clerk may ask the Regional or a District Chairman for advice on listing. In such instances the case is likely then to be allocated to a District Chairman or an experienced part-time Chairman with the appropriate ticket. A Regional or District Chairman might ask to be assigned a particular problem case, such a request would be unusual, but permissible. Secondly, although the actual day-to-day allocation to cases is treated as an administrative function, allocation to cases operates within the jurisdictional limits imposed by the system of ticketing, and the allocation of tickets is itself clearly regarded as a judicial function.

Postponements also are treated, from the perspective of part-time chairs, largely as a "done deal" managed by the clerk. Clerks can refer a postponement decision to any legally qualified member under reg. 51(1). In practice, however, they tend to refer the more difficult cases only to a District Chairman for a decision.

Adjournments are a Judicial Decision

Adjournment decisions were very clearly seen by chairs as a judicial matter. Clerks were not consulted over adjournment issues, except to confirm possible dates on which cases could re-enter the list. In the view of the chairs interviewed, clerks were clearly mindful of the distinction between the administrative function, and their professionalism was praised in this regard.

One other point of note regarding adjournments: there is no principle of ensuring judicial continuity over cases that are adjourned. The formal position is that, where a case is adjourned and the tribunal has already taken evidence before adjournment, then the case must either be re-listed before the identical panel, or an entirely different panel. It is the responsibility of the original tribunal chair to make a recommendation. This power to re-list before the same members is used sparingly, to the extent, it was suggested that we should view the system as operating on the reverse presumption – i.e. that continuity is *not* expected. The justifications for this are largely pragmatic. It is extremely difficult to achieve continuity with the number of cases and tribunal members involved in the system, particularly as the majority of the latter are also part-time. On receiving the bundle of adjourned case papers, one function of the chairman is to check that any such re-listing directions have been followed and to advise the clerk, should any errors in listing have arisen.

Other Practical Issues of Allocation

It follows from what has already been said that cases are, for the most part, allocated randomly. This principle is only interfered with, subject to ticketing requirements, in some fairly exceptional situations, notably where cases are highly complex (see above), or they raise substantive issues under the Human Rights Act 1998 (HRA), in which case, such issues are specifically directed to tribunals that have sufficient expertise to deal with HRA questions.[91]

Transparency of allocation rules

Beyond the general principles laid down in the published regulations, the basis on which allocation decisions are made is not publicised, nor is the case distribution communicated to parties. Indeed the latter was thought to be a bad idea; the Appeals Service, we were told, could not easily change its allocation decisions in any event, and should not expose itself to pressure from parties who were, for some reason, 'forum shopping'.

[91] The President of the Appeals Service has published a Protocol (no.6) on 'Handling Questions under the Human Rights Act'. This states, *inter alia:*

> "6. In each of the regions the Regional Chairman has nominated District Chairmen who as well as himself will lead on Convention issues. Their task will be to screen Convention cases in advance, and in consultation with their colleagues in the other regions, decide on a suitable lead case or group of such cases for determination as soon as practicable by a chairman nominated by the President. Pending resolution of that case the President may advise that all other cases raising the same issue should be stayed until the issue is resolved either by a tribunal or by a decision of a superior tribunal or court."

3 VIEWS ON ALLOCATION

How do judges, court managers and stakeholders value the current state of affairs?

Our interviewees took the view that the existing system works well. Ticketing seems to be effective, though it may be difficult in some regions for members to widen their experience, because there is not a sufficient variety of work to justify it. In general there have been few problems with the system that our respondents could recall. Indeed, the following issues were the only ones to arise in our research.

Judicial Bias and Conflicts of Interest

One area where members might intervene in allocation decisions is in respect of potential conflicts of interest. Members are obviously responsible for identifying and declaring their own conflicts of interest. These might particularly arise for medical members who are in medical practice in the area (and so might be listed to hear an appeal by one of their patients) or where they undertake work as Examining Medical Practitioners (EMPs) - that is, they are paid (as consultants) to write medical reports used in benefit assessments for the Department for Work and Pensions. Conflicts can also arise for legal or financial members who also work in legal or advice work settings. The system tries to anticipate this problem at the point of appointment rather than allocation. Those members who have representative functions must sit as members in a different area from that in which they undertake advice or representation work. A "handful" of EMP medical members, following *Cunningham* (below), have been allocated to a different district.

The only particular judicial integrity issue that has been highlighted for SSATs concerns the appointment of medically-qualified members who are also EMPs to panels. The question has arisen formally in two Scottish cases as to whether an appeal tribunal's decision could be regarded as erroneous in law on the ground of bias where the medical member was also an EMP. In decision *CSDLA/1019/1999,* a Tribunal of Commissioners had held that the apparent conflict of roles was sufficient to raise a reasonable apprehension of partiality, that the doctor may favour the reports of other EMPs over competing evidence, say, from the claimant's own doctor. However, in the light of more recent judicial guidance on bias,[92] the Court of Session overruled the Commissioners in *Secretary of State for Work and Pensions v Social Security Commissioners and James Gillies,*[93] finding that the doctor's work as an EMP, without more, was not sufficient to raise an apprehension of bias in the mind of a reasonable and well-informed observer. The *Gillies* decision was in turn distinguished in *Secretary of State for Work and Pensions v Cunningham*[94] which found on the particular facts that where a doctor sat regularly on the Hamilton SSAT, and whose reports as an

[92] Discussed in the introductory section of this report.
[93] [2003] Scot CS 292.
[94] Reported as *R(DLA)7/04.*

EMP also frequently came before the Hamilton tribunal, there was in the mind of an informed observer a real possibility of sub-conscious bias. The court however, declined to lay down any guidelines as to how often a doctor would need to have sat with the Chair and/or carer member before an appearance of bias claim could be made out.

Views are mixed as regards the *Gillies* decision. Some welfare rights groups have criticised the *Gillies'* Court for the level of faith in EMPs its decision displays. The Appeals Service on the other hand takes the view that, had the Commissioners' decision in *CSDLA/1019/1999* been upheld, the Service would have been left with little option but to remove all its EMP medical members, a move which would have had significant practical ramifications.[95] *Cunningham,* by contrast is felt to present the Service with far less of a problem, *Cunningham* conflicts, it was reported, are not common outside of Scotland (which is a much more localised jurisdiction than England and Wales). Nevertheless steps are being taken to ensure that EMPs are not in a position to report on cases in areas in which they also sit as tribunal members.

Availability

Despite the SSATs reliance on a large pool of part-time members, availability was not viewed generally as a problem, except as regards medical members. Here the problem has been maintaining a sufficient pool of medical members to draw on. Recruitment of medical members was described as "a nightmare" – fees paid to sitting medical members are below Health Service locum rates, which makes tribunal work financially quite unattractive. It was suggested to us that when the Appeals Service is transferred to the DCA, the rules on tribunal composition might be reviewed with a view to refining the range of cases which require a sitting medical member.

The Impact of the Human Rights Act 1998

The SSATs are, like all courts and tribunals, experiencing the impact of the HRA 1998 on their proceedings. As noted above, the tribunal operates a special Protocol in respect of such cases which raise Convention issues[96], it states, *inter alia:*

> [2] ….Representatives, in particular, will play a very significant role in identifying and presenting arguable points. It is important that they do so at the earliest opportunity either before our tribunals or before the superior courts so that all appellants, represented

[95] One cannot yet say conclusively that the issue is closed. Gillies was granted leave to appeal to the House of Lords, though there are no signs at present that an actual appeal in the case will be launched.

[96] Protocol No. 6, 'Handling Questions under the Human Rights Act'.

> and unrepresented alike, can have their appeals heard in accordance with Convention rights.
> 3. Accordingly, where representatives know in advance of the hearing that a Convention point will be raised they should include it in the grounds of appeal, or if that is not possible, in a separate document which should be submitted to us well before the date set for the hearing. It should be raised with as much supporting argument as possible (together with copies of the relevant authorities). Grounds which merely say that the appellant will rely on the Convention without identifying the article(s) alleged to be breached and without indicating at least in outline why the breach(es) would lead to a different conclusion are unlikely to succeed.
> 4. Where a point raised in an appeal is a point of substance or where the case itself clearly raises such a point then the Government Department should deal with it in its submissions to us.
> 5. Representatives should understand that raising a Convention point for the first time at the hearing when it could reasonably have been raised in advance will almost certainly lead to an adjournment of their case, thereby adding to the delay for their clients. Representatives owe a duty to tribunals to act responsibly. Those who raise spurious arguments or seek to rely on the Convention when its provisions will not alter the outcome of the appeal are wasting the time of the tribunal (and of other tribunal users who are themselves waiting to argue legitimate points).

In fact, despite initial concerns about the volume of HRA issues that might arise, the Act does not appear so far to have had a significant impact on case allocation principles or practices, nor has there been as high an incidence of Convention points arising as was anticipated before the Act came in.

Training, Experience and Evaluation

A number of issues arose under this heading.

The value of an experienced clerk was highlighted. Some concerns were expressed that this was being put at risk by DWP employment practice which is apparently to place staff onto temporary or fixed-term contracts, leading to greater turnover and a consequent loss of that important element of institutional memory and experience.

The legally qualified members we spoke to had mixed views as to the adequacy of their own training. Both felt the initial and annual training provided was of good quality, and acknowledged that they received considerable informal support from District Chairmen. However both also stated that they had received no direct training on what they saw as judicial behaviour or judicial integrity. As one observed, after two years as a member, the only time he could remember judicial integrity being mentioned was at his appointment interview. One did not see this as a problem – judicial integrity for him was a matter of appropriate professional behaviour, rather than something for which one could be trained. The other acknowledged that there could be a gap; that there was a risk of developing a "canteen culture" that could be judgmental of appellants. He felt that this was possibly a greater risk for members who lacked the professional training of the lawyers and doctors, they were perhaps more likely to see their membership of

the tribunal as “just another job” rather than the performance of a judicial function as such.

By contrast to the civil courts, the Bench Book appeared to be less significant for our SSAT members, although it does contain guidance on appropriate judicial behaviour. As one member observed: “I haven’t looked at it for a while, though it was very useful at the beginning”.

Appraisal, which includes observation of the actual performance by chairs in tribunal settings, is clearly seen as an important process by senior members of the Appeals Service. Poor performance on appraisal is taken seriously, and in some instances, it has led to the referral of members to the Lord Chancellor, to initiate procedures for removal. However appraisal also appears to be relatively infrequent; one member interviewed was unsure of the frequency, the other thought it was about once every three years.

While tribunal decisions are monitored, particularly the adjournment rate, there are no formal targets imposed on chairs as a consequence. Our interviewees considered this to be a correct approach. On the basis of our (limited) data there is an awareness within the Service of the tensions between process accountability and judicial independence, and a clear sense that the setting of targets would be inconsistent with the judicial function, which requires that every case is tried on its own merits, to some extent regardless of case and time management needs.

Issues raised by user groups and other interest groups

There is a national user group which meets formally three to four times a year. The minutes of its meetings are published on the Appeals Service website,[97] but agendas and background papers are not, which limits their utility as a meaningful (public) information resource.

Allocation and listing as such does not appear to be a significant issue for the user group. Only three related issues seem to have arisen in the last four years. First, there is something of a recurrent theme in user group meetings to suggest that users generally lack information about how a range of technical decisions are made. However only one allocation decision was specifically mentioned in this context – a question as to the circumstances in which certain appeals might be expedited. Secondly, some representative groups have expressed concerns that instances have arisen where appellants have been disadvantaged by the tribunals’ reluctance to adjourn cases, for example where the appellant’s representative has fallen ill or been delayed, or where an interpreter is not available or has not attended.[98] Thirdly, as noted above, a number of interest groups have been critical of the *Gillies* decision.

[97] at www.appeals-service.gov.uk/522.htm
[98] See *id.,* Minutes of the National Customer Representative Liaison Forum 03/03, 17 July 2003.

4 COMMENTARY

The SSAT deals with a substantial caseload with increasing efficiency. In 2003-04, the average waiting time for an appeal was 11.2 weeks, as compared with 12.5 weeks in 2002-03.[99] The judicial and administrative members interviewed seem generally satisfied with the operation of case allocation principles, though we have observed also that there is arguably some lack of transparency as regards listing and case management practices.

In sum, two important issues arise from our research. First, the practice of the SSAT is distinctive from the other areas of practice we have explored because of its treatment of initial case allocation (and listing policy more generally) as an administrative decision. It might be argued in this regard that the Appeal Service is impinging on what is conventionally a judicial area of responsibility. As more administrative targets are introduced to our courts and tribunals, such divisions of responsibility can become increasingly significant in ensuring there are sufficient balances between the desire for administrative efficiency and the need to provide due process.

The second question is whether SSAT procedures do sufficient to support the appearance of judicial impartiality and independence. This has been raised as a substantive issue, as we have seen, in respect of EMPs in the *Gillies* and *Cunningham* cases, but the question could also be extended more generally to the relationship between the judicial arm of the Appeals Service and the DWP. The bottom line remains that the Secretary of State who is responsible for initial benefit decisions is also responsible for paying the salaries of the judicial officers who will hear appeals against his/her decisions. In this regard the transfer of the Appeals Service to the DCA will do much to reinforce the perceived independence of the SSAT.

[99] Appeals Service, *Annual Report and Accounts, 2003-2004,* p.6.

1 FORMAL RULES AND PRACTICES

Which are the rules to enhance and protect judicial integrity and impartiality in relation to case assignment?

Today's civil and family court system has evolved over many years. It is composed of different types and levels of court. Each different court deals with different types of business (although many of the boundaries overlap). Within the separate types and levels of court, different tiers of judiciary preside over cases and different practices and procedures are employed. Many have argued that the system is therefore inflexible and overly complicated.[100]

Family Courts: Structure and Jurisdiction

To gain some understanding of the way in which family cases are allocated in the courts of England and Wales it is first necessary to appreciate the way in which these courts are structured. We currently have a three-tier system or jurisdiction involving the High Court, the County Courts and the family proceedings court (FPC) which, in accordance with The Children Act 1991, operate concurrent, though differing, jurisdiction.[101]

The High Court has a specialist subdivision—the Family Division—which is distinct from the other two divisions of the court[102] as a reflection of the belief that family law "is inherently different from other kinds of law [and] welfare issues raised in family law cases [need] a different kind of judge to those of other divisions."[103] The division is located at the Royal Courts of Justice in London and headed by the President, Sir Mark Potter, and is served by 18 High Court judges.[104] It has jurisdiction to deal with all matrimonial matters, proceedings relating to family homes and domestic violence, all cases relating to children and it exercises exclusive jurisdiction in wardship and matters relating to the Hague

[100] Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at para. 3 Executive Summary.

[101] The Act was implemented in October 1991 and established concurrent family jurisdiction for the first time across all three levels of court. Although the rules still dictate that certain business must be commenced or tried in certain courts, the Act requires the same orders and principles to be applied in all courts dealing with applications under it. A similar approach has also been adopted under the Family Law Act 1996 in relation to domestic abuse.

[102] The Family Division was created by the Administration of Justice Act 1970 and is distinct from the Chancery Division and Queens Bench Division.

[103] Cownie, Bradney and Burton (2003) *The English Legal System in Context* (LexisNexis Butterworths) at 63.

[104] Cases can also be heard by district judges of the Principal Registry of the Family Division.

Convention on child abduction.[105] Essentially the court is designed to deal with the most complex, difficult or grave cases.

Technically the Family Divisional Court of the High Court Family Division is superior to the division as it is staffed by two High Court judges and hears appeals in family causes from decisions of magistrates' courts and County Courts.[106] In the Family Division a single High Court judge sits on a case.

High Court work is also dealt with at The Principal Registry of the Family Division (PRFD), in London.[107] The PRFD has two branches, the Family Administration Branch and the Clerk of the Rules Branch.[108] The administrative branch is comprised of nine sections: four of which deal with divorce issues,[109] and three with matters concerning children,[110] then the Court Section, which essentially guarantees the courts' efficient operation[111] and finally the List Office lists all cases before district judges at the PRFD. The second branch—the Clerk of the Rules, Family Division—is gifted with the responsibility of all Family High Court and circuit judge listings.[112] It is also responsible for the daily lists, which record all the cases and the courts to which they are allotted.[113]

Family County Courts are a distinct set of County Courts designated by the Lord Chancellor to determine any matrimonial cause (i.e. divorce proceedings or matters concerning marriage annulment). They have general jurisdiction in matrimonial matters and can issue all private law family proceedings. In addition some County Courts have specialised jurisdiction. For instance, Family Hearing

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[105] See Appendix one for full details with regard to the court's jurisdiction.

[106] Generally this concerns appeals against orders made about financial provision under the Domestic Proceedings and Matrimonial Causes Act 1978.

[107] at First Avenue House. In the provinces approximately half of all county courts act as regional offices for the high court and family high court work is dealt with by those district registries, which have divorce jurisdiction.

[108] See further www.hmcourts-service.gov.uk/infoabout/family/index.htm

[109] (i) *Divorce Section A*: deals with all matters relating to the issue and service of petitions for divorce, judicial separation and nullity. It also processes Petitions for Declaration of Marriage and Declaration of Parentage. (ii*) Divorce Section B*: primarily deals with the processes that lead to parties obtaining their Decree Nisi and Absolute. (iii) *Divorce Section C*: processes applications for financial orders and non-molestation injunctions; general applications filed within divorce proceedings and the issue of Originating applications. In addition they deal with all divorce documents lodged simply for placement on the court file. (iv) *Decree Absolute Search Section*: holds a central index of all Decrees Absolute granted in England and Wales from 1858 to date at www.hmcourts-service.gov.uk/infoabout/family/index.htm accessed 27.04.05.

[110] (i) *Public Law*: deals with care cases involving local authorities and ensures the demands of the judicial case management protocol are met. (ii) *Private Law:* handles all residence, contact and specific issue applications between parents, wardship and child abduction cases for the High Court. They maintain the register for Parental Responsibility Agreements. (iii) *Adoption*: handles all aspects of the adoption from issuing to the service of the final orders made by the High Court judges at www.hmcourts-service.gov.uk/infoabout/family/index.htm accessed 27.04.05.

[111] Its main function is to provide administrative support to the District Judges, to ensure the courts run smoothly and to produce of all orders at ibid.

[112] See www.hmcourts-service.gov.uk/infoabout/family/index.htm accessed 27.04.05.

[113] Ibid.

Centres may issue and hear all (un)contested private law family matters; Care Centres have full jurisdiction in (un)contested private and public family law proceedings and Specialist Adoption Centres process and hear applications to free a child for adoption and make an adoption order. [114]

Lay magistrates (Justices of the Peace (JPs)), when dealing with domestic matters, sit as a family proceedings court. Occasionally district judges (magistrates' courts)[115] accompany them.[116] These courts have full private and public law jurisdiction plus jurisdiction to hear and determine adoption proceedings. They deal with a significant number of less complex child-related family cases. However, they are unable to hear divorce, nullity or judicial separation proceedings, but may make a range of separation related orders such as orders for periodical payments and lump sums.

Finally it is worth noting that London is home to the only specialist court, which deals with family cases, the Inner London and City Family Proceedings Court. Indeed, it deals with more that half of the capital's overall family proceedings work.

Allocating and Transferring Cases Between the Three Tiers of Court[117]

The case allocation and transfer system between the tripartite court levels originated as an efficient use of resources rather than an indication of the seriousness of the matter.[118]

> Those courts exercising family jurisdiction regularly transfer cases between the three tiers, thereby ensuring that they are heard by the most appropriate level of judiciary and with the least delay possible… It is plainly necessary that the right judge at the right level of seniority should deal with any individual case in the most cost effective manner for both the court system and the litigant but also in the right place and with a just outcome.[119]

Family cases and thus family court business may be split into two types: public law cases and private law cases. The former covers the duties and powers of

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[114] For the forgoing see, House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para.11. Also see Appendix One.

[115] Formerly called stipendiary magistrates, i.e. legally qualified judges.

[116] House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para. 12.

[117] See The Children (Allocation of Proceedings) Order 1991, Statutory Instrument 1991 No.1677 (L.21) and Appendix Two for fuller details.

[118] Cretney. S.M., Masson, J.M. and Bailey-Harris, R. (2003) *Principles of Family Law* (Sweet & Maxwell: London) at 576.

[119] The Bar Council (Apr 2005) *Response of the Bar Council to the DCA Consultation Paper on a Possible Single Civil Court* at www.barcouncil.org.uk at introduction and para. 6 accessed 20.05.05.

the state itself, such as protecting children from harm, [120] and must usually be heard in the family proceedings court.[121] The latter essentially covers the rights and duties of individuals with which the state is not immediately or directly concerned, such as divorce. [122] Here the applicant reserves the right to select the tier of court and in addition the court may apply.[123]

Irrespective of where a case commenced it may be transferred to another more appropriate court, vertically or horizontally.[124] So, for example, a difficult case may be transferred from the FPC to the County Court or to another FPC if the first is too busy.[125] Thus cases, which may have started in another court, can be transferred to the tier most appropriate to their complexity or to facilitate consolidation of matters.[126] It is also possible for a case to be transferred down from the High Court to a County Court. A case cannot be transferred down to a family proceedings court. And where children are concerned transfer is essentially regulated by the governing principle that any delay is likely to prejudice the child's welfare.[127]

In relation to judges assigned to particular cases, the level of judiciary to which a judge belongs will basically determine the level or type of work they can undertake. Broadly speaking the judiciary of England and Wales is organised on two levels; interlocutory (procedural) or disposal (trial). The table below indicates the division of judicial role in family matters in relation to the correct level. [128] So, for instance in public law a district judge can make directions orders and interim care orders but cannot make a final care order. Consequently the allocation of cases follows a binary system, where there are two judges allocated, the district judge will give the directions and the circuit judge will hear the final case.

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[120] Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at footnote 14.

[121] Children (Allocation of Proceedings) Order 1991, SI 1991 No. 1677, arts. 3,4.

[122] Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at footnote 14.

[123] Children (Allocation of Proceedings) Order 1991, art. 7(1), 11, 12, 13. In a small study of transfers completed in 1993, 43% of transfer requests occurred on the court's motion with 6% being opposed, cited by Cretney. S.M., Masson, J.M. and Bailey-Harris, R. (2003) *Principles of Family Law* Sweet & Maxwell: London at 577 footnote 81.

[124] Duffield, N., Kempton, J. and Theobald, J., (2004) *Family Law and Practice* (Jordans) at 2000.

[125] *Ibid*.

[126] Cretney. S.M., Masson, J.M. and Bailey-Harris, R. (2003) *Principles of Family Law* (Sweet & Maxwell: London) at 576. For instance, "[i]f Children Act 1989 proceedings are commenced in a divorce county court ancillary to divorce, and the application is then opposed, the case will have to be transferred to a family hearing centre. In these circumstances, it is possible for the whole cause to be transferred rather than just the CA 1989 application." Duffield, N., Kempton, J. and Theobald, J., (2004) *Family Law and Practice* Jordans at 2000.

[127] S.1(2) Children Act 1989.

[128] Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at para.13.

Table One: Division of Roles Between Different Tiers of Judges[129]

Court Business	Intelocutory/Procedural Judge	Disposal/Trial Judge
Adoption or public or private law care cases in the Family Proceedings Courts	Nominated lay magistrates or nominated district Judge (Magistrate's Courts)	(Subject to transfer to a higher court) nominated lay magistrates and nominated District Judge (MCs)
Public law cases in the county courts	(Generally) nominated district judges	Nominated Circuit Judges
Public law cases in the High Court	District judge of the Principal Registry of the Family Division	High Court judges or district judges of the Principal Registry
Private law cases in county courts	(Generally) nominated district judges	Nominated Circuit and district judges
Private law cases in the High Court	District judges of the Principal Registry of the Family division	High Court judges and district judges of the Principal Registry.

A judge's 'membership' of a particular level will depend upon their qualification and training.

Family Work Training and Guidance

> Because of the sensitive nature of family cases, and the specific knowledge and understanding that is required, [the] rules…help to ensure that only trained and suitable [judges] sit in family proceedings.[130]
> Exercising the family jurisdiction makes demands on judges quite different to those in other jurisdictions. Most family cases are not intellectually particularly demanding but do require special resources of patience, sympathy, firmness and humanity. It is a jurisdiction that should never be exercised by anyone who does not want to do so.[131]

As all family courts are specialist courts all those presiding over them are specially selected and trained to ensure they possess the required commitment, ideas and philosophy necessary for the work.[132]

As a prerequisite for hearing family proceedings, lay magistrates in family proceedings courts are drawn from a specially selected family panel and have to undergo specialist, continuing training. [133] This training is based on the national

[129] Department for Constitutional Affairs, (2005) *A Single Court? The Scope for Unifying the Civil Jurisdictions of the High Court, the County Courts and the Family Proceedings Courts* Department for Constitutional Affairs Consultation Paper CP 06/05 at
[130] Slapper, G. and Kelley, D. (2004) *The English Legal System* (Cavendish Publishing: London, Sydney, Portland Oregan) at 124.
[131] *Family Law Bench Book* at para. 4.1 at www.jsboard.co.uk/family_law/fbb/index.htm accessed 15.02.05.
[132] Cretney. S.M., Masson, J.M. and Bailey-Harris, R. (2003) *Principles of Family Law* (Sweet & Maxwell: London) at 576.
[133] The current system is approximately within the last 15 months of its existence. S.49 The Courts Act 2003 sets out a new framework for authorisation of lay magistrates. It gives the Lord

training standard, known my the acronym MNTI 2,[134] which sets out the knowledge, understanding and skills magistrates need to demonstrate to perform their role. Training requirements are based on the acquisition of competencies and linked to mentoring and appraisal through which individual training needs can be identified.

As a prerequisite for hearing family matters district and circuit judges in County Courts must be nominated by the President of the Family Division[135] and undertake special family work training and guidance. This is often dubbed as 'family ticketing' of judges. A ticket gives a judge licence to hear a particular kind of case. A circuit judge will have potentially the following tickets, *inter alia*:

- Public law tickets
- Private law Children Act tickets
- Adoption tickets
- Ancillary relief tickets—which allow them to deal with matters ancillary to divorce proceedings.
- Appeal tickets—which allow them to hear appeals from the district judge at first instance.[136]

District judges hold private law Children Act tickets and ancillary relief tickets but not all have public law tickets, for example, a part-time district judge can never be eligible for a care ticket[137] and generally they do not have adoption tickets.[138]

Once a judge has acquired the requisite training and been allotted a case, there are further rules as to how they must manage the case.

Case Management

The Civil Procedure Rules[139] overriding objective—that the court deals with cases justly—was implemented in the family field by the regulations contained in

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Chancellor power to make rules regarding (a) the allocation and removal of authorisations for justices to sit as members of the FPC, (b) the appointment of chairmen of FPC, and (c) the composition of such FPC.

[134] Magistrates New Training Initiative, now referred to as the Magistrates National Training Initiative. See The *Family Court Competence Framework for Chairmen MNTI 2* and the *Magistrates National Training Initiative Handbook MNTI 2* at www.jsboard.co.uk

[135] Judges who have not been nominated may still hear matrimonial and domestic violence injunctions, see House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para.13.

[136] A circuit judge may also be designated to do joint directions. This is not a ticket proper, but allows the judge to give directions to bring together the timing of two cases, where there is a pending criminal trial in the Crown Court which is related to the family case, e.g. a child alleging abuse would not have to give evidence twice.

[137] The Family Procedure Rules and the Allocation Rules make these specifications.

[138] Research interview 19th July 2005 conducted with a designated family judge.

the Family Proceedings Rules 1991 (FPR).[140] Efficient case management is vital to the overriding objective and under CPR Part 1 the court is duty bound to case-manage.

Here case management is well explained by considering, as an example, The Protocol for Judicial Case Management in Public Law Children Act Cases (The Protocol).[141] The 'paramount objective' of the protocol is "to improve the outcomes for children by reducing unnecessary delay and, to this end, to achieve the completion of all cases within an overall timetable of not more than 40 weeks."[142] The protocol is constructed in the style of a step-by-step guide through a care case.[143] The allocation and hearings step seeks to make provision for continuous/consistent judicial case management. Consequently a *care centre court officer* must allocate one or two case management judges to the proceedings and the judge must fix a date for the final hearing and confirm the identity of the final hearing judge. The case management step, which then follows, aims to consider case management directions and the timetable.

There is no equivalent 'private law protocol', however, the Private Law Programme[144] provides guidance to improve the resolution of private law family cases in the High Court and the County Court.[145] The only target times are those

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[139] Furthermore parties have a prevailing duty to assist the court in realising the objective (rule 1.3 CPR Part 1). At allocation stage the court will identify the issues and, if necessary, request a party to provide further information to assist in this process (rules 18.1 or 26.5(3)).

[140] Rule 2.61A-F. The rule is supplemented by the president's direction of 25 May 2000 containing the pre-action protocol, the family law protocol of the Law Society, and the Solicitors Family Law Association Good Practice Guide for Disclosure (The SFLA is now called Resolution—First for Family Law). Note: Practice directions are guidance notes drawn up by the senior judges to help lawyers and judges interpret and apply the statutory rules; pre-action protocols have been drawn up for different areas of civil justice and guide practitioners on how they should be conducting litigation in particular fields. They are usually created by specialist practitioner groups, see Malleson, K. (2003) *The Legal System* (LexisNexis Butterworths UK) at 105.

[141] The Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) [2003] 2 FLR 719. The *Practice Direction (Care Cases: Judicial Continuity and Judicial Case Management)* [2003] Fam Law 606 gives effect to the Protocol and includes the annexed *Principles of Application* which govern the application of the Practice Direction and Protocol by the courts and the parties.

[142] Save in exceptional or unforeseen circumstances, see the Lord Chancellor's Advisory Committee on Judicial Case Management in Public Law Children Act Cases Final Report at para. [4.1]

[143] The route map for the protocol comprises six steps (1) the application—day one to three (2) the first hearing in the family proceedings court—on or before day six (3) allocation hearings and directions—by day 11 (county court) or 15 (High Court) (4) the case management conference—between day 15 and 60 (5) the pre-hearing review—by week 37 and (6) the final hearing—by week 40.

[144] *The Private Law Programme Guidance for Courts and Parental Separation and Children's Needs* (Jan 2005) sets out a framework designed to help the judiciary, managers from Her Majesty's Court Service (HMCS) and the Children and Family Court Advisory and Support Service (CAFCASS) to consult on and develop local schemes for family dispute resolution.

[145] In due course it is intended to formally extend the Programme to all family proceedings courts.

necessary to reduce delay by early case management and early referral back to an allocated judge. So, for example, an early First Hearing Dispute Resolution Appointment in all cases should be listed before the district judge in a window between four and six weeks of an application being issued, and there should be detailed case management at the first hearing to identify agreements of those issues that need to be determined and a timetable for the case. Once again the overriding objective is "…to enable the court to deal with every (children's) case…justly, expeditiously, fairly and with the minimum of delay…"

Listing

The forgoing provides some of the backdrop for the allocation or more accurately, listing of cases to particular judges working out of particular courts. For each Civil Trial Centre and the feeder courts associated with it, there is a *Diary Manager*, whose responsibilities for listing will often extend to family, as well as to civil, cases. A Care Centre will usually have a *Listing Officer* who is specifically responsible for family work.[146] However, the division of functions between these officials is not uniform throughout the country.

Furthermore there is no one universal listing policy to which all courts involved in family work subscribe. Consequently the way in which listing works is individual to each court and/or set of courts in a particular administrative area. However, all listing arrangements reflect the practices set out in a number of sources, *inter alia*, the Protocol for Judicial Case Management in Public Law Children Act Cases, the Children Act Family Proceedings Rules 1991, the 1997 Children Act Advisory Committee's Handbook of Best Practice in Children Act Cases and the report "Avoiding Delay in Children Act Cases."[147] Finally the Civil Bench Book adds:

> The judge is the person who, with the assistance of the parties, is best placed to decide how long a particular case is likely to take. If it is the considered view of a judge that a case will take (say) a day, and that this will have unfortunate consequences for the listing of that case or other cases, that view must prevail. Such a view should, however, only be formed after taking account of the input of an experienced Listing Officer or Diary Manager, who will have acquired an accurate 'nose' for predicting the duration of hearings and the likelihood of cases collapsing.[148]

We focus on the listing in The Inner London Family Proceedings Court (FPC) and the Family Division of the High Court. We also provide an overview of listing in an administrative area outside London.

[146] The listing officer may (in liaison with the local Diary Manager) also look after civil listing as well, see *Civil Bench Book* http://www.jsboard.co.uk/civil_law/cbb/mf_03.htm#top.
[147] By Dame Margaret Booth's the President of the Family Division.
[148] http://www.jsboard.co.uk/civil_law/cbb/mf_03.htm#top

The Inner London FPC actually does have a written listing policy which aims "to provide efficient and effective listing of all family cases consistent with the no delay principle enshrined in the Children Act 1989 and the Protocol…whilst taking account of the needs and requirements of court users". Thus the following applies:

Courtrooms

Up to seven courts sit daily:

- There is a dedicated court sitting daily at 10.00am to deal with new and renewed interim public law applications.
- Emergency applications brought by local authorities are generally listed in this court.
- Up to three District Judges sit on consecutive days allowing cases of up to five days duration to be heard.
- Further courts sit to hear cases of up to one day's duration.

Directions Court

- There is a daily directions court taken by a designated legal advisor.
- Four new private law directions hearings are listed on Tuesday, Wednesday and Thursday mornings from 10.30am.
- Directions hearings are listed at half hourly intervals.
- Directions may be listed at 10.00am, 10.45am daily or before a bench in urgent cases.

Sitting Times

- Cases are listed in the district judge Courts at either 10.30am or 2.00pm.
- Block booking of cases occurs in the directions court.
- It is expected that courts will finish their business by 4.30pm or by 5.00pm in exceptional cases.
- Parties are expected to arrive 30 minutes before the hearing time to ensure a prompt start to proceedings.
- List callers are on duty outside courtrooms from 9.50am and legal advisors will be available in courtrooms by 10.00am should parties need to consult with a legal advisor before court sits.

Urgent Applications

- Flexible listing allows the court to list cases at short notice.
- Legal advisors in court will always have details of early available hearing dates.
- The listing officers can always be contacted regarding urgent listings.
- If applicants in urgent cases cannot attend court by 3.00pm the application may have to be dealt with by out of hours arrangements…
- Special arrangements exist for listing urgent domestic violence applications under the Family Law Act 1996.

Waiting Times

- Whilst every effort is made to call cases in to court promptly, delays may sometimes occur.
- The court undertakes to make every effort to reduce waiting times on the day and to keep parties informed of the progress of work through the court.
- With flexible listing arrangements it may be possible to transfer cases between courtrooms. Parties will be consulted before a transfer takes place.

Multiple Cases

- With sufficient notice the court will try to accommodate lawyers who are appearing in more than one case by keeping their work listed in one courtroom. However, because of the unpredictability of this type of work there may be situations where to maximise the use of courtrooms and minimise the delay to other parties, it may be necessary to transfer work between courts. In these situations representatives may need to instruct another representative.

In contrast the Family Division of the High Court does not have a formal written policy. Listing is run out of the Clerk of the Rules Branch using established procedures. Outside London listing is generally centralised. One provincial court will house the Central Listing Office (CLO) which liaises with all the courts in the Group and also with the Designated Family Judge for the area.

Essentially all courts have a policy of over listing / multiple listing, i.e. more than one case being given the same listing time slot and back to back listing, i.e. case(s) listed immediately after one another. It "is good listing practice and no system could operate without taking [this] acceptable degree of risk."[149] It works best in larger courts because clearly there is greater flexibility.

2 PRACTICAL OPERATION OF FORMAL RULES

What kind of practices are used based on the day-to-day operations of these formal rules as perceived by court manages, judges and stakeholders (members of the bar, public prosecutors, repeat players, other)? Are there other circumstances or measures than just rules, by which judicial integrity is enhanced and protected.

As will have been noted above the Inner London FPC contains seven courtrooms. There is a listing department, which is run on an administrative basis and follows the court's listing policy. New work comes into the court daily and is listed in the diary where spaces are available; public law cases are listed to a dedicated court whereas new private law cases are given a directions hearing at the directions court. The diary is a manual one containing six courts and there is a separate diary for the directions court. Work is double or treble listed.[150] The parties request the amount of days they think their case will take and are likely be allotted half that time. So, for example, if four court days are requested, two are allotted, as proven statistical experience has shown the court that only approximately 10% of these cases will actually take four days and the court aims to get as many cases through as possible so that all children who are subject to proceedings get their cases heard quickly and without undue delay.[151]

Once parties are in court, further listing dates can be set by the legal advisor, present in each court, phoning down to the listing section and requesting a date, the length of time required having been negotiated with the judge and the parties.

An officer from the listing department regularly goes between the courts to check progress and forecast whether a case is going to finish early and thus free up time. This is because if space becomes available cases can be moved around and it is acceptable practice, where appropriate and possible, to exchange cases between judges.

[149] Research interview senior judge 19 July 2005.
[150] Research into the court's figures has demonstrated that approximately 80% of cases settle shortly before the listed hearing date or at the door of the court, i.e. 80% of work 'goes short'.
[151] If the four-day request is accurate, the court guarantees it will find the additional time.

The Care Protocol, in relation to judicial continuity, is followed so far as is possible. Accordingly at the initial allocation hearing it is decided which judge has that case in effect for its life.

At the High Court Family Division matters are somewhat different. In relation to public law cases there is no allocation hearing as specified in the Care Protocol. Instead, when such a case is transferred up,[152] the High Court and circuit judge listing officer decides which judge a case will be allocated to. This is done purely on a rota basis for the 19 judges assigned to the court.[153] Essentially every judge has the same number of live cases, so if A has five and B has four, then B gets the next case. Private law cases, however, just go into an ordinary list according to who is free and how many courts are available (the division has its own set of courts), over listing runs at 70%.

Unlike the Inner London Family Proceedings Court the High Court has its own unique computerised listing system, written especially for the court and designed purely for the way the court operates. At present judges do not have access to the system, their access is planned for the near future but this will not include the ability to make listing appointments for themselves. The system lists, *inter alia*, the cases that are allocated to each judge, the legal matter that the case concerns, the time estimated for the length of the case and cases reserved to that judge. All short work goes into one court

Fundamentally listing is a controlled random process based on the availability of judicial time, rank of judge and court space; whoever is next qualified in line, is the person to whom the case will be listed. As one interviewee said

> I think that generally speaking, it would be wrong to think of [listing] as being random, and it is purposeful but it is generally speaking not personal.

A number of our interviewees alluded to the purposive but non personal nature of listing whilst speaking in relation to private law cases:

> …[we] don't publicise this, but if it's particularly complex or there are particular issues with it we might then identify this really should actually go before a district judge [as opposed to a lay magistrate].
> With public law, it goes in for a hearing immediately in front of magistrates and again if there were particular issues there [at] the next date we might say, '…that should be dealt with by a district judge'. But otherwise we would just list it either before a district judge or magistrate. We just list it anywhere but we might identify...[154]

[152] Public law proceedings cannot start in the High Court, they have to start in the magistrates' court, then they may be transferred to the county court level then to the high court: see appendix one and two.
[153] Though in practice there is an agreement that a minimum of nine judges will be in London at any one time, then deputies sit to fill the gaps.
[154] Research Interview court manager 12 July 2005.

> [To] a degree we…try and match cases to judges…because some judges are quicker and faster at some things than others, you know we are all different. So [we] try to make sure we get through cases as fast as possible, so you know [we] try to match cases up that way.[155]

Though the listing policy of the Inner London FPC is written and publicly available on request, no one has actually requested it. And none of the other courts at which we interviewed had their policies formally written in this way. One explanation for this may be the open randomness of listing systems. Lawyers know that they cannot request a specific judge to hear their case.[156] Our interviewees were at pains to point out that everyone operates on a level playing field and though a lawyer might prefer to appear before a particular judge it was their job to guarantee that this did not happen otherwise than through the proper mechanisms.[157]

3 VIEWS ON ALLOCATION

How do judges, court managers and stakeholders value the current state of affairs?

> It's not a problem, with the way cases are allocated, our problem is with the sheer volume of the work and lack of resources. Not having enough courtrooms and enough staff and enough money. [S]ee how far ahead we are listing, it's totally unacceptable really. But there is nothing more we can do to reduce that without additional resources across the board. And that is the problem it is nothing to do with case allocation.[158]

This overarching issue of lack of resources and volume of work bring with them the attendant problems of delay, over listing, judicial availability and continuity, case management concerns and concerns about transfer between courts.

Delay[159]

Senior judges and court managers alike highlighted to us the difficulty of delay.

> The only real complaints you get about case allocation are delays…people need to have their cases tried, whether they're civil or family. There it's fair to say that the problems come and go…if we find, shall we say, the family work is falling behind it is pretty rough to think that a child's future may not be decided for six months, during which, if you're four years old, goodness knows what mum and dad are doing to each other. So we then try and put more resources into that, get more days for family work to be listed and that

[155] Research Interview court manager 21 July 2005.
[156] Excepting in accordance with the protocol, when the court officer has initially allotted judge(s), it is intended that judge remain with the case and a lawyer can request that judge at further hearings.
[157] A lawyer would need to make an application, showing case, for their case to be heard before a particular judge.
[158] Research interview court manager 21 July 2005.
[159] In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the child, S.1(2) Children Act 1989.

> alleviates that pressure and then suddenly you find criminal cases are perhaps falling behind. So the delay is something that is constant, you have to keep an eye on it.[160]

> …children cannot wait an undue period of time for important decisions to be made in their lives. Now it doesn't mean to say that we should rush to judgment, what we should be doing is gathering as swiftly as is reasonably possible all the information that we need…And when that information has been gathered the important thing is the court should then be able to hear the case as close to the optimum time as we can achieve. So everybody in the link in the chain has a responsibility on behalf of this child to do their piece of work within a reasonable time. Not with undue haste but to do it properly and to get it done…
> [T]wo months is 1% of a child's childhood. If we take a year to hear a case, which if everybody had worked efficiently we could have got done in six months, we have wasted 3% of that child's childhood that we can't give back. And we should always feel someone looking over our shoulders telling us that...[161]

As previously indicated the delay in public law children cases[162] led to the introduction of the Protocol and although still relatively new, [163] our interviewees were of the opinion that it had gone some way towards alleviating the problem but that flexibility, whenever possible was the key,

> The danger is, and this has been said many, many times, the danger is that people should see the protocol as a straight jacket and it mustn't be a straight jacket. What it is, is a flag in the ground on the issue of delay. And there are cases which can't be dealt with within protocol times.[164]

Jane Craig, a family law partner with London solicitors Manches summaries the position for private law cases when she comments:

> Private law cases are shuffled down the list. It is right that public law cases are given precedence because a child may be at risk. But the delays in private law cases can also be very damaging for children and they inevitably prejudice the non-resident parent. Money cases are the really poor relations. If you have a financial dispute resolution hearing at the beginning of February and it doesn't settle, the date for the final hearing is likely to be October and that is outrageous[165]

Private law contact cases are particularly illustrative of the delay issue:

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[160] Research interview senior judge 21 May 2005.
[161] Research interview senior judge 12 July 2005.
[162] There are approximately 20,000 public law care applications per annum, and the average length for such cases in 2002 was 48 weeks. In 2003 an additional 2,000 sitting days were allocated to county courts in England and Wales to cope with the increasing number of public law care applications, see Source Correspondent "Speedier Child Justice" *The Source Public Management Journal.*
[163] The protocol has been in operation for a little over 18 months. It came into effect on 1st November 2004.
[164] Research interview senior judge 12 July 2005.
[165] As quoted by Langdon-Down, G. (2005) "The Future of Family Law: Family Fortunes" 102:8 *Law Society Gazette* 20, 24th February.

> A wholly deserving father left my court in tears having been driven to abandon his battle for contact with his seven year old daughter…From the father's perspective, the last two years of the litigation have been an exercise in absolute futility.[166]

Such cases have attracted a good deal of media attention in recent times not least because failure to act early may mean that a resultant lack of contact becomes entrenched and the non-resident parent is cut off from their child. [167] And, as District Judge John Mitchell has stated, "judges are getting some of the blame" for intractable contact disputes.[168] Indeed because of the length of time such a dispute may take the eventual judgement a court delivers with regard to the child's best interest "may be different from what it would have been when the case began, perhaps several years earlier."[169]

Fathers groups have, however, resorted to increasingly extreme measures to voice their concerns over the problems in the system and the laws apparent "indifference to their plight."[170] Flour bombs have been hurled at the prime minister and disrupted parliamentary question time, fake mail bombs have been sent to specialist family solicitors, 'Batman' has invaded the balcony of Buckingham Palace, and 'Spiderman' has brought London traffic to a standstill.[171]

However, all our interviews tell us that the activities of such groups have had no effect on which cases are allocated in courts and lists are executed. They acknowledge that these measures have an effect on a macro level in that they can bring issues to the front of the governments agenda[172] but on a micro level do not impact on the way in which the courts carry out their daily functions. More important are the views of court user groups composed of, for instance, judges, court managers, lawyers, social workers and guardians but none of the groups discussed at interviews included court 'clients' as members. Furthermore, none of these groups had raised issues concerning the way in which cases are listed.

Over Listing

[166] *Per* Munby J in *Re D (a Child)(intractable contact dispute)* [2004] EWHC 727 (Fam); [2004] 1 FLR 1266 the case lasted a 'scandalous' five years and *Re M (intractable contact, interim care order)* [2003] 2 FLR 636 took seven years to resolve.
[167] See House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para. 53.
[168] Mitchell, J. "Love Split Parents: Failed by the System?" 154: 7127 *New Law Journal* 678
[169] House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para. 53.
[170] Piercy, Mark (2004) "Intractable Contact Disputes" 34 *Family Law Journal* 815
[171] Piercy, Mark (2004) "Intractable Contact Disputes" 34 *Family Law Journal* 815
[172] For example, lobbying over the delay and complications in private family law affected the governments agenda in relation to family justice and helped lead to the White Paper *The Next Steps*.

As over listing is norm it was not seen as an issue by our interviewees and rarely lead to difficulties. Where the obvious risks taken in over listing occasionally realised, a pragmatic approach was taken both by the judges, court managers and court users.

> Eighty per cent of our work goes short, settles, doesn't live up to the time allotted to it… So on that basis we over list... Just occasionally, very occasionally, we get egg on our faces but it was worth the rare occasion when we do get egg on our faces to go through that process and when we have a situation where we let someone down at 4 '0' clock in the afternoon, we call them in and we say 'look, we are terribly sorry, we over-list because that's the way to get the work done and it's important to get the work done, today you have been inconvenienced, we do apologise, now when is the day that we can put you in next, that would suit you best? And you will get priority. And it might be tomorrow, or it might be next Monday, but we give them priority and usually it settles itself out within a week.[173]

> …the only problem of course is that [over listing is] an average. Some weeks we have to stand work out [meaning it] just doesn't get heard…there's nothing else you can do…we try not to…and it doesn't happen very often, but occasionally it does [particularly when there are emergency cases]…you get a phone call in the morning asking to be heard that day, so we have to clear a court there to get it heard. [T]he rest of the cases are always very understanding about that sort of thing, they know what happens here, they know it's something we can't avoid…they are just used to the way it works really, and there is nothing you can do about it.[174]

Though parties do not always understand;

> I cleared a court last Friday I just went down there and said, "sorry everybody you're not going to get heard go back up to the list office and get yourself re-fixed" and we get lots of people complaining and we say "sorry tough, go".[175]

And neither do all judges. A senior judge pointed out to us that one of the reasons for double and treble listing is that parties settle issues whilst in the court house waiting for their turn before the judge.[176] So that often, when that turn arrived, they had already formulated an agreed order and / or course of action. With lots of parties doing this judges can be left waiting while matters settle around them. Full-time judges always have other business they can attend to, however, for part-time judges away from major occupations, this can be frustrating.

> We had a number of, particularly men, magistrates resigning from the family panel because they were annoyed sitting in a waiting room while everybody talked outside and then at the end of a long day when they'd had ten cups of coffee and read the papers, people came in with an agreement.[177]

[173] Research interview senior judge 12 July 2005.
[174] Research interview court manager 21 July 2005.
[175] Research interview court manager 21 July 2005.
[176] Research interview senior judge 12 July 2005.
[177] Research interview senior judge 12 July 2005.

Looking at the frustration on a more philosophical level, the dynamics of the process—all parties together in one location and the court's atmosphere influencing them to face up to and deal with issues—meant that the mere presence of the judge had an effect. Making things happen that perhaps would not have done without the confluence of events brought about by over listing.[178]

Judicial Availability and Continuity

Very many judges, despite being 'ticketed' to conduct family court business do not work solely in this field and so, for example, will spend much of their time trying criminal law cases. Moreover, many judges such as deputy district judges, deputy High Court judges and recorders only sit part-time. Clearly this impacts on the ability of listing to ensure judicial continuity.[179]

> [P]ublic law cases…when they start should be allocated to one or two judges or one bench and one or two legal advisors, justices clerks, and it's hoped that way to achieve continuity…that is one of the requirements of the protocol. It happens up to a point and it is certainly a huge amount better than it was, I mean unrecognisably better than it was. But there were some cases that could still fall from the net and last week sitting here in the high court I was dealing with a case that 11 other judges were seeing over the last two years, it should never be the case.
> But mostly cases get allocated to a single high court judge, mostly stick to him or her, in the county court they mostly stick to the same team of two judges…[180] In the family proceedings court they try very hard to keep benches but it's not always easy to do so because one has people who are part timers who have day jobs and family and other responsibilities, so it's not so easy there to deal with it.

We interviewed a barrister of almost 20 years call, who specialises in public law children cases and who further highlighted the problem of continuity when judges are itinerate:

> I have known in the past, times when I have done cases before one particular high court judge, if it's over run or we want the case to continue in front of him, we suddenly discover that he is going to be in Manchester next week. If we want our case to continue we have to go to Manchester because that's where he is going to be. So the whole case goes to Manchester. You go where your judge is. Obviously there will be practical issues, because obviously the court he is going to will have been expecting him to come and deal with cases in Manchester and not be hoiking up his London cases with him. But, if it happens, you end up following them to where they happen to be. And it happens and it happens quite a lot if you really want to keep your judge.
> In care where there is a practice direction from the president about trying to keep judicial continuity in cases…The Protocol…we do have a tight timetable and we are supposed to

[178] Research interview senior judge 12 July 2005.
[179] House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para.13.
[180] In many county courts this team consists of one district judge and the final trial judge. Otherwise it should normally be dealt with by the designated family judge at that particular care centre (or his deputy if it is at a care centre where he does not sit that regularly), which is in accordance with most care centre plans (the working out of The Protocol on a local level).

try and keep to it and the whole idea is to try and get care cases dealt with quickly and expeditiously and without people wasting time and so children don't languish in care for months on end. It's a wonderful idea, it doesn't work fantastically well but one of the main tenants is that you try and keep judicial continuity.
[The case] should remain with the same judge all the way through, that's what the protocol says. I think actually initially when the Protocol first came in they tried really, really, hard to make it happen. The problem with the idea is of course that there aren't enough judges to hear all the cases, that's that thing I said about having to follow your judge around, judges won't always be in the same place all the time. So when you need to have a hearing your judge might not be around so then what do you do? Do you not have a hearing, which means delay or do have it in front of some other judge, which means you don't have judicial continuity? Something has got to give and usually not having judicial continuity is the one that gives and you just have whoever is available to hear it, you need to get heard. [181]

What follows is an exchange between two of our interviewees, a senior judge (SJ) and a court manager (CM), which encapsulates the difficulty of achieving continuity and efficiency of listing as well as the tensions that can exist between the judicial and the administrative function:

CM: Under the Protocol it is required that the same judge stays with the case. Now to achieve continuity you loose flexibility. And in this court we don't actually stick to that because otherwise we couldn't carry out our listing policy and that is the problem. [We] do, support continuity because, yes if one person has a knowledge of the case it is far better because you're actually following it through, the parties know they have to come back to you... The problem is if we actually operated this policy of having the same tribunal deal with each case we actually wouldn't be able to list, we couldn't do what we're doing…we would completely lose our early hearing dates and everything.
SJ That's right.
CM If you had three district judges here, who were all going to keep their own cases we would actually loose so much flexibility. I mean often we will come to [a judge] and say 'look can we move this case out', 'cause cases are collapsing all the time.
SJ I keep a lot of work to myself
CM But you will let it go, for the sake of economy you will let it go
SJ Sometimes
CM Say into court today, say there was a three-day case listed in one of the courts and that's collapsed, where do we get the work from? You've got a courtroom it would be ridiculous to say "no, that judge is dealing with all those, we can't move any of his work" because then those children are going to have to wait, it's a balancing act.
SJ At the same time, if I've got four cases in front of me for review in a day and they are all mine and I know I can get it all done in a day, I won't release it. But if I know I am not going to get through, then I will have to release some.
CM That's right, because we want to get these cases heard, so that's the real dilemma, there really is an issue there about continuity and reducing delay. [Particularly in] the county courts…one will find that [continuity causes] problems with the fixing of hearing dates, because the judges are only available on a certain date. And you have got to find a judge available, you've got to find a courtroom available, and it's a problem. But continuity in the ideal world, that's what we should have, you should have the same tribunal dealing with the case.
SJ What on earth do parents think, when we've got issues of children being removed from their care because of neglect or ill-treatment or whatever, and they arrive in front of one tribunal and they hear that they are going to be back in a months time and they

[181] Research interview with a family law barrister 23 May 2005.

> appear in front of another tribunal and then they hear in six weeks time there is another very important hearing, they come to court and there is yet another tribunal.
> CM I agree but I don't know how you resolve that issue.
> SJ I think you have to pick on the cases that…
> CM Well it's complex, it's the cases that…
> SJ It's bloody difficult
> CM…it's actually identifying which is the case that really, for the benefit of the child…is going to be better if the same judge sticks with it.[182]

The problem is no less acute in private law cases. In *Re D (a Child)(intractable contact dispute)*[183] the father who abandoned his claim for contact after five years of court battle, experienced 43 hearings conducted by 16 different judges. In *V v. V (Contact Implacable Hostility)*[184] the father, ultimately awarded residence of his children after a three year court battle, had 17 court appearances and 16 different judges (regardless of a direction that the case should be reserved to one particular judge). These are "neither unique nor even unusual" cases.[185] These cases highlight the inadequacies of current court procedures; *inter alia*, gross delay in court listing and lack of judicial continuity.[186]

Case management

> Really what the Protocol instils is a sense of control by the courts on what's happening at every stage and there is an expectation that things will be done by a particular time, so that if it is not done by a particular time then someone needs to explain what's going on... If it does take longer then everybody knows why it is taking longer rather than things just going off and nobody would know why and there was no one bringing it back to court and it would just go, and go and go. So it has brought about a greater sense of court control, judicial control over cases and I think that is a good thing.[187]

The view in relation to the Protocol appears to be that it has focussed the minds of lawyers, given judges more control and generally been quite beneficial. However, matters that were unmanageable before the protocol, that went wrong before the Protocol, remain unmanageable and continue to go wrong:

> The judge decides [at the case management conference] what you can have, what you can't have whether you should have it now or wait till later, and that's the judicial control thing. They have a specific mandate to manage the case and that's the good thing about having the same judge because they know what they intended when they started, by the time they get to the end… So the idea is to give it focus and direction and for the court to manage it but even then you can't always manage everything, stuff happens and then you have to readjust and juggle and move stuff around to make it work. But judges have flexibility with that. [Though] some judges are very wedded to the Protocol and are really inflexible about it. So even when you say "it's not going to be ready, it can't be ready",

[182] Research interview 12 July 2005.
[183] *Re D (a Child)(intractable contact dispute)* [2004] EWHC 727 (Fam); [2004] 1 FLR 1266.
[184] *V v V (Contact Implacable Hostility)* [2004] EWHC 1215 (Fam); [2004] 2 FLR 851.
[185] *Per* Judge Bracewell in *V v V (Contact Implacable Hostility)* [2004] EWHC 1215 (Fam); [2004] 2 FLR 851.
[186] Piercy, Mark (2004) "Intractable Contact Disputes" 34 *Family Law Journal* 815.
[187] Research interview with a family law barrister 23 May 2005.

> they say "I don't care; that's your final hearing, I'm going to keep your final hearing… Although oddly with some judges the miracle of just saying "I don't care, you've got to be ready by then" makes stuff happen and people just force it in and make sure you're ready to go…or you end up having to get adjourned off and that can be quite bad…[188]

This fear of being adjourned is one echoed by a senior judge:

> [Judges] try to timetable work…once the big reports are in [for example] the assessment of parenting or the psychiatric report…we then say, 'alright local authority have two weeks to consider that, file their final evidence and their care plan, parents have another two weeks to consider and file what their position is, and then guardian has another two weeks and then you have a hearing about two weeks beyond that. Now sometimes…you have to concertina it and you have to say, "I'm sorry we've got a final hearing date fixed, that report has come in late, I'm now going to put you under the cosh, you've got five days to answer, you've got a week, you've got three days but you're going to do it and you're going to get it done" and…it really is pressure. But it's holding on to a court date that was set some time ahead because if we vacate it we can't fit them in for that period of time for another three or four months, so they've got to get the work done… It is putting people under pressure. I see social workers wince, and I say "look I'm awfully sorry, I'm aware I'm putting you under pressure, but you don't want me to loose this court date, we all know that we have got to make a decision for this child, so the only way I can do it is to ask you do to it and I'm sorry". And usually they nod, stay up all night and get it done.[189]

The decision to adjourn is a judicial one and a judge will grant it if warranted by the merits of the case. It is not an action granted in order to thin an overloaded list or refused in order to keep up court service statistics.[190]

Transfer of Cases between Courts

The rules with regard to transfer of cases do create difficulties in determining which cases should be transferred,[191] these difficulties clearly contribute to delay:

> The rules require that every care case starts in the magistrates' court, doesn't matter how serious it is it must start in the magistrates' court. So you will have this stupid business where you start in the magistrates' court; you know it's really, really serious and it needs to be in the high court but you still have to have your first hearing in the magistrates' court—send it immediately to the county court—got to go to the next level first and then it's going to go to the high court.
>
> Sometimes what we will do [in London] is try and leapfrog… you'll start in the magistrates' court and get transferred to a judge in the county court who can also sit as a high court judge. So you have one hearing; you go over, sit with a county court judge who hears it as a county court judge and then transfers it to a high court judge, turns himself into a high court judge. You have all that nonsense to go through.
>
> We can do that in London because we know who the judges are. The local magistrates' court that does most of the care cases in London is the Inner London Family Proceedings

[188] Research interview with a family law barrister 23 May 2005.
[189] Research interview senior judge 12 July 2005.
[190] See *Civil Bench Book* http://www.jsboard.co.uk/civil_law/cbb/mf_01.htm
[191] Cretney. S.M., Masson, J.M. and Bailey-Harris, R. (2003) *Principles of Family Law* Sweet & Maxwell: London at 577.

> Court, so you will go there, they will know to ring the Registry or if we know that we need to go straight to the high court they will ring the RCJ [Royal Courts of Justice] and they will ask for a county court level judge who can also sit as a high court judge, who can hear the one application and deal with it all at once. So you can do that to speed things up. But basically the rule is you have to do a step-by-step process and a judge at every level has to decide whether a case should be transferred to the next level.[192]

Transfer rules have further listing implications which we return to in the final section.

4 COMMENTARY

Your opinion on the operation of internal case assignment within courts in your country and your suggestions for improvement.

The operation of internal case assignment within the family courts does demonstrate tensions between, in the main, achieving judicial continuity and avoiding delay. These tensions can be seen as part of broader issues concerning the training of judges, the role of the administrator and the judge in procedures for progressing cases and the ability to transfer of cases between courts.

Delay

In terms of public law the situation regarding delay has, it seems, greatly improved due to the priority given to care cases under The Protocol. In terms of private law, the Department for Constitutional Affairs has recently commissioned research to investigate the time taken to resolve residence and contact dispute legally.[193] It found cases currently take 36 weeks to complete on average thus do, in legal terms, resolve without unwarranted delay. [194] Regardless, the perception is to the contrary and once a perception becomes imbedded it can equate to a reality.[195] As a result plans are in operation to address the perceived problem. The judiciary is developing guidance setting out how best to actively manage private law cases. This will involve:

- Earlier listing of cases
- Cases to be heard as quickly and effectively as possible
- Greater judicial continuity

[192] Research interview family barrister 23 May 2005.

[193] The research found that 18% of cases ended within three months, 48% in less than six months, 70% in less than one year and 13% took more than two years: see Smart, May, Wade and Furniss (2004) *Residence and Contact Disputes in Court*, The Department for Constitutional Affairs: London.

[194] Department for Constitutional Affairs, Department for Education and Skills and the Department for Trade and Industry (2004) *Parental Separation: Children's Needs and Parents' Responsibilities* Cm 6273, paras 74, 75, 77.

[195] For example, "there is a perception on the part of the press, public and practitioners that the family courts are failing to provide effective redress in [contact] cases, thus denying relationships between non-resident parents, usually fathers, and their children", Piercy, Mark (2004) "Intractable Contact Disputes" 34 *Family Law Journal* 815.

- Rapid return to court when needed

Target times will be developed by the end of 2005 for key stages such as first hearing conciliation appointments and enforcement hearings with the key aim of reducing delay.[196]

These are admirable aims but with the declared lack of resources—and no promise of their increase—coupled with the priority already given over to the listing of care cases they may not always be possible to meet. Without the increased resources courts need to look at ways to best utilise what they already have, make changes and increase efficiencies. Small steps and further rationalisation can make a difference to a court. For instance, at the High Court there is a problem of parties not informing the court when their matter settles and they no longer require the listed hearing date, as a consequence there is 'dead work' sitting on the diary. After meetings with the Users Group this fact will get fed back to the membership and it is hoped that lawyers as a result will be more informative, meaning this space can be freed up more quickly. The court is also currently working on new procedures for ancillary relief cases in order to speed their progress through the court.

Judicial Continuity

Continuity is important in order for the parties to engage with the judge particularly when there are sensitive issues to be dealt with, this engagement can often take time. So judges and court managers try to ensure that each time parties are brought back to court they see the same person. To do otherwise is to risk respect for the tribunal being lost as parties constantly have to repeat often very sensitive issues before a succession of judges and time being wasted as each new judge has to become familiar with the papers afresh. But continuity can be at odds with the issue of delay,

> I shall be trying a three week case in October in the high court which was listed before me late April. If it had been listed before the high court judge to whom it was allocated it would have come on in, shortly after Easter 2006.[197]

Judge Bracewell has called for cases to be timetabled to suit their particular needs rather than the slots made available by court listing.[198] The judiciary and the court service need to promote a culture of judicial continuity avoiding time wasting and inconsistency, by a more proactive management of judges' calendars and itineraries[199] but there will always be a fine line between achieving continuity, avoiding delay and ensuring efficiency. The key is seemingly the

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[196] *Parental Separation: Children's Needs and Parents' Responsibilities* Report of the responses to consultation and agenda for action January 2005 Cm 6452 at paras 75, 76.

[197] Research Interview Senior Judge 19 July 2005.

[198] *V v V (Contact Implacable Hostility)* [2004] EWHC 1215 (Fam); [2004] 2 FLR 851.

[199] House of Commons Constitutional Affairs Committee (2005) *Family Justice; the operation of the family courts* Fourth Report of Session 2004-05 Volume 1 (London: House of Commons) at para. 21.

ability to identify those cases where for the benefit of the child it is imperative that the case continues before the same judge and those where speed is more important. To achieve a speedy appointment in front of the same judge is not impossible. Listing is a judicial function and judges are entitled to "force [their] case" into the list but are reminded that to do so will delay other cases.[200]

Training and Experience

As earlier explained judges need to acquire training in particular types of family work in order to be qualified to judge a family matter. The training[201] and experience of lay judges, who make up the mainstay of judiciary at family proceedings courts, is a matter of concern.[202] Currently a magistrate receives a *minimum* of eight hours family training and sits for six and a half days per annum. Though this magistrate will almost certainly be sitting with an experienced chairman and at least another moderately experienced colleague it is not unusual for a bench to exhibit little more than minimum standards, yet can make grave decisions that, for example, see a child adopted out of its family.

> If the public were aware that those decisions can be made by people who had been doing the work for no more than six and half days per year, and indeed some of those six and a half days will be adjournments, and some of those six and a half days will be a different type of family case, I think the public would be not entirely content that a judicial role of that nature is being fulfilled on that basis.[203]

The better trained and more experienced judges are the more expeditiously they can deal with cases and avoid unnecessary delay.

> It is much, much slower in the magistrates' court in front of a bench because every bench, because there is three of them, has to go off and deliberate about everything and then they have to come back and have really detailed reasons for what they have done, which all takes a humongous amount of time. Whereas if it is in front of one judge, he sits there, he hears it, he makes the decision and it's done and you get out and it's all over. With magistrates it just takes ages, they have to go off and be deliberating for a couple of hours and that's waste of time and the number of times I have been stuck in a court until 6 or 7 at night because you are waiting for them to come back and give their reasons; that happens all the time and that's just waste of time for every body. Whereas a single judge, even a single district judge in a magistrates court, just gets on with it, comes back, gives their reasons all done…[204]

Longer training and experience which is consistent and specialised would go some way to assuage concerns about lay magistrates' fluency and knowledge in family work.

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[200] Family Bench Book at para. 4.12 http://www.jsboard.co.uk/family_law/fbb/
[201] Magistrates are currently trained by the Magistrates' Court Committee.
[202] A consultation paper is due to be issued soon which seeks to consider the authorisation procedures for magistrates undertaking family work and the minimum number of days which family proceedings court judges might be expected to sit.
[203] Research interview senior judge 19 July 2005.
[204] Research interview barrister 23 May 2005.

The Judicial Studies Board, with the Department for Constitutional Affairs, have made a proposal to radically reduce the numbers of categories of full-time qualified judges who are "ticketed" to hear family cases. These proposals have been submitted to the President of the Family Division for consideration.[205] Should they reach fruition they ought to see simplification of allocation of cases to ticketed judges, which may increase the pool of judges available for listing.
Currently all district judges can: deal with divorce decrees and financial support, issue domestic violence injunctions and, rule on the future for children from broken families.[206] Judges with 'private law tickets' may make final orders for children's residence and contact and those with 'care tickets' may make preliminary or procedural rulings on taking children into local authority care.[207] However, they may not, despite skill and experience, make a *final* order to put a child into care that is the province of the circuit and High Court judges. That part-time magistrates can take children into care but a full-time district judge cannot, does appear nonsensical. The proposals should see this change and the most experienced district judges will be allowed to decide care applications personally without being obliged to transfer up to a circuit judge who may be less familiar with the facts.[208] District Judge Rawkins believes that accredited district judges could speed the delivery of justice and has commented that "there are some cases, less complex and requiring less sitting time, that could be resolved by a district judge. And that might ease the pressure on circuit judges and enable them to make an earlier decision in more complex cases."[209]

Administrative v Judicial

This tension between the administrative and judicial is a constant one. Many judges are more focused on the running of 'their' court and less so on the management of the court as a whole, whereas diary managers / listing officers are responsible and accountable to management for making efficient use of courtrooms. Therefore friction can result between achieving the best court throughput and achieving the best for the child, between responsibility and accountability to management and responsibility and accountability to children. From our interviews it is fair to say that tension is solved in the child's favour but this can have a detrimental effect on private law family work such as ancillary relief.

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[205] Hall Judge Victor, Director of Studies, Judicial Studies Board, research email 2nd August 2005.
[206] Rozenburg, J. (2005) "Dark Horse in the Judicial Stakes: changes to family law herald a greater role for the 415 district judges in England and Wales" *The Daily Telegraph* 31 March at 21
[207] Responsibilities and limits of the office of District Judge is not laid down in a single set of rules or practice directions.
[208] Rozenburg, J. (2005) "Dark Horse in the Judicial Stakes: changes to family law herald a greater role for the 415 district judges in England and Wales" *The Daily Telegraph* 31 March at 21
[209] Ibid.

The nature of this tension changes depending on the court in question. In typical family proceedings courts the court clerks/legal advisors[210] who advise lay magistrates are frequently not legally qualified, unlike their superiors known as Justices' Clerks.[211] Both types of clerk have not only an advisory but also a judicial role[212] particularly in terms of a number of important case management decisions that they make. For instance, in relation to care cases under The Protocol, clerks generally decide whether the case stays down in the FPC or is transferred up to the County Court.[213] Clearly this affects the number of cases that are listed in FPC and the speed at which they can be considered.

Transfer of Cases

The flow of cases between courts influences their flow within courts as clear and efficient progressing of cases between courts can lighten internal case lists. Yet the culture of transferring work between the courts can militate against this.

Again taking the Protocol as an example, it would appear that the pressure of resolving Children Act cases within the 40 week deadline has increased the transfer of cases up to the County Court.

> Since the Protocol…the family proceedings courts have been transferring more and more cases up…because of the pressure to get things done in forty weeks. It is a fairly hopeless situation if the magistrates hang along with the case for 29 weeks and then suddenly decide it's too complicated for them; because we can't give it a date or time quickly...[214]

County court care centres have power to transfer down when a case becomes simplified but rarely make use of it which is a "source of great ire to the

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[210] The new title of Judicial or Legal Advisor is increasingly being used in place of magistrate's court clerk.

[211] No one may be appointed as a Justices' Clerk unless at the time of appointment s/he has a five year magistrates' court qualification, or is a barrister or solicitor and has served for no less than five years as assistant to a Justices' Clerk, or is or has previously been a Justices' Clerk: S.43 Justices of the Peace Act 1997. From 1st January 1999, a Justices' Clerk assistant may only be appointed as a *court clerk* if s/he is a barrister or solicitor or has passed all the necessary qualifications to become a barrister or solicitor. An assistant not so qualified may act as a court clerk if s/he holds a valid training certificate granted by a Magistrates' Court Committee before 1st January 1999 (to enable training to be completed), or a training contract registered with the law society. For the above see Bailey, S.H., Ching, J.P.L., *et al* (2002) *Smith, Bailey & Gunn on the Modern English Legal System* (Sweet & Maxwell) at 225-226.

[212] The role, duties and responsibilities of the Justices' Clerk and the legal advisor are set out in *Practice Direction (Justices: Clerk to Court)* [2000] 1 W.L.R. 1886 issued by L. Woolf C.J. with the concurrence of the President of the Family Division. And "where a person other than the Justices' Clerk (a legal advisor), who is authorised to do so, performs any of the activities referred to in this direction he/she will have the same responsibilities as the Justices' Clerk" ibid., at para. 2.

[213] See stage II of The Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) [2003] 2 FLR 719.

[214] Research interview senior judge 19 July 2005.

magistrates".[215] There are practical reasons for this,[216] the major one being that care cases tend to 'come together' approximately two weeks before the final hearing at the pre-hearing review when the reports and evidence are in and as a result parties are forced to realise the futility of their case. Subsequently it is rather late to transfer and indeed a final order may be made at the pre-hearing review.

Furthermore massive delays can be encountered in fixing new appointments in child cases because the court's antiquated software does not enable the judge to fix a new appointment before the parties leave court.

> There is, in most courts a total lack of communication between the listing organisations in the county court and the listing organisations in the near by family proceedings court. The time it takes to communicate between the two, can take up really valuable sitting time in the middle of the day when you could be doing much better things, providing a much better service for children and families by using that time as opposed to waiting whilst people try to organise these things on a somewhat inefficient basis. And the computer systems by the county court are different to the computer systems operated by the magistrates court so there is no easy communication between them and you could not simply ask in the county court what the next date available in the family proceedings court is.[217]

But also there are cultural reasons behind the lack of downward delegation.

> There is not a culture of sending work down and so people tend not the think of it. If they do think about it there tends to be a culture against sending work to the magistrates because it's assumed they don't know their way around it or aren't trained well enough to deal with it even if it is simplified. The lawyers prefer the service they receive in the county court where cases are dealt with more expeditiously by more experienced tribunals and would not urge the case to go down.[218]

Cases which are transferred to the County Court tend to stay there and only a very small percentage transfer up to the High Court. However, as the High Court is so overworked there is much more pressure on it to transfer down into the County Court so transfer in this direction flows well. This is partly because the High Court has more confidence in the care centre as a tribunal and also that on transfer down the matter must be dealt with by a Section 9 Judge, i.e. one who also possesses an authorisation to sit in the High Court.[219]

Very little private law work is issued in the magistrates' court and, for the same cultural reasons as earlier stated, not a great deal of private work is transferred down by the County Court. But magistrates will transfer up more complex cases to the County Court and County Courts will quite often transfer up. The latter has caused perhaps unnecessary congestion in the High Court

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[215] Ibid.
[216] These reasons were identified to us by a senior judge at a research interview 19 July 2005.
[217] Research interview senior judge 19 July 2005.
[218] Research interview senior judge 19 July 2005.
[219] Section 9 Supreme Court Act 1981.

> …because you know there are some intractable disputes that have been going on for years, and years and years and the judges in, say in [XXX] County Court just got fed up with it, "send it to the High Court they will sort it out". Now we have introduced a new procedure to deal with that, all they can do at the moment now is phone up and say, "can a high court judges look at this for half an hour, we'll give them a half a hour slot in a couple of weeks time and the high court judge will then decide whether or not he is going to take it on or send it back to the judge at [XXX]…and maybe they can say, "well look have you tried this", so it's not necessarily dumped on our doorstep to deal with forever and a day.[220]

The process accountability referred to in our introductory chapter is evident in the methods of selecting and allocating judges to family cases and the rules for allocating judges to the family courts. However, some of these are perhaps overly complex and require rationalisation. Furthermore, modernisation and commonality of IT systems could increase the efficiency of listing as would a culture shift in attitudes towards the transfer of cases.

[220] Research interview court manager 21 July 2005.

CONCLUSION

We have presented information about the listing and allocation of cases across a diverse range of judicial fields that indicate the structure, or lack thereof, of the English courts. Their arrangement represents the culmination of their histories and cultures that go back many centuries. Court reforms have sometimes taken a holistic approach, but, more often than not, they have occurred piecemeal. Judges have called for single criminal and civil courts,[221] and while the criminal court is to be unified, the civil courts have yet to be tackled. The most significant reforms, however, from the perspective of case allocation have been in civil procedure with the Woolf reforms. These have considerably modernised the courts' approaches to case management. Their equivalents are now being planned for the criminal courts.

Our concluding remarks cover four key areas: resources; judicial availability; continuity of judges; tickets.

1. Resources: Court and judicial budgets are combined with the legal aid budget. For the UK Treasury this is a means of attempting to urge the judges and courts to control legal aid expenditures. Essentially, what remains from the expenditure on legal aid is for the courts' use. Although the combined budget has been criticised by judges as inefficient and ineffectual, the Treasury has been reluctant to alter its composition. The result is that the courts are continually under funded. For example, see the arguments over the proposed new Commercial Court. Not only new buildings may be hard to come by, but also judges and court equipment, including IT provision.

The budget process is instrumental in courts improving their efficiency through the adoption of case management techniques. However, under funding is implicated in the delays courts and their litigants are experiencing. It is unlikely that government action will be taken to rectify these deficiencies in the near future.

2. Judicial Availability: The pattern is variable across our courts. The Commercial and Family courts are experiencing difficulties in obtaining a full bench of sitting judges. This arises from a number of reasons.
(a) High Court judges have to divide their time between sitting in London and going on circuit around the country as senior judges. For some this means splitting the term between half in London and the other half on circuit. The London courts mainly tend to suffer from this bifurcation of duty.

[221] F. Gibb. "Radical in a roll-neck sweater has judicial mission to reform: Interview: Lord Phillips", *The Times* 1 March 2005, Law p. 3. It is worth noting that his reformism has in part earned him the promotion to Lord Chief Justice on Lord Woolf's retirement.

(b) The Lord Chief Justice is crucial in distributing judges among the courts and some are perceived to have greater needs than others. This means some may have to function with diminished numbers.
(c) The availability of members of the bar who want to become judges varies. It is difficult to attract high-earning commercial barristers because of the marked drop in earnings they take. Moreover, some judges are leaving the bench because of disillusionment with the judge's life and the prospect of poor pensions. Mr Justice Laddie, the Chancery Court, recently resigned for these reasons.[222] This is also affecting the numbers who may be selected to be part-time judges as a precursor to a full-time bench appointment.

3. Continuity of Judges: One of the difficult features of modern litigation is attempting to maintain judicial continuity in the oversight of cases. Since much depends on the original analysis of the temporal aspect of the case by a judge, a listing officer can only then list as much time as indicated by this analysis. If it is underestimated then it is probable that the case will have to be adjourned part way and rescheduled. In some areas, such as family, the effects can be substantial, especially where children are involved. This type of problem can be exacerbated by the shortage of space within courts; for example, where a particular case needs a large courtroom because of the substantial quantity of documentation implicated.

4. Tickets: A crucial feature of the English judiciary is the combination of generalist and specialist expertise found within judges. Judges appointed to the High Court are, on the whole, meant to be generalists. Yet within the court there are divisions and sections that require particular expertise. This applies to crime, commercial, family, amongst others. For these areas judges are ticketed for certain fields. While most expertise is evaluated and defined upon appointment, judges are able to undergo further training to acquire new expertise and new tickets. At present, the appointments system for judges tends to select those needed in lacking areas. As the DCA moves towards a merits-based application system, these selection criteria may be harder to implement, and subsequent training programmes might have to be instituted to ensure a range of ticketed judges.

Rather as the common law is a piecemeal, ad hoc accretion of statutes and precedents, very much the model of substantive rationality as opposed to the formal rationality of continental systems, the judiciary and the courts also reflect that image and culture.

[222] *Legal Week* "The Bar: Laddie move prompts ban review" 7 July 2005 <http://www.legalweek.com/ViewItem.asp?id=24824&Keyword=mr>