FINDING THE FACTS: THE JUDGE SHOULD LEAD THE SEARCH PARTY

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I INTRODUCTION

Law and procedure are products of the culture of the power they moderate. This article discusses how the historical development of the role of counsel in controlling the common law jury fact-finding method has led to abuses. Comparisons are made between the common law and civil code methods to suggest improved and less adversarial approaches to fact-finding in common law courts and tribunals.

Two core features of the common law method are the use of juries as the fact finder and the involvement of specialist trial counsel. Originally, jury trials were conducted informally, without counsel.[1] Jury members were active participants[2] and the judge had the responsibility to ensure a fair process for the defendant. Counsel were introduced to protect against abuses of this system by judges without security of tenure, after restoration of the Monarchy of Charles II in 1660.[3] The *Treason Trials Act 1696* first permitted defendants to be represented by counsel and required a copy of the indictment to be given to the defendant not less than five days before the trial.[4] Some pre-trial disclosure was also put in place. By the *Act of Settlement 1701*, judges held office conditional upon good behaviour and were granted life tenure in 1761.[5] The judges extended a limited right to counsel for defendants in trials on indictment in 1730, to protect against abuses that arose from financial rewards offered to prosecution witnesses by the reward statutes. A full right of defence counsel in felony prosecutions was enacted by the *Prisoner's Counsel Act 1836*.[6] Once lawyers became involved in the trial process, they developed the complicated procedure and exclusionary rules of evidence we now take for granted and took control over the gathering of evidence and the conduct of the trial, thereby marginalising the role of the judge.

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1 John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 10–11.

2 Ibid 319. Langbein relates the record of a jury member asking a witness, who was complaining of the theft of his wallet from his trousers whilst he was in a brothel, whether his trousers were down at the time. They were down.

3 For example, later discredited executions following the Popish Plot (1678), the Rye House Plot (1683) and Hanging Judge Jeffries Assize following the Monmouth rebellion where more than 200 were hung, drawn and quartered: ibid 69, 76–7.

4 Ibid 90.

5 Ibid 81–2.

6 Ibid 109–11.

Using juries to do the fact-finding dictates a procedure that ends with a climactic trial when all the evidence that is required is presented, mostly orally, to a disparate group of unconnected people, who have been assembled to do their work as jurors and then return to their lives. The pre-trial processes are in the control of the lawyers,[7] so that they can be properly prepared for the trial. The trial is highly managed, the protagonists wear special costumes, and in this way the method is theatrical in its presentation. It can be highly combative. There are elaborate rules of evidence, which are now justified by the need to protect the jury of lay fact finders from drawing unfair inferences.[8] Rather than admitting evidence and giving it weight according to the reliability of its source, it is often rejected. These rules have become so technical that they sustain the highly skilled barrister tradition from which the judiciary are primarily drawn. Both sensibly support the merits of the system that sustains them.

The jury trial paradigm drives a system in Australia where juries are, in practice, rarely used. For example, in South Australia, jury trials determine less than 20 per cent of criminal prosecutions and none of the trials in civil cases. Many more trials are determined in federal courts and state and federal tribunals without juries.[9] Less than two per cent of all the cases in government courts and tribunals have the potential for a jury trial.[10] It follows that procedures whose only basis is to fit the particular needs of a jury, should not be used for all the other cases, unless those procedures are the best suited for a judicial officer sitting alone.

A lawyer-controlled process can work well where the parties are both well represented and are content to bring the matter to a prompt and affordable trial. However, even then, the parties are alienated from the process. They sit at the back of the court and when they are heard, they are restricted in the way in which they can tell their story and are subject to combative cross-examination. Where the parties are not equally represented, or one is not represented at all, the system

7 Pre-trial processes are managed by solicitors who refer the matter to barristers to draft the pleadings in civil matters and for advice on evidence.

8 See Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997) 29–34. Damaška points out that there is a contradiction between the elaborate rules designed to protect a jury from error and the trust that is placed in them and also in the complicated instructions that are given to them in the final charge given by the judge. These are valid criticisms that reinforce the point in this article — that these limitations, which have their basis in the need to protect lay fact finders, fall away if the fact finder is a professional judge.

9 For example, in 2003 in South Australia, there were 80 998 criminal prosecutions commenced, 3664 matters were listed for trial, only 601 were listed for a jury trial and only 115 went to verdict. The rest were listed for trial by a professional magistrate sitting alone: South Australian Courts Administration Authority internal computer and manual data accessed by the author in August 2005 for an unpublished speech delivered to the CLEA national conference, Adelaide, 16 September 2005. Additionally, 95.9 per cent of criminal lodgements and 89.5 per cent of civil lodgements in Australia are in the lower courts which do not use juries: Steering Committee for the Review of Government Service Provision, Productivity Commission, *Report on Government Services* (2005) 6.17, table 6.4. Tribunal work is much more numerous and additional to the state court work.

10 Consider, 601/3664 criminal trials = 16.5 per cent. This is less than half the total work of state courts when civil work is considered: ½ of 16.5 per cent = 8.25 per cent. This is only 20 per cent of the total work of government courts and tribunals; 20 per cent of 8 per cent = 1.6 per cent : Andrew Cannon, 'Comparisons of Judicial and Lawyer Resources to Resolve Civil Disputes in the Civil Code and Common Law Methods' (2001) 10 *Journal of Judicial Administration* 4, 245–7, table 1.

is not effective. The technicalities of the process make it poorly designed for litigants in person. Inherent in the party/lawyer control of the extensive pre-trial processes,[11] culminating in the party/lawyer controlled oral trial, is the potential for abuse. Even where the parties are equally represented, if one party has no merit in its case, or for strategic reasons does not want a judicial determination on the matter,[12] the adversarial process gives it ample armament to delay and obfuscate. Within a lawyer/party controlled system, there are systemic features that will lead to abuse of the process when there are strategic reasons to do so. This is not a criticism of the lawyers involved, but of the system that makes abuse of it a path to advantage for their clients.

II ABUSES OF PROCESS INHERENT IN THE COMMON LAW METHOD

A judicial finding of the abuse of pre-trial tactics was made in the Federal Court of Australia in *White Industries (Qld) Pty Ltd v Flower & Hart*.[13] The judge at first instance found that the firm of lawyers, Flower & Hart, suggested to its developer client, Caboolture Park Pty Ltd, that it institute proceedings against its builder, White Industries (Qld) Pty Ltd, as a pre-emptive strike to assist it in defending against an anticipated claim by the builder, who had not been paid for the building work. Flower & Hart abused pre-trial processes through delay and obstruction. The judge, in awarding indemnity costs against the lawyers found:

> The institution of the proceeding by Flower & Hart on behalf of its client was flawed and an abuse of process from its inception because of the illegitimate purpose for which the proceeding was instituted. That abuse of process was exacerbated by the manner in which Flower & Hart conducted the proceeding and the obstructionist and delaying tactics in which it indulged. …The impetus for the institution of the proceeding came from the lawyers. It was their suggestion that the proceeding be instituted immediately. Had the advice and recommendation in the letter of 18 December 1986 not been given the proceeding would not have been instituted.[14]

Seven hundred pages of interrogatories were sent, although the court did not approve them. There were clear findings of tactical manoeuvres being taken to delay the matter proceeding to trial. Although the plaintiff Caboolture's case was totally specious and only commenced for tactical reasons, an application for summary judgment to dismiss it early in the trial was refused, 'not because

11 With case-flow management, some control over pre-trial processes has shifted to the Courts from the parties, although mainly as to the timing rather than the content of the pre-trial activity.

12 For example, an insurer facing multiple risks of liability, such as in the medical field, or a company facing multiple product liability claims, will seek to delay losing the first case by judicial determination.

13 (1998) 156 ALR 169 ('*Flower & Hart*'). This was upheld on appeal: *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.

14 *Flower & Hart* (1998) 156 ALR 169, 251.

Caboolture's case on the evidence it had filed was not hopeless, but because Caboolture might be able to rely on evidence not yet before the court.'[15] The trial of this hopeless case went on for a total of 154 days. There was no evidence to support the pleaded facts. There were later judicial findings that Caboolture's advisors must have known the case had no prospect of success.[16]

The fact of abuse by the solicitors Flower & Hart was revealed only because their advice came to notice in the liquidation of their client. However, this was not an isolated abuse of the common law pre-trial and trial processes. *Day v Perisher Blue Pty Ltd (No 2)*,[17] was an example of a finding that a solicitor held a joint conference of witnesses before the trial to the effect of schooling them. In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd,*[18] an expert witness was found to have adopted opinions put to him by solicitors for the party calling him.

In the *Three Rivers* case in the UK,[19] a class action against the Bank of England and its directors for misfeasance of public office was summarily dismissed, but reinstated on appeal. In commenting on this case, Professor Adrian Zuckerman, noted civil procedure commentator and editor of the Civil Justice Quarterly, could not identify any basis for the case beyond lawyer self interest.[20] He noted that it always had little prospect of success, as misfeasance of public office requires proof of knowledge and intent and the directors had been cleared of that in the independent report to the House of Commons by Lord Justice Bingham. Plaintiffs' counsel opened for 205 days, but when it came to evidence, the case collapsed. The Bank of England costs were £80 000 000 and the plaintiff's lawyers' costs were probably around £50 000 000.

The emphasis on party/lawyer control permits the exploitation of weak arguments and the massaging of evidence by parties whose case has little merit. Specious pleadings can be made based on factual allegations without disclosure of the evidence to prove them. The conduct of Flower & Hart was exceptional only because it came to light. Abuses of this type are inherent in the common law adversarial system, because courts have to indulge specious allegations until the evidence on them is all heard. This problem is a direct consequence of a system that leaves the presentation of the evidence to support allegations in the hands of the parties and at the end of the process. If the court processes required the disclosure of evidence and the court could direct the presentation of all relevant evidence on key issues early in the process, abuses such as these would be much harder to sustain. In the *Flower & Hart* example, the key issue was whether Caboolture's claims of misrepresentation had any merit. If the court had been

15 *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134, [26].

16 *Flower & Hart v White Industries (Qld) Pty Ltd* (1998) 156 ALR 169, 186, 204 .

17 [2005] NSWCA 125 (20 April 2005).

18 (2005) 65 IPR 289, 344–5 [227]–[231].

19 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 15, CA.

20 Adrian Zuckerman, 'A Colossal Wreck — The BCCI-Three Rivers Litigation' (2006) 25 *Civil Justice Quarterly* 287.

able to demand that it disclose all evidence relevant to that issue and then order it to call that evidence at an early stage, the court could have resolved that issue early in the process and could have disposed of Caboolture's claim long before the unsuccessful application for summary dismissal. It would have arrived at an appropriate result earlier and at a much reduced expense, rather than leaving both parties in liquidation.

Activity based cost shifting encourages unnecessary pre-trial activity.[21] In the United States' version of the common law adversarial model, where often there is no cost shifting to the victor, the abuse can occur the other way; by plaintiffs with little merit in a claim and no cost risk in making it, driving a defendant to make an offer in settlement rather than suffer the expensive oppression of the pre-trial discovery process.[22] This criticism is of the bad design of a system that puts control of process in the lawyers' hands and rewards them for the activity they undertake, not of lawyers who use the system to their clients' advantage, nor of the discovery process per se, which offers much useful insight into the strengths and weaknesses of each case.[23]

Abuses of pre-trial processes are common enough to have a colloquial name: 'deep pocketing' your opponent; that is, making the pre-trial path so tortuous and expensive that the opponent cannot afford to make the journey. In the 1970s in South Australia, when judicial awards for personal injuries were relatively generous, defendants' (insurers') lawyers in motor vehicle injury cases routinely required standard interrogatories generated on word processors to be answered by plaintiffs. Failure to answer often resulted in delay, orders from the court that answers be given and cost orders in favour of the defendant who had administered the interrogatories. There is a fertile and well ploughed field of case law about whether interrogatories are oppressive or constitute 'fishing' and whether answers are a sufficient answer. After this game had been played out, if the matter went to trial, it was common for these interrogatories not to be referred to. To the common law lawyer this is obvious. One calls the witness years after the event to give oral evidence, but much earlier detailed statements on oath are only material for cross-examination, not primary evidence. To an outsider it must be astonishing. All this expensive effort to give a pedantically precise written version of events on oath which the court may not even see!

To prevent this expense interrogatories were forbidden without leave[24] and the courts imposed an alternative requirement on all personal injury plaintiffs to give written particulars of the cause and effect of their injuries.[25] This removed the

21 Andrew Cannon, 'Designing Cost Policies to Provide Sufficient Access to Lower Courts' (2002) 21 *Civil Justice Quarterly* 198.

22 Ibid 229, citing Richard W Painter, 'Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?'(1995) 71(2) *Chicago-Kent Law Review* 625.

23 In contrast, German commentators acknowledge the weaknesses of discovery in their process, which may permit the non-disclosure of adverse evidence: Interview with Herr Professor Dr Peter Schlosser, Dean of the Faculty of Law (Munich University, 1 April 1999).

24 *Supreme Court Rules 1987* (SA) r 57.01 — this has since been repealed by s 7 of the *Supreme Court Civil Rules 2006* (SA); *Magistrates Court (Civil) Rules 1992* (SA) r 76(2)(a).

25 Supre*me Court Rules 1987* (SA) r 46.15; *Magistrates Court (Civil) Rules 1992* (SA) r 68, Form 22.

expense of drafting the request and now leaves the fertile field of legal argument about interrogatories fallow. However, they are only used as an extension of the pleadings, that is, as assertions and not as proof of the facts so asserted.[26] At trial, the plaintiff still gives exhaustive oral evidence about pre-action injuries, the circumstances of the accident and the consequences, independently of the personal injury particulars. The much earlier written particulars of this information can only be used as evidence if they are used in cross-examination.

The misuse of interrogatories is a powerful example of the abuses inherent in a lawyer-controlled process and how wedded the common law system is to oral evidence as the main basis of evidence. There is no sound logic to this. If the emphasis is on oral evidence, then it should be heard when it is fresh in the witnesses' minds, not at the end of a process that takes more than a year and usually takes several. By the time of the trial under this method, the memories of the witnesses are stale and may have been affected by subsequent events, including being coloured by the giving of detailed statements. The Courts 'crossed the Rubicon' that a party cannot be required to disclose non-documentary evidence until the trial, when it required the plaintiff to give written personal injury particulars on oath early in the process. Such a formal sworn statement should be available to the court as primary evidence of the facts in it. The other side can cross-examine on any aspect that its counsel wishes to contest.

Where there is a conflict of expert opinion on key medical, technical or accounting issues, there is a tendency to seek partisan experts to bolster the competing views, rather than to investigate the basis of the conflict of expert opinion. Expensive document discovery overwhelms commercial litigation. These problems are the result of the same bad systemic design of leaving the fact-finding processes in the hands of lawyers and their clients, who are caught in the classic prisoners' dilemma — that if each individual spends more they may enhance their prospect of success, but if they both spend more it is merely wasted expense.[27] The underpinning design fault is that the judge, who is the only participant with a certain interest in factual accuracy and justice, is a referee between combative versions, without direct control over the fact-finding process. Sir Anthony Mason AC KBE observed: 'Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties.'[28]

26 *Holyoak v Ivanoff* (1995) 183 LSJS 21.

27 The prisoners' dilemma is an economic paradox based on two prisoners, each faced with the choice of giving evidence against the other and receiving a lenient sentence in return. If neither 'grasses', the police can only bring evidence to convict them on a lesser charge for which they would be sentenced to a medium term. Their joint interests demand silence but individually one would be better off serving self-interest.

28 Sir Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 6–8 August 1999) <www.aija.org.au/ac1999/mason.pdf>.

III CASE-FLOW MANAGEMENT

The traditional common law adversarial model for civil disputes has already been modified significantly by case-flow management systems.[29] The typical models of case-flow management involve a shift of the control of the timing, rather than the extent, of the pre-trial procedures from the parties to the court. This arose because of dissatisfaction with periods of delay in finalising cases in terms of years rather than months. In common law forums where it has been adopted, criticisms of the concept of court control of procedural steps by case-flow management are now largely based on fears that it increases costs to the parties[30] and concerns regarding confusion as to the proper judicial role where case-flow management steps into the use of Alternative Dispute Resolution ('ADR') techniques.[31] This is as opposed to any serious concerns about the principle of case-flow management resulting in any injustice or lack of procedural fairness. This shift of control over the timing of pre-trial procedures from the parties, and their advisers, to the court, is accepted as a not improper departure from the adversarial process. The argument made here is that common law courts should take the further step of exercising a degree of control over the gathering and presentation of evidence. The primary control over the dispute will still lie with the parties and their advisors, who will define the dispute and the evidence to be brought to bear, and the central role of counsel to question witnesses and make submissions will remain. However, in

29 In Australia, case-flow management systems are in place in most states and in federal courts of first instance. In South Australia, it was first introduced in the District Court in the late 1980s. It is accepted as part of the landscape and there is no serious attack on its appropriateness. Most case-flow management requires standard events to be performed by set dates. Docket systems, such as in the Federal Court of Australia and the Magistrates' Court of South Australia, give each file to a particular judge/magistrate (as occurs under the civil code), which allows individual management of pre-trial processes, but, as *Flower & Hart* demonstrated, without control by the court over the identification of key issues and the presentation of the evidence, case-flow management only changes the timing of process not the management of fact-finding.

30 Philip L Williams et al, *The Cost of Civil Litigation before Intermediate Courts in Australia* (Australian Institute of Judicial Administration, 1992), showed that costs of litigation in the District/County Courts of Queensland and Victoria were affected by the stage in the process at which the case was finalised, rather than how long it took. Reducing time to disposition per se will not necessarily reduce litigation costs. However, it is pointed out in Chris Guest and Tom Murphy, *An Economic Evaluation of Differential Case Management* (Civil Justice Research Centre, 1995) that delay did contribute to cost when loss of use of the money was taken into account. The defence of the traditional common law adversary system in the United Kingdom in the face of the Woolf reforms, included the fear that case-flow management would increase costs: Michael Zander, 'Why Lord Woolf's Proposed Reforms of Civil Litigation Should Be Rejected' in A A S Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure — Essays on 'Access to Justice'* (Clarendon Press, 1995) 79. There must be little doubt that undifferentiated case-flow management can increase costs by institutionalising all the pre-trial steps. Early management also means more cases are managed, that is, some cases are managed that would have settled anyway. Against this, the author's research suggests that involving the parties and magistrates at the beginning of the process saves costs by increasing the number of cases that settle early in the process: A Cannon, 'An Evaluation of the Mediation Trial in the Adelaide Civil Registry' (1997) 7(1) *Journal of Judicial Administration* 50. Contrary to this, the RAND research on the *Civil Justice Reform Act* in the USA supports the view that greater judicial management increases costs: A Cannon, 'Implications of the Rand Report on the Civil Justice Reform Act in the USA for Changes to the Civil Justice System in South Australia' (1998) 7(4) *Journal of Judicial Administration* 197.

31 Judith Resnik, 'Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging' (1997) 49(1) *Alabama Law Review* 133.

appropriate cases, the court should be willing to identify the key issues and insist that the evidence is brought first on those issues so that the court can make findings of fact on them, before spending time and incurring expense on other issues.

IV MANAGERIAL APPROACHES

Discussion in Australia about alternatives to the common law adversarial system has sometimes set the civil code system up as the alternative and incorrectly styled it in civil disputes as inquisitorial. Although the civil code courts *are* inquisitorial in criminal cases, in which the judiciary have a role in the investigation and gathering of evidence, in civil cases the parties control the dispute and the method is expressly adversarial. The debate in Australia about these supposed alternatives can be as combative as the oral barrister tradition itself.[32] This obscures the reality that in civil disputes the civil code and common law processes have important similarities:[33]

- the parties are entitled to be served,
- the parties define the dispute,
- the parties can end the dispute by agreement,
- the parties nominate the evidence to be brought to the court,

and the usual due process protections that:

- the parties can question witnesses and can be heard on all issues,
- proceedings are conducted in open court in the presence of the parties and their legal advisers, and
- reasons for judgment are given and are subject to appeal.

The first four points are essential to an adversarial court process between parties rather than an inquisition by the court. The fact that the parties must be notified of a dispute, their ability to define its boundaries, to nominate the evidence that is brought to bear and to end the dispute on their own terms, leaves the ultimate control of it in their hands. This much must be in the parties' hands for it to be an

32 See Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 294–307. Earlier discussion occurred in Sir Richard Eggleston, 'What is Wrong with the Adversary System?'(1975) 49 *Australian Law Journal* 428, suggesting change; P D Connolly, 'The Adversary System — Is It Any Longer Appropriate?' (1975) 49 *Australian Law Journal* 439, defending the status quo; Helen Stacy and Michael Lavarch, *Beyond the Adversarial System* (Federation Press, 1999); Mason, above n 28; Australian Law Reform Commission, *Review of the Federal Justice System*, Discussion Paper No 62 (1999) [2.21].

33 See Andrew Cannon, 'A Diary of Two German Civil Cases' (2002) 76(3) *Australian Law Journal* 186.

adversarial contest between them, rather than an errand, or inquiry imposed upon them, by an intermeddler — the court.[34]

The last three of these points are the usual due process protection features which ensure natural justice. The methods used for calling and testing evidence vary between civil code and common law systems, but they do not define what is adversarial. The common law barrister-controlled fact-finding that is used in trials is also used in inquiries such as a coronial inquest, or a Royal Commission, which are inquisitorial. The opportunity to test the evidence is part of procedural fairness, which is an essential element for a process to be judicial,[35] but the particular method of testing the evidence does not define whether the process is inquisitorial or adversarial. The fact that the process occurs in an open forum, that the decision must be justified and that the process and the decision are subject to appeal, ensures that departures from due process, and other errors, can be corrected by the appeal court. The fact that the decision is final, subject only to appeal, ensures that this adversarial process determines the dispute and is not just an adversary skirmish.

There is nothing inherent in an adversarial process that prevents the judge from managing it by exercising control over the order of presentation of the evidence that the parties decide can be called in the matter. In a well-designed justice system the question should not be whether the judge should manage the fact-finding process, but rather, when and how?

Left to their own devices, the parties and their lawyers often use the common law processes to good effect. They should be allowed to continue to do so. This is not the place to discuss the design of processes to assist the overwhelming majority of cases that settle. The focus here is to discuss how the fact-finding process can be improved for those that will not. Good fact-finding underpins all settlement processes. Accurate and affordable judicial determination is a great encouragement to realistic negotiations. Without it, a well resourced party can prevaricate (and 'deep pocket') forever. However, judicial management is time consuming and expensive[36] and should be exercised only over those cases that will benefit from court management of the gathering and presentation of evidence. Which cases are these?

34 If the Court can determine the boundaries, subject matter and evidence to be called, the process is an inquiry, ie an inquisitorial process. There are examples of this in common law processes, such as a coronial inquiry or a Royal Commission.

35 Andrew Cannon, 'A Pluralism of Private Courts' (2004) 23 *Civil Justice Quarterly* 309, 310.

36 Per 100 000 of the population, there are 9 judges in South Australia and 12 in the Netherlands compared to 24 in Germany. This reflects different legal cultures, in part the greater role of the judge in civil code systems, but also other factors such as cost scales, multiple judges sitting at first instance and other matters: see Andrew Cannon, 'Comparisons of Judicial and Lawyer Resources to Resolve Civil Disputes in the Civil Code and Common Law Methods' (2001) 10(4) *Journal of Judicial Administration* 245.

V APPROPRIATE CASES FOR COURT MANAGEMENT OF FACT-FINDING

Where cases involve a narrow issue that will determine them, a great deal of unnecessary time and effort is often spent on peripheral issues. An example of such a narrow issue may be a particular factual dispute or a ruling on a legal issue. If the court intervenes early to determine the narrow issue, much effort on peripheral issues may be saved. A particular example of this lies in cases where liability and complicated proof of damage are both in issue. Court management may allow the liability issue to be heard first. If the plaintiff loses, proof of damage will be unnecessary and if it wins a much clearer basis upon which the parties might negotiate an agreement on the issues of damage has been established.

Cases where a party is abusing the court processes to defeat the other side through delay and the introduction of specious issues (as in *Flower & Hart,*[37] discussed above) can be shortened by the court determining the order in which the evidence is heard, so as to eliminate the specious defences or claims at an early stage. Such cases will most likely be identified if they are not proceeding at a satisfactory rate through the pre-trial processes — evidence that the party owing the money and seeking delay, is achieving its goal.

Where the parties have a marked difference in resources there is obvious potential for an unjust result if the gathering and presentation of facts is left to the parties. The common law adversarial process is predicated on an even struggle and where one side is much weaker, by its own logic, the system is likely to fail. The high value the market places on some counsel suggests that the market accepts that to some extent you can buy a better result by hiring better counsel.[38] The need for a court to take this into account is recognised in some court rules.[39] The imbalance is most marked where one party is unrepresented. Judicial management of these cases should assist in preventing the imbalance in resources or legal skills affecting the result so that it is determined on the merits.

Courts should actively manage expert evidence and have the capacity to appoint their own expert, to work with the parties' experts, to give neutral advice on the opinion issue.[40] If this can be determined early often the parties can agree the

37 (1998) 156 ALR 169 (14 July 1989).

38 See the prisoners' dilemma referred to above. A process where the result can be determined by wealth must be capable of improvement.

39 The overriding objective in the English *Civil Procedure Rules 1998* r 1.1(2)(c)(iv), includes the need to consider the financial position of each party. In Australia, the *Magistrates Court (Civil Division) Rules 1998* (Tas) rr 4(b), 4(d)(2), provides that the Court needs to conduct the litigation in a way that is proportionate to the financial position of the parties.

40 This routinely happens in civil code countries and has been used, mainly in building and accounting disputes in the South Australian Magistrates' Court: Andrew Cannon, 'Courts Using Their Own Experts' (2004) 13(3) *Journal of Judicial Administration* 182.

rest. In the area of medical experts there are already moves in Australia to impose controls over the parties' rights to call expert evidence.[41]

These examples are not intended to be comprehensive. With experience, judicial officers[42] will readily identify cases that will benefit from court management of the gathering and presentation of evidence.

A *Identification of Key Issues*

Where the court exercises control over fact-finding it will first need to ascertain the key issues. Consequent upon that, other issues can be grouped into those that assist in determining the key issues and those necessary only to completing the required findings. German courts generally do not permit evidence from the parties as they expect them to be biased. This illuminates the view that how a party's version of the facts fits with the detail of the surrounding circumstances is often a better indication of their veracity than their demeanour is when giving evidence, or a cross-examination that unmasks them. Indeed, sometimes a skilled cross-examination can make an honest witness so discomforted that they look like a liar.[43] Where there are competing versions, courts should ensure that the parties efficiently gather the detail of the circumstances surrounding the key issues. Much of this detail will be uncontroversial. It may be ascertained from documentary records and it has already been noted that the common law tradition of discovery is good at ascertaining the extent of such records that are relevant to a dispute (and some that are not). In some cases it will be better to bring this evidence to court at the earliest reasonable time, rather than leaving it hidden as a trap to catch the liar at the oral trial, which is the barrister's instinct. The detail may overwhelm the liar, or reveal an honest mistake, without the necessity of the trial.

The collection of evidence of facts that are not expected to assist in the resolution of the key issues should be given less priority and should not be allowed to become the subject of discovery abuse. At the end of the day, when the key issues are decided, any controversy regarding them will often evaporate, either because the party who has to prove them has lost the main issue, or because the other party, having lost the main issue, will limit its contest to serious disputes to minimise costs.

41 For example, Justice David Ipp et al, 'Review of the Law of Negligence' (Final Report, Review Panel, 30 September 2002) <http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf>; New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005). The NSW Supreme Court, *Practice Note No 128 — Single Expert Witnesses*, 18 November 2004 (repealed) imposed single expert witnesses in these cases from 31 January 2005 until 17 August 2005, when NSW Supreme Court, *Practice Note No SC CL 5 — Supreme Court Common Law Division — General Case Management List*, 12 May 2006 replaced it.

42 Including judges, magistrates and tribunal members.

43 This is part of what Langbein calls the *combat effect* implicit in the common law adversarial method which drives each side to distort the evidence of witnesses to prove their case: Langbein, above n 1, 306–11. See also Eggleston, above n 32, 431.

B *Disclosure of Evidence*

Once key issues have been identified, the court should require the parties to disclose the evidence that they have which directly proves those issues or that will assist in doing so. The court should then order the manner and timing of its delivery to the court, for fact-finding purposes. Where witnesses will need to give oral evidence, then consideration should be given to hearing that early in the process. Under the common law method, where detailed witness statements are taken, the risk of coaching is inherent.[44] Requiring key witnesses to give evidence early in the process could lessen the risk of this.[45] It also reduces the risk of evidence becoming very stale, as occurs when all the evidence is delayed until the end of the process. Experienced witnesses, such as police, avoid the problems inherent in this by recording their version at the time and courts then permit them to refresh their memory from these notes. The notes may be an unconsciously or consciously filtered version, but this is difficult to test a year or so later, when the witness responds to cross-examination with the answer that the notes are all he/she by then remembers.[46] Oral fact-finding should be reserved for doing what it is best at: determining factual issues, which, by their nature, depend on oral evidence. When it is needed, consideration should be given to recording it by video and sound as an oral deposition, close to the event, when the witnesses' memories are fresh.[47] If oral evidence is as useful as the common law method implies, it is contradictory to not hear it for sometimes years after the event.

An alternative to early oral evidence is to require early preparation of written statements by key witnesses. It has been noted that the South Australian courts already require plaintiffs in personal injury actions to supply written evidence on oath early in the process. This is a precedent for common law courts requiring witness statements on key issues and they should be prepared to use them as evidence of the facts, subject of course to the right to test them by cross-examination. However, in some cases, the routine preparation and exchange of witness statements may increase expense, without tangible benefits and also, inherent in witness statements is the possibility of them being massaged by the lawyer preparing them. Whether they should be ordered will need to be individually assessed.

44 To protect against this, a German lawyer is ethically bound not to take a witness statement. This can cause some surprises at trial. This is not necessarily a protection against coaching, merely lawyer involvement in it.

45 As can happen in the USA as part of the discovery process. Judith Resnik identifies this as a move in the USA towards the European system of civil procedure: Judith Resnik, 'Migrating, Morphing, *and* Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts'(2004) 1(3) *Journal of Empirical Legal Studies* 783, 790.

46 Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan Press, 1981) 95.

47 This is recommended by the Victorian Law Reform Commission, above n 32, ch 6, 3.8, 414–5.

Techniques to narrow the factual controversy by means other than formal evidence should be considered.[48] Conferences conducted under mediation protocols with key witnesses present can be very effective in covering a large amount of complicated factual ground and reaching agreement on most of it in a relatively short period of time. The areas of factual controversy can be quickly identified and quarantined for further consideration. Courts could use these techniques in complicated factual cases to narrow the area of factual disputes. If these techniques are to be part of the fact-finding process, they either need to be conducted by the judge as a fact-finding process, not mediation, without the protocol of confidentiality,[49] or on a confidential basis by someone other than the judge, who may attempt to mediate, but if that is unsuccessful, they must identify the areas of factual agreement. A collateral benefit of narrowing the disputed factual issues is that it may make it easier for the parties to reach an agreement.

The notion that the plaintiff must prove all of its case and disprove defences raised by the defendant before the defendant is called upon should be abandoned. This often places a party in the position of attempting to guess the evidence that might be called against it and to seek to prove matters that are inherently within the opponent's knowledge. Once the court identifies a key issue, the parties should disclose all the evidence they have on that issue and be required to produce it at any stage that the court thinks is appropriate.[50]

These recommendations, in some cases, will involve a shift of the sole focus of the fact-finding from one continuous oral hearing, to the acceptance of multiple hearings on different days. Some cases managed in this way will need to be heard by the same judge and the judicial role will change as the focus moves away from the climactic oral trial.

VI CHANGES IN THE JUDICIAL ROLE

Defenders of the traditional common law adversarial process place much weight on the importance of procedural fairness, which is said to be essential to the pursuit of justice:

48 Judge Hugh F Landerkin QC in the Canadian context recommends the court taking an active role in the settlement of cases as part of a larger change of the judicial role. This is in order to engage the judge and the parties more directly in a respectful process he styles as 'Judicial Dispute Resolution' (JDR as opposed to ADR): Hugh F Landerkin and Andrew J Pirie, 'Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?' (2003) 83 *Canadian Bar Review* 249.

49 As a general rule, confidential facilitator mediation is inconsistent with the judicial role, which should be conducted in public and should arrive at results in accordance with law: Andrew Cannon, 'What is the Proper Role of Judicial Officers in ADR?' (2002) 13(4) *Australasian Dispute Resolution Journal* 253.

50 Where a party is seeking to prove matters through the opponent's knowledge, rather than doing so by discovery, a German expedient of reversing the onus of proof in product liability and medical negligence cases onto the party with the knowledge should be considered. These precedents are based on an interpretation of the *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 282. This judicial innovation is now contained in a special piece of legislation, the *Produkthaftungsgesetz* (abbreviated as 'ProdHhaftG' or 'PHG').

> ... the values, indeed myths, about the rule of law that have sustained Anglo-American-Australian jurisprudence since Dicey summed them up better than anyone else more than a century ago. These values have to do with the centrality and special character of our courts of law — their indispensable universality, their commitment to a particularly severe conception of procedural and personal detachment, their adversarial process, and their absolute superiority as instruments of justice. [51]

The remoteness of the bench under this process protects it from criticism because the judge does so little. The pre-trial processes are in the hands of the parties and their advisers and they likewise run the trial itself. The evidence and law are summarised by them at the end of the trial and by then the issues to be decided should be clear. The model protects the bench by keeping it aloof from the arena. When injustice is done it is not the individual judge's fault. But judges in the common law system control the practice and procedure of their courts and if they do nothing to address systemic failures it *is* their fault.

In addition to the identified systemic abuses that the common law adversarial process permits and even encourages, there is a further reason why it is flawed. The fairness of the process depends upon the ability of both sides to negotiate it and put their case competently. The rules of pre-trial procedure and the complicated rules of evidence are difficult for the parties to personally comprehend. This means that party control is in fact lawyer control. The process disadvantages parties with unskilled counsel and unrepresented parties. Both are common enough, especially in lower courts. It is interesting to note that the German system, which is relatively informal, insists on legal representation.[52] It is a contradiction for the common law system to maintain intricate processes, dependent on legal expertise for negotiating them, whilst permitting unrepresented parties. Lack of legal aid combined with the increasing cost of litigation, leads to a significant number of unrepresented parties in the courts. Many are defendants, who have not engaged in the system by choice. It is incumbent on common law courts to ensure that their systems are not an inherent obstacle to unrepresented parties. Otherwise, rules justified because they supposedly improve procedural fairness may in fact be procedural injustice, as parties lose as a consequence of their inability to negotiate the process, rather than winning or losing on the merits of their case. It is perhaps ironic that the German example of the civil code system, which insists on legal representation, has features of court control over the delivery of evidence and relative informality, which, if they were adapted to the common law system, would allow the unrepresented party to negotiate the process more easily.

51 Oliver Mendelsohn and Laurence Maher, 'Introduction' in Oliver Mendelsohn and Laurence Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe University Press, 1994) 1.

52 In civil cases the defendant is required to appoint a lawyer and file a written defence: *Zivilprozessordnung* [Code of Civil Procedure] (Germany) §§ 271, 275, 276, 277. There is a court administered legal aid system with a merit test assessed by the court.

VII CONCLUSION

A change to court control over the presentation of evidence in appropriate cases has the potential to create a system with less elaborate rules of process and evidence, which consequently can more directly involve the parties. It is likely that direct involvement by the parties can increase their satisfaction with the fairness of a process.[53] More importantly, inherent in a process that is managed by the court, is an enhanced ability to arrive at an accurate decision on the facts, whether or not the parties have very different resources.

The judge and counsel will need different skills in this changed process. There is the skill of identifying appropriate cases which will benefit from judicial control over the fact-finding process and the skill of identifying key issues and those that will assist in their determination. They will need conciliation skills to conduct conferences to narrow the area of factual dispute. Amongst other new skills, they will also need diary and management abilities.

The protest of Felix Frankfurter is apposite: 'Federal judges are not referees of prize fights, but functionaries of justice.'[54] If judicial officers in common law courts are to be functionaries of justice, they need to be willing to exercise control over the fact-finding process. They should not, as they presently do, abdicate control to the prize fighters, because under our present system the best fighter, not the party in the right, has too good a prospect of winning.

53 There is ample evidence that respectful involvement of parties in processes improves their sense of fairness. See for example the American evidence that party involvement in settlement processes increased their sense of fairness in Kakalik et al, *Just Speedy and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act* (Rand, 1996) vol 4, 42, discussed in Cannon, above n 30, 203; E Allan Lind et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (Rand, 1989) vii–x; E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

54 A minority view in *Johnson v United States,* 333 US 46, 54 (1948).