

REFLECTIONS ON THE JUDICIAL CASE MANAGEMENT EXPERIMENTS OF SIR FRANCIS NEWBOLT*

MICHAEL REYNOLDS†

London School of Economics and Political Science

Abstract

In two earlier articles¹ published in *Amicus Curiae*, a pioneering form of case management was reviewed. Essentially these essays revealed that Sir Francis Newbolt, an Official Referee, was the pioneer in this processual innovation, in his work between 1920 and 1936. His procedural experiments and advances laid the foundation for a distinctive process adopted by the Official Referees' Court which survives to this day, albeit enhanced and adapted to meet the challenges of the digital age. In many respects, and as suggested in the earlier contributions, Newbolt was far ahead of his times, although it is important to appreciate also that he was driven largely by the impact of post-World War I austerity and the economic pressures of the Great Depression which stretched judicial resources. In some respects, there may be an almost historical correlation between his times and today—a period of austerity followed by an unexpected pandemic, exacerbated by interruptions to trading relationships. The pandemic of 1918 is said to have had greater consequences than the World War, imperial preference, protectionism and the depression. The experience of those times may have some relevance to our own. In this article, however, a comparison is drawn between Newbolt's 'Scheme' and the subsequent access to justice reforms in England and Wales, demonstrating in many respects a certain degree of equivalence in the objectives of Lord Woolf and Sir Francis. This may be equated with my experience as a solicitor who practised in the Official Referees Court, which then became the Technology and

* KC 1914; Hon RA; JP, MA, FCS, ARE Hon Professor of Law at the Royal Academy.

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1 *Amicus Curiae*, Series 2, Vol 1, No 2, 165-200 and *Amicus Curiae*, Series 2, Vol 1, No 3, 389-417.

Construction Court. That court inherited the practice derived from Newbolt's experiments and enabled a more efficient form of case management broadly conforming to the objectives of access to justice.

Keywords: case management; official referees; innovative procedure.

[A] REHABILITATION OF PROCESS METHOD

In any justice system the role of procedure is far greater than generally accepted (Woolf 2008: 16).

What the earlier articles on this subject have shown is the development of a rudimentary form of case management, forgotten perhaps to history, but now rediscovered. Sir Francis Newbolt's 'Scheme' was possibly the best means available to him and colleagues at the time for the expedition of cases saving disputants' time and cost. Judge Fay teasingly described the referees' practice as:

the judges operate what might be termed a limited dossier system: in advance of interlocutory proceedings, they expect to be provided with the relevant papers and to familiarise themselves with the issues; in consequence they not infrequently themselves make suggestions with a view to rendering the trial more manageable or shorter or less expensive (Fay 1988: 17).

But he did not tell us if the 'suggestions' were a significant part of the Newbolt Scheme, nor did he describe the Scheme. Essentially earlier contributions discovered that there was more to the referees' function than a purely judicial role. What Newbolt was compelled by circumstances to do was to use other techniques that today might be described as part of an alternative dispute resolution (ADR) culture. Long before Lord Woolf modernized the Rules of the Supreme Court and encouraged greater recognition of informal means of settlement by the judiciary Newbolt had put this modernizing idea into practice. He acted almost as a facilitator, and in something of an entrepreneurial spirit described the Scheme as one that created an atmosphere in interlocutory hearings for settlement. Importantly, these were on procedural applications, usually with solicitors who were keen on saving client money and resolving matters before trial. Newbolt was aware of the need not to overstep the mark, as he had been warned by Lord Birkenhead (Letter from Sir Claude Schuster 1922) against 'pressure from the Bench' determining or at least influencing outcome. However, by enquiry, in an informal atmosphere in chambers, he could lead the solicitors to appreciate the amount of common ground which might well outweigh the differences between

their clients. In this way, subtle encouragement could lead to earlier settlement. The apparent reason for the Scheme was the lengthy state of the referees' lists when Newbolt became a referee and the weakening state of the national economy. Coinciding with Newbolt's appointment was the acquisition of the non-jury list which trebled references to the court in the three years 1919–1921. He refers to that critical fact in his letter to Lord Birkenhead (Letter to Lord Birkenhead 1920) (Newbolt 1923). He reported that this list 'will occupy my Court for a year'. Two cases in that list took 18 months to reach trial. It is clear that what troubled him is probably what also troubled Lord Bowen in writing anonymously to *The Times*: 'how much is it likely to cost and how soon at the latest is the thing likely to be over?' (Bowen to *The Times* 1892) Newbolt's ingenuity was to link cost and time, utilizing the subordination of his office for the benefit of the parties. He did this by means of an alternative process: informal discussions in chambers. He considered settlement to be at the heart of the legal process in most cases. Lord Birkenhead, on the other hand, whilst not denying the benefits of early settlement, was anxious to preserve the litigant's right to a trial, to preserve judicial independence, and to avoid any untoward embarrassment of any presumption of bias.

Be that as it may, there were some undoubted benefits to Newbolt's Scheme in that:

- 1 the referee, being a Circuit Judge and below a High Court judge in ranking, saved High Court judge time and the need for jury trials;
- 2 the referee acted as a facilitator;
- 3 such interlocutory management had a positive effect in terms of efficiency and economy in technically complex factual cases (Reynolds 2008);
- 4 in quantitative terms that up to a quarter of all cases may have utilized the Scheme and that this produced a possible time saving of 50 per cent to 80 per cent of time at trial (Reynolds 2008);
- 5 the Scheme produced a marked effect on caseflow in reducing the backlog of cases, especially when a more 'activist' approach was adopted.

Having concluded that Newbolt was far ahead of his times, in an earlier study (Reynolds 2008) I also considered how the findings might contribute to the corpus of knowledge on dispute resolution—especially in the context of the competing cultures of the traditional adversarial system and informal alternatives, and perhaps most importantly how it might affect our thinking about what a court is or should be and what a judge is or should be.

[B] ON WOOLF AND NEWBOLT: CONTRASTING CASE MANAGEMENT CONCEPTS

What Newbolt created was essentially a new role for the referee at the interlocutory stage of civil proceedings, utilizing the traditional role of a Master as a judge and considering how a summons for directions before a referee ‘would be most beneficial’. This was also inspired by his knowledge of arbitration: ‘how arbitration, with all its convenience and finality can be obtained in the Law Courts for the ordinary Court fees’ (Letter: Newbolt to *The Times* 1930). In essence the Scheme generated a more facilitative and less adversarial approach at the interlocutory stage when it was likely easier to settle, avoiding the further expense of disclosure, expert evidence and the parties becoming more entrenched in argument. In that sense, the Scheme is a display of ‘soft power’ in informal chambers discussions as opposed to ‘hard power’ in a formal courtroom setting (Reynolds 2008). Newbolt’s facilitative approach in his ‘discussions’ was the catalyst for settlement. It is important to reflect that Newbolt arrived at his approach recognizing the importance of early settlement 73 years before the publication of the Heilbron/Hodge Report in 1993. Newbolt’s rudimentary approach to judicial case management coincides with the objective described in Civil Procedure Rules (CPR) 1.4(2)(f)

helping the parties to settle the whole or part of the case.

It also accords with Lord Woolf’s policy, described in chapter 24 of his *Interim Report* (Woolf 1995)

to develop measures which will encourage reasonable and early settlement of proceedings.

Newbolt was *directly* involved in chambers discussions, as he put it: ‘the mere discussion across a table’ (Newbolt 1923: 437). Newbolt thought there was no more effective way of dealing with cases than for the judge to deal with his own summonses (Newbolt 1923: 437). This corresponds with the ‘Woolfian’ concept of the ‘procedural judge’. It also gives the judge greater managerial responsibility with the intention of encouraging a more effective use of court time and hence controlling cost. The Scheme also mirrors Lord Woolf’s concept of promoting settlement—as Lord Woolf stated in chapter 24 of his *Interim Report* (1995):

[1] Case management will facilitate and encourage earlier settlement through earlier identification and determination of issues and tighter timetables.

Importantly, it also corresponds with Lord Woolf’s idea of judicial case management, which he identified as serving:

to encourage settlement of disputes at the earliest appropriate stage: and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing, which is itself of strictly limited duration (Woolf 1995: chapter 24).

This is consistent with Newbolt's concept of expedition and economy which are also reflected in the CPR 1.1(2)(c) and (d) referring to proportionality and cases being conducted 'expeditiously and fairly'.

Newbolt was much before his time in departing from adversarial tradition displayed by an antagonistic approach to litigation which in his *Interim Report* Lord Woolf likened to 'a battlefield where no rules apply'. Whilst a tiny minority of cases will be fought to the bitter end, as Lord Birkenhead observed in his written response to Newbolt in his letter dated 21 February 1922 (Schuster 1922), Newbolt dampened such adversarialism by his Scheme. This was achieved by the informal atmosphere of chambers hearings, for example, by counsel or solicitors appearing before him remaining seated. This practice was more business-like and more conducive to settlement. It should also be borne in mind that much of Newbolt's work and that of the Official Referees' Court at that time dealt mostly with building cases and some commercial matters not the mainstream flow of tort cases that would be heard in the High Court. Their jurisdiction was limited and consequently (without demeaning their importance) the method of handling such processes was more inclined to a less formal atmosphere on applications before the judge.

Lord Woolf described his approach to case management in his *Final Report* (Woolf 1996) as follows:

Chapter 1 Introduction

1.

... Case management includes identifying the issues in the case: summarily disposing of some issues and deciding in which order other issues are to be resolved: fixing timetables for the parties to take particular steps in the case: and limiting disclosure and expert evidence.

He described case management as:

6.

... The aim of case management conferences in multi-track cases is that fewer cases should need to come to a final trial, by encouraging the parties to settle their dispute or to resolve it outside the court system altogether, and that for those cases which do require resolution by the court the issues should be identified at an early stage so that as many of them as possible can be agreed or decided before the trial.

The pre-trial review should then take further steps to ensure that the trial will be shorter and less expensive. Case management hearings will replace, rather than add to the present interlocutory hearings. They should be seen as using time in order to save more time.

This description certainly is empathetic with Newbolt's Scheme as are the conclusions at paragraph 16 of the *Interim Report* (Woolf 1995):

- (a) Encouraging and assisting the parties to settle cases or at least to agree on particular issues;
- (b) Encouraging the use of ADR;
- (c) Identifying at an early stage the key issues which need full trial;
- (d) Summarily disposing of weak cases and hopeless issues;
- (e) Achieving transparency and control of costs.

Whilst neither of Lord Woolf's reports nor the rules go as far as Newbolt's Scheme in relation to 'discussions in chambers', CPR 1.4(f) provides for:

helping the parties to settle the whole or part of the case.

This rule has not been interpreted by the editors of *Civil Procedure* as enabling the judge to discuss settlement with the parties in chambers, but rather that the judge may refer the matter to ADR processes (*Civil Procedure* 2004:1.4.9). It also encourages the parties to exchange settlement offers or dispose of the case summarily. The beauty of the Newbolt approach was that, in some cases, the referee himself was actively encouraging the settlement. This pragmatic approach is in line to some extent with that taken by the District Judges today in their case management practices.² Roberts also reflected on this when he wrote:

So common law courts are today sites where the profoundly different rationalities that ground rule-based adjudication and negotiated agreement coexist and interact (Roberts 2013: 11).

The Scheme and ADR Concepts

Having compared the concept of Newbolt's Scheme with the Lord Woolf concept of case management, we now take a closer look at ADR critiques in the context of Newbolt's Scheme. According to Auerbach, the modern movement for greater use of mediation had its origins in Cleveland, Ohio, in 1913, seven years before Newbolt's experiments (Auerbach 1983: 96-97). That movement originated outside the legal system and gradually evolved in various urban centres in the United States (US). It has been characterized by the 'father' of ADR, Professor Frank Sander (1976: 79) as

² As observed whilst practising in several County Courts.

‘an alternative primary process’ and its more recent origins illuminated by Carrie Menkel-Meadow in her essay ‘Mothers and Fathers of Invention: The Intellectual Founders of ADR’ (Menkel-Meadow 2000). A process which Sander described as:

particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist of a meditational phase, and then, if necessary, an adjudicative one (1976: 79).

Newbolt’s Scheme followed that pattern in his ‘early chambers’ discussions’. If the parties agreed to his suggestion, Newbolt facilitated settlement; if not, he gave directions for trial.

In an important article Sander describes a dispute resolution centre—the famous ‘multi-door courthouse’—which housed different types of dispute resolution process and which, on reflection, encompassed features of Newbolt’s Scheme (Palmer & Roberts 2020: 308). Newbolt did not go as far as Sander because Newbolt was focused on the micro-management procedural aspects of the case whereas Sander could widen the horizon to the macro-management aspect of the court system. Newbolt had to work with a nineteenth-century organization. Such a co-ordinated centre has not evolved in England and Wales, but a range of organizations which promote ADR have evolved and include the Law Society, the Bar Council, the Royal Institution of Chartered Surveyors, the Centre for Effective Dispute Resolution, the Chartered Institute of Arbitrators, and the London Court of International Arbitration.³

The courts have also been involved with ADR with pilot schemes in mediation being run in the Central London County Court, the Mayor’s and City of London Court (Roberts 2013) and in the Technology and Construction Court (TCC) (Reynolds 2008). In 1996 judges in the Central London County Court established a mediation scheme. That scheme was monitored and became the subject of a report by Professor Hazel Genn (Genn 2001). Whilst practitioners were impressed by the commercial acumen of the mediators, they had reservations about the mediators’ legal knowledge and procedural direction. This echoes the concerns of the Judicature Commissioners regarding the role of commercial arbitrators in the 1860s (Reynolds 2020a). Genn also had some concern about ‘arm twisting’ because in some cases mediators used undue pressure on the parties. Judges do not need to use such pressure and have no commercial

³ We might also note that traditional international arbitration institutions such as the International Court of Arbitration (ICC) and the International Centre for Settlement of Investment Disputes (ICSID) are now promoting ICC and ICSID mediation in international investment matters.

incentive as do commercial mediators. Newbolt did not appear to bully or cajole, but gave an honest assessment of the likely outcome of the case in the course of his discussions. Ten years after the Central London County Court scheme, in 2006, the Mayor's and City of London Court initiated a similar scheme which was the subject of Simon Roberts' report (Roberts 2007). He noted the commitment of the District Judges at the court and the lead they took in designing and operating an effective scheme. Michael Palmer and Simon Roberts and others have examined a shifting culture change away from the traditional trial and judgment concept to 'the primary task of sponsoring and managing negotiations' (Palmer & Roberts 2020: 327). This, in a sense, is what Newbolt envisaged by his approach to 'discussions in chambers' and what may appear a more direct business-like approach of judges of the TCC that I experienced in making interim applications—little did I know in those days the origin of that approach. What I also detected was what Palmer and Roberts termed 'a radical reconceptualization in the offing of the courts' functions' (ibid 329), not only encouraged by the judges but by my colleagues enthused with an interest in digital communications⁴ and ADR processes.

The key to reconciling the two approaches is to be found in Newbolt's letter to Lord Birkenhead (Newbolt 1923: 440) dated 13 February 1922 in which he extolled his confidence in the value of 'friendly business discussions over the table'. This had two fundamental aspects: first, encouraging direct discussion as to settlement; and, second, the advice of an independent judicial authority. Newbolt's discussions might be interpreted by what Owen Fiss called 'the anticipation of the outcome of trial' (Fiss 1984: 1076) in that enquiry as to how the case might proceed and the risks of trial might facilitate discussion with benefit to the parties. To an extent such an approach may have been adopted, but it would be wrong for Newbolt (as warned by Lord Birkenhead) to overstep the mark. Birkenhead's concern would be that this might amount to pre-judging without hearing the evidence and legal argument of both sides. What Fiss in his analysis of the problems of settlement in the US system in the late twentieth century was concerned about was disparities in the resources available to the parties: the imbalance as between a worker and a corporation; the 'ability of one party to pass on its costs which would "infect" the bargaining process'. Newbolt's approach and Fiss's concern may be reconciled in that Newbolt's purpose with early directions was

⁴ Espoused by the Lord Chief Justice in a speech on 3 December 2018 on 'Online Courts: The Cutting Edge of Digital Reform' at the First International Forum on Online Courts and more recently by the Master of the Rolls, Sir Geoffrey Vos, at the London School of Economics on 17 June 2021 considering 'a streamlined online dispute resolution process'.

not just to reduce the backlog but to provide opportunity to facilitate settlement and save unnecessary costs.

Again, according to Palmer and Roberts, the courts have now ‘embraced ADR in their novel enthusiasm for sponsoring settlement’ (Palmer & Roberts 2020: 70). Newbolt perceived this a long time ago as motivated by the economics of litigation, yet, according to modern commentators such as Marc Galanter, the US judiciary took a pioneering role in relying on judges as mediators (Galanter 1986: 257-262) including a settlement role (Galanter 1985: 18; Strine 2003: 593). This extends to the Middlesex (Cambridge) (MDDC) Superior Court near Boston, Massachusetts (Stedman 1996), a novel multi-door courthouse facility with a variety of dispute resolution processes available. Whilst this court model was based on different dispute resolution process applications in a multidisciplinary setting, it may be that the innovations now encouraged by the senior judiciary accelerated by the SARS-CoV-2 pandemic towards a universal acceptance of digitalization. This may enhance both the court-centric view taken by Professor Crespo (Palmer 2014), so people know where to obtain a legal remedy and enlarge the institutional scope of ADR within and without the multi-door courthouse concept. In his article Galanter states:

Most American judges participate to some extent in the settlement of some of the cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work (1986: 257-258).

He goes on to describe the conversion of American judges to this approach, noting the early experiments of Mr Justice Edgar J Lauer of the Municipal Court of New York in the mid-1920s (Palmer & Roberts 2020: 258) just after Newbolt commenced his Scheme. When one examines Lauer’s approach, one is struck by the similarity to that of Newbolt (Lauer 1928):

to call counsel to the bench before me and interrogate them respecting the nature of the case and the prospect of adjusting differences. I have secured many settlements without the exercise of any pressure on the parties to reach settlement

These complimentary developments on both sides of the Atlantic may have been entirely coincidental, for there is no evidence that Lauer had heard of Newbolt’s Scheme.

More recently Galanter described what he termed ‘extra-judicial processes’ which lead to non-judicial outcomes (Palmer & Roberts 2020: 248). These resemble the results of some Newbolt ‘experiments’ but, more importantly, to quote Galanter:

if settlements are good, it is also good that the judge actively participates in bringing them about. He should do this not only by his management of the court ... but also by acting as a mediator (Galanter 1986: 261; also Palmer & Roberts 2020: 248).

We must be very careful, however, to distinguish what Galanter concludes from what Newbolt may have done. Newbolt would not have been acting in the capacity of a mediator but exercising some of the functional elements of a mediator. I would suggest that Lauer's description is nearer the mark than Galanter's, but the objective of such an approach may be the same.

Again, as Palmer and Roberts opine quoting Galanter:

As a result, 'cases that once might have been settled by negotiation between opposing counsel are now settled with the participation of the judge. We have moved from dyadic to mediated bargaining' (Galanter 1986: 262).

Newbolt did not quite take that stance but by his 'friendly discussions in chambers', as he liked to call them, he was able to enable the solicitors to appreciate the gravity of their client's predicament and with that realization the solicitors were well aware of the costs and other risk consequences for their clients.

In this sense it seems that the Newbolt philosophy is now part of the judicial process in the US save that Newbolt did not perceive his role as that of a mediator. When Newbolt used an accountant expert in a case, he noted that this was not the role of an

arbitrator or conciliator or concession, but an intelligent use of a court of justice by businessmen (1923: 438-439).

What Newbolt did was to enable settlement. This did not displace the adjudication process with a negotiation process as perhaps has been the case in the US (Galanter 1985:12-15). Remarkably, Newbolt's Scheme encompassed the philosophy of both the 'access to justice' and ADR movements (Reynolds 2008). We may consider the first as encompassing what Palmer and Roberts describe as:

the contemporary expression of primordial concerns about the costs, delays and general inaccessibility of adjudication, and called for quicker, cheaper, more readily available judgement with procedural informality as its hallmark (Palmer & Roberts 2020: 2020: 51-52).

Newbolt's Scheme satisfied these concerns because of Newbolt's anxiety about costs and delay on the one hand, and the productive results of his informal discussions with the parties and their legal representatives on the other. Another remarkable facet of Newbolt's Scheme was its

creativity. Indeed, we might argue that his Scheme anticipated Derek Bok's prediction that:

Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperative and design mechanisms that allow it to flourish, they will not be at the centre of the most creative social experiments of our time (Bok 1983: 582-583).

[C] RECONCILING CRITIQUES

Having contrasted these competing paradigms, we consider the critiques of ADR that are relevant to this study. Laura Nader and Richard Abel suggest that ADR is a way of institutionalizing settlement (Abel 1982; Nader 2002: 162; Roberts & Palmer 2005: 76). But ADR is essentially an alternative set of processes that the parties can agree to employ in the resolution of their dispute; they are free to use this alternative to the court but they are not prevented from using the court. Abel takes the view that the state neutralizes

conflict by responding to grievances in ways that inhibit that transformation into a series of challenges to the domination of State and capital (Abel 1982: 280-281).

It would appear from cases such as *Bickerton v Northwest Metropolitan Hospital Board* (1970: 989) that in England and Wales our highest court is not averse to challenging institutions in the public interest. Abel also says that ADR is anti-normative (Abel 1982: 297-298). Fiss goes further, saying that (1984: 1076):

In truth, however settlement is also a function of the resources available to each party to finance the litigation, and these resources are frequently distributed unequally.

That being the case, Newbolt's Scheme would appear to offer a better way because the judge may be able to assess what process is more effectively tailored to the financial resources of the parties. If that is right, then it suggests that Newbolt considered that he, as a judge, knowing the resources of the court, would be in a position to suggest, as a matter of practicality and common sense, the most appropriate *fora*.

However, Newbolt needed to bear in mind Birkenhead's warning that judges may not impose settlement: instead, settlement must be a consensual process if it is to be allowed to determine the outcome. For this reason Abel's deeper concern that the parties will be bullied by the state

into accepting an unjust compromise may have some justification. Abel argues that ADR is an extension of state authority (Abel 1982: 270-271, 275). But here that argument is met by the incorporation of the Scheme within the court process, and whilst the referee was a state official he acted in the wider public interest as a public servant. The Scheme also resists the critique of Nader (2002: 144) who argued that the 'deficiencies of litigation have been falsely portrayed' and her critique characterized by Palmer and Roberts (2020: 68) in the following terms:

It began to look very much as if ADR were a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion.

Newbolt knew there was certainly no 'imaginary litigation explosion'; it was real. The transfer of the non-jury list and the exponential growth of litigation after the Great War and the 1918-1919 pandemic had placed enormous pressure on the referees. The same was quite true of the necessity for Lord Woolf's enquiry, particularly in relation to the referees in the 1980s where the judge's diary was quadruple booked causing consequent delay in getting a trial date. For the construction industry it served this was especially frustrating and financially burdensome.

Newbolt's Scheme is consistent with Abel's concern that 'informal institutions deprive grievants of substantive rights' and anti-normative processes that 'urge the parties to compromise' (Abel 1982: 297-298.) But compromise is often an ingredient of judgment. The court may accept only particular submissions and evidence. Cases are seldom clear-cut: there are innumerable shades of grey on narrow issues of law and fact. Parties may argue they have rights, when no right truly exists. Often the remedy (usually monetary compensation) may not satisfy the parties, but then there is a limit to what the state can do. In the triadic structure of the court and the parties sometimes it is the judge who must invent the formula which will resolve the dispute. In so doing it may reconcile the competing philosophies of an adversarial system and facilitation of settlement.

[D] A UTOPIAN DREAM OR NECESSITY?

Having considered some of the critiques of ADR we can finally turn to the critical question underlying this study. This was identified in Roberts' essay: 'Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship' (Roberts 1993: 452) in which he asked that fundamental question of whether we should see ADR 'as part of the process of

adjudication, radically transferring it, even making us re-examine our basic understandings of what a “court” is?’ We may surmise that Newbolt would have responded to Roberts’ question enthusiastically and have redefined the judge’s role to encompass that of a facilitator. This resonates with Dean Roscoe Pound’s notion about the judicial role (Pound 1913: 319):

a judge who represents both parties and the law, and a procedure which will permit him to do so effectively.

What may be difficult to reconcile in this digital age is the intermingling of the judicial role and the needs of the twenty-first century where there is demand for a more expedient disputes resolution process. Newbolt’s ‘discussions in chambers’ were revolutionary at the time, just as the invention of the referee’s office was revolutionary when it was created (Reynolds 2020b). What happened was that through facilitation Newbolt was able to narrow issues to the point that in some cases they settled: his pro-active form of micro-case management thus often encouraged and accelerated settlement.

In suggesting such unorthodox accommodation, we must always remember Birkenhead’s warning to Newbolt, which was echoed by Roberts (1995: 457) that there need not be ‘active involvement of the court in sponsoring settlement’.

This challenge has to be met if the courts are to continue to enjoy public respect and if certainty of the law is to prevail, for the key questions of our times are, first, what is a court, but also in this context what should a court be or in more practical terms how can the judge’s role be modernized to keep pace with social change? These are critical questions of civil justice that emerge. What may be required are displays of ‘soft power’ or the facilitative process suggested by the Scheme which, to use Martin Shapiro’s words, is not: ‘an antithesis to judging but rather a component part in judging’ (Shapiro 1981). Newbolt’s ‘discussions in chambers’ reminds us of Shapiro’s discussion of the prototype of courts where the parties and the judge:

Speak on until arriving at some verbal formulation of the law synthesised from their various versions (Shapiro 1981: 13).

It is not suggested that the judge engineers settlement, but that the parties realize that the outcome at trial is unlikely to be different. Often that is the advice the parties have received from counsel and are persuaded, but, in some cases, it may take a judge. This is not usurping the lawyer’s role nor undermining judicial independence in cases where the outcome is clear and inevitable provided the judge has sufficient information

before him or her and the parties' probable outcomes converge. Such intervention may produce a consequent reduction of uncertainty and hasten settlement (Schuck 1986: 337).

Whether the judiciary can change its culture is another matter and is a challenge identified by Adrian Zuckerman who wrote:

unless all levels of the judiciary can be persuaded to embrace the overriding objective that incorporates the requirements of proportionality and expedition, as well as of the need to do justice on the merits, the entire CPR system may become a colossal wreck (Zuckerman: 2006).

Zuckerman's point is in harmony with Newbolt's objectives outlined in his seminal article (Newbolt 1923: 440). So far the 'colossal wreck' has not transpired but the legal vessel has been sailing in some turbulent waters of late when, according to Briggs LCJ, there is a need

in time of radical impending change, to focus on aspects of that which we should cherish, so that they, and the underlying causes of them, are not put at risk in the revolution upon which we are about to embark (Briggs 2015).

In his important (interim) report on civil justice Lord Briggs pointed to the excellence of the Rolls Building housing the TCC and the Commercial Court and their contribution to civil justice and the economy estimated at more than £3 billion per annum (Briggs 2015: 49). He also pointed to a number of other factors: a serious backlog and work overload in the Court of Appeal (ibid 58-61); no reasonable access to justice for people of low incomes (ibid 51); a culture of procedural complexity 'designed by lawyers for use by lawyers' (ibid); 'proportionally high cost of legal representation and advice ... attributed to the current project structure and procedure of the civil courts' (ibid 55); and 'that overall the system was too complex for laymen' (ibid 52-54).

In his subsequent *Final Report* Lord Briggs identified the following factors: the lack of adequate access to justice for ordinary individuals and small businesses due to excessive costs; lawyer's culture and procedure of the civil courts making litigation without lawyers impracticable; inefficiencies arising from 'the continuing tyranny of paper' coupled with the use of obsolete and inadequate IT facilities; and unacceptable delays in the Court of Appeal caused by excessive workload and weakness in the processes for enforcement of judgments and orders (Briggs 2016).

It is significant that Lord Briggs noted in his *Interim Report* that the availability of an early case management conference (CMC) in cases in the multitrack, both in the County Court and the High Court, was an

important factor in the timely and efficient management of civil litigation (Briggs 2015: 59). This supports both Lord Woolf's approach to having a CMC as well as Newbolt's approach. On the other hand, the fusion of costs management and case management increased the burden on judges and caused delay (Briggs 2015: 60) The predominant inclination of some case management judges to case manage single-mindedly for trial, rather than for resolution by other means, may be another issue identified by Lord Briggs which would not accord with Newbolt's Scheme.

The conclusion that Lord Briggs reached in 2015 was that: 'Lord Woolf's expectation of a rise in the status of civil justice is yet to be fully achieved.' (Briggs 2015: 64) In his *Final Report*, Lord Briggs considered that the combination of digitalization and rationalization of court space in fewer, larger, hearing centres and more business centres offered unprecedented opportunities for beneficial reform, rather than merely saving money, although that was an important objective (Briggs 2015: 33). In addition, he welcomed the utility of an Online Court, a creation of the digital age. Would Newbolt have welcomed it? Who can tell? He would be in favour of a more effective and convenient system no doubt, but he would like most judges have some scepticism as to its effectiveness in highly complex cases, especially matters of fact where witness examination is required.⁵

If we take Lord Briggs's reports as some reflection of the reforms advanced by Lord Woolf, we may not have a 'colossal wreck', but the ship may not yet be quite watertight. Having considered Zuckerman's anxieties about the civil justice reforms, it is sobering to recall Michael Zander's reservations in his thought-provoking paper: 'Why Woolf's Reforms Should Be Rejected' (1995: 80-95). His essential concern was that Lord Woolf's *Interim Report* was not properly structured in terms of an 'historical perspective, a rounded in-depth analysis of the problems, a weighing of options and a conclusion' (ibid 79). Lord Woolf said that he and his team had carried out 'what is suggested to have been the most extensive and thorough examination which has ever taken place into the civil justice system' (Woolf 2008: 331). One of Zander's major criticisms was on the subject which forms the basis of my work in this area of civil justice; the efficiency of case management (Zander 1995: 90). He considered that judicial case management would only operate in 'a small proportion of cases' and was therefore an innovation not worth having (ibid). This study, however, suggests that the Scheme operated in up to a third of all referee cases. Zander was perhaps on firmer ground in his

⁵ In his third Hamlyn Lecture on advocacy, 'The Future of Advocacy', Lord Pannick expressed his reservations as to Online Courts in relation to examination of witnesses (Webinar, Faculty of Law, University of Oxford, 11 November 2021).

recognition of the need to get a grip on cases that were ‘dragging’ (Zander 1997). Zander’s concern was perhaps met by Lord Woolf’s understanding of what case management would achieve (Woolf 2008: 339):

It is the court providing a forum in which lawyers and the judge can work out the most satisfactory way a case can be dealt with and the judge then supervising the progress to trial in accordance with that programme. What the judge will prevent is parties not fulfilling their responsibilities, acting unfairly to a weaker party or acting unreasonably.

A study by James Kakalik and others (1997) concluded:

Four case management procedures showed consistent statistically significant effects on time to disposition: (1) early judicial management; (2) setting the trial schedule early; (3) reducing time to discovery cut off; and (4) having litigants at or available on the telephone for settlement conferences.

Kakalik’s conclusions support the findings of the Reynolds 2008 study in terms of the value of early judicial management and settlement discussions. The US may provide further support for the Scheme approach, perhaps most notably in the role of the Settlement Master (Silberman 1989: 2131-2178). The Settlement Master (like the early referees) is empowered to enquire and report, as well as to facilitate settlement which Newbolt devised. Silberman has suggested that the role of the Settlement Master in the *Agent Orange* case was successful because the Master acted with judicial powers and knew the views of the judge. That particular Master was a judicial agent, just perhaps as referees were intended to be when they were created by the Judicature Commissioners to enquire and report to the High Court judge.

[E] ARIADNE’S THREAD

Reconciling the differing approaches to resolving disputes is a conundrum to which there can be no complete answer. It is a matter of dealing with each case in an appropriate and proportionate way according to the merits. But it is to unravel Ariadne’s thread in terms of the essential question posed by Roberts. One may conclude that in certain cases a rudimentary system of case management was effective particularly where the judge was more interventionist. Such a supposition tends to support, from an historical perspective, the former Head of the TCC Jackson J (as he then was) who stated that case management ‘is the principal service which the TCC provides to court users’ and that one of the twin objectives of the TCC judges was: ‘facilitating settlement where this is possible’ (Jackson 2007: 13). In that report Jackson J referred to research being undertaken

at King's College London to identify the types of cases in which mediation most commonly leads to settlement and the stage in the action at which mediation is most effective (Jackson 2007: 21). In a King's College London survey it was reported that mediations in TCC cases were being undertaken by a process involving several stages: pleadings, disclosure, payment in and shortly before trial (Hudson-Tyremen 2008: 79). In a report published by the Centre of Construction Law and Dispute Resolution (Gould & Ors: 2010) reference is made to a scheme suggested by TCC Judge Toulmin whereby the parties could attend a confidential, voluntary and non-binding dispute resolution process to attempt an amicable resolution. The judge hearing the case could offer a Court Settlement Conference. This process is private and confidential and documents are privileged. If the conference is successful then a Court Settlement Agreement could be made and the action terminated. If a settlement could not be reached, then the judge may send the parties an assessment, setting out their views on the dispute—including on the parties' prospects of success on individual issues, the likely outcome of the case and what an appropriate settlement would be. The judge would then recuse him or herself and the action would be transferred to another judge. This formalizes what Newbolt attempted on more informal basis.

The model of Newbolt's Scheme has wider implications for the judiciary in certain cases. Being informal and *ad hoc* may have a benefit so that the parties do not feel that such 'discussions in chambers' are mandatory or that they are pressurized unduly. Any untoward 'arm twisting' would be an abuse of the judicial office (Genn 2007). The Genn study reveals that in 18 per cent of cases the parties enter into mediation because the judge advised them to do so (Genn 2007: 155). Genn also noted 'a significant tendency for more judicial encouragement from 25 per cent of the cases compared to 11 per cent in 1998' (Genn 2007: 156). This is a healthy sign in harmony with Newbolt's philosophy which Genn also indirectly reflects (Genn 1998). The fundamental question posed by Roberts as to what a court is may be answered to some extent by the Newbolt Scheme. This not only involves a change of culture but a radical reappraisal of the judge's role. There is some evidence from the Vice Chancellor of the Delaware Court of Chancery that Newbolt's interpretation of his function remains valid. In his essay Vice Chancellor Strine writes:

the active involvement of a judge in the process of helping parties to business disputes resolve their conflicts consensually (particularly ones that arose from incomplete contracting in the first instance) seems likely to be of economic value and to have social utility. By providing parties with the opportunity to shape their own solutions to litigable controversies with the input of an experienced business

judge, this mechanism should result in more efficient outcomes at less risk and expense than awaiting an up-or-down judgment on the merits (Strine 2003: 593).

We may be moving in this direction. But there is something else of importance here, a factor Newbolt recognized as did the Judicature Commission: user requirements. Lord Woolf also recognized society's demands of the judiciary:

just as the common law has evolved to meet the changing requirements of society, so should the role of the common law judge. It is of critical importance to society that the judicial role evolves in this way (Woolf 2008: 193).

My earlier study (Reynolds 2008) demonstrated how the referees' office evolved and, importantly, the manner in which Newbolt was pro-active in facilitating settlement at an early stage. This again fits the characterization suggested by Lord Woolf:

Where litigation in the courts is unavoidable, then the judges need to be proactive in promoting settlement, the control of costs and the expeditious resolution of the dispute (Woolf 2008: 195).

In this sense, as Galanter (1986: 262) says: 'we have moved from dyadic to mediated bargaining' but also, as Judith Resnick identified (Resnick 1982: 374-448), a shift from the traditional judicial model to a managerial style where in this case the court assumes more control of the process overall. In that respect Newbolt was the pioneer. Perhaps in this sense Newbolt may have been a pioneer in what is termed judicial dispute resolution. In their paper de Hoon and Verbeck consider what judges do and consider the barriers in becoming a 'new judge' (de Hoon & Verbeck 2014: 27). This also accords with the objectives of access to justice and the continuing trend to encourage settlement through judicial interaction as Tania Sourdin and Archie Zarinski have stated:

the work undertaken by judges to encourage, direct or engage in settlement processes for civil litigation, including judicial, conciliation and mediation (Sourdin & Zarinski 2013: 2).

Their approach combines creativity in terms of content, procedural justice by promoting proactivity in terms of process, and interactional justice by promoting respect among parties in terms of their interaction (Roberge 2013). Again we may reflect that Newbolt's Scheme, embryonic as it may seem in today's hi-tech, world met such criteria. But there can be little doubt that the multi-tasking judge of today effecting case management and facilitating settlement by his/her interaction with the parties follows Newbolt's rubric. Thus, it would appear that the judge's role in relation to encouraging settlement must be considered in the context of

their case management powers. Whilst recognizing a culture shift towards more judicial control of the proceedings there is more awareness of the need to facilitate settlement through party participation in chambers-like discussions or through mediation. The lesson of the Scheme suggests a triadic configuration and the interaction of the judge and the parties presents an effective means for earlier resolution avoiding trial. There can be little doubt that the Scheme increased the caseflow and saved time and costs aided by a facilitative and a more activist approach. Such an approach may in certain cases encourage such an activist role in order to avoid the danger foreseen by Zuckerman (2006: 287). The transition to online courts supported by the senior judiciary may also result in a more inquisitorial stance where litigants in person (LIPs) are involved.

This essay and my earlier two articles have described the referee's transition from a nineteenth-century judicial officer to a modern-like facilitator of settlement in certain cases. In many ways this study supports what Melvin Eisenberg said (1976: 637):

the principal area of modern legalised dispute settlement intimately intermixes elements of mediation and dichotomous solution, consent and judicial imposition.

What is suggested here is merely an extension of those principles outlined by the Judicature Commissioners a century and a half ago. If Lord Woolf's objectives and the aspirations of Newbolt are to be achieved in line with what Lord Devlin suggested,⁶ further encouragement along such lines may be required. It is also upon the argument of Lord Devlin that we may agree that something is better than nothing when it comes to providing Online Court services which may be less expensive for litigants. It is always arguable, however, that the price of justice should not be a bar to the quality of justice but this has defied reformers down the ages. How to reconcile both ideals (Colleen 2008: 98) is to try and unravel Ariadne's thread. It may involve an enhanced sensitivity towards settlement but also the appropriate use of digitalization. So far as settlement is concerned, Roberts' report on the Mayor's and City of London Court (Roberts 2013) suggested that the District Judges may have already unravelled that thread to some extent, but an even greater challenge awaits the judiciary, lawyers and litigants with the advent of what has been called 'the fourth industrial revolution'.

⁶ Lord Woolf referred to a broadcast by Lord Devlin in his *Interim Report* (1995). He quoted Lord Devlin who said: 'Is it right to cling to a system that offers perfection for the few and nothing at all for the many?' This was also referred to in *Gregory and Another v Turner and Another* [2003] 2 All ER 1114.

[F] A BRAVE NEW WORLD

In a very thought-provoking article, Carrie Menkel-Meadow questioned whether a decision given automatically online by artificial intelligence will be effective. To illustrate the issue she said that her claim against an airline was simply ‘what the tick boxes or company policy allowed’ (Menkel-Meadow 2016). She also questioned ‘Where in the tick boxes and the email communications will there be room to brainstorm and create a different solution?’ She accepts that in certain cases, such a process may work, but questioned whether it was what was envisaged by mediation and negotiation working in ‘the shadow of the law’. Going further in her reflections at the online dispute resolution (ODR) conference in The Hague in 2016 she referred to the remarks of Lord Justice Fulford that ‘virtual courts’ would replace physical courts so that consumers and complainants would access online on a smartphone or in the local library. While this may indeed bring justice at less cost it becomes impersonal and infers a production-line mentality. This may well suit such organizations as eBay and Amazon but may not suit a complex engineering dispute in the TCC. On the other hand, Colin Rule made some telling points in his response to Professor Menkel-Meadow (Rule 2016: 8). He argued that you cannot separate ODR from ADR because lawyers practice ODR in some form, whether on the telephone, by email, using a spreadsheet, or by using Skype or FaceTime. It must be said that during the pandemic many arbitrators transitioned to hearings and conferences on Teams, Zoom and Skype quite seamlessly. Rule also argues that technology is no stranger to the medical profession for without technology doctors would not be able to perform as they do (Rule 2016: 8).

Rule makes a strong argument in favour of expanding ODR, utilizing the model of the multi-door courthouse. He visualizes a court not just with doors for adjudication, arbitration or conciliation, but possibly hundreds to fit varied dispute requirements (Rule 2016: 9). Perhaps his most telling point is his comment that ‘if the cost of these procedural protections makes redress processes inaccessible to parties, I believe it is worth rethinking their necessity in some contexts’ (Rule 2016: 10). This is a strong argument for those who support the access to justice movement and it is well to remind ourselves of what André Tunc referred to in his contribution to Mauro Cappelletti and Bryant Garth in *Access to Justice in the Welfare State* (Cappelletti & Garth 1981: 352) regarding the pursuit of a justice system that was ‘cheap in terms of cost, not of quality’ but warning that ‘these goals may not be compatible’. That is the dilemma that confronts us now and has always confronted those who wish to make the system more accessible to the poor. Thus it may be that

the development of ODR and Online Courts may alleviate some of the distress caused by the lack of legal aid funding.

In her Birkenhead lecture, ‘Online Courts and the Future of Justice’ Dame Hazel Genn (2017) focused on the societal aspects of the public justice system that cannot be ignored in the drive towards digitalization. She rightly placed concern on our traditional rule of law values and procedures which underpin public confidence and trust. The question that may worry us is her remark that computers ‘can outperform human experts using “brute force processing”’ (Susskind 2015: 45). Thus, computer software is designed to make decisions and supplant decisions. Whilst this has excellent advantages in medical science regarding diagnosis and treatment (Genn 2017: 3) and in many other scientific areas for a litigant or disputant, it may be a leap of faith. For how many of them are computer literate? How many LIPs are?

These issues present problems, but we must ask ourselves what is the greater injustice: not providing what can be provided or making no provision at all? This is no Utopia and times are difficult, but if reasonable means are there it is worth a try. Indeed, Genn points to the many advantages that technology can now provide (Genn 2017: 3). Whilst this will not be an easy transition in the civil, family and tribunal cases and will require robust document and case management systems as promised in the Joint Vision Statement 2016,⁷ it may be possible with the investment the government has promised. This will necessitate training for judicial officers who may be dealing with these cases and serious consideration of the rules that will apply. Maintaining ethical standards and ensuring fairness will be paramount. However, if the system adopts that of the British Columbia Civil Resolution Tribunal which was considered by the Briggs Civil Court Structure Review similar to the Susskind Report (2015), it would entail a three-stage ODR process of an automated ‘triage’ stage, a dispute resolution stage and a determination stage (if the case is not settled) and would not be without difficulty. But is there a choice? Joshua Rosenberg who has followed these developments concluded that it will take time and, whilst there has been advancement, it seems there is little choice, as one judge told him: ‘we have to do this; it has got to be made to work’ (Rosenberg 2019). We are not there yet, but it seems it is getting somewhere subject to the serious questions that Genn raises (2017: 15).

⁷ [Transforming Our Justice System](#) by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals.

Perhaps we are transitioning to a new dimension of a technological revolution necessitating a convergence of processual innovation in the court system with the advent of Online Courts and streamlined case management. Perhaps the words of Lord Devlin echoed by Lord Woolf can only be achieved by this means given current stringencies. Whilst many lawyers and arbitrators have considerable experience in online hearings and ‘documents only’ cases, lessons may be learned from them. However, an essential characteristic of a public justice system—fundamental to the English legal system—is openness and public accessibility to the court. That would be technically a challenge in limited multilateral exchanges online. On the other hand, taking the example of the Supreme Court, they could be televised or made accessible online. But some may have reservations that a foreign British Columbia model can be cut and pasted onto our system *in toto*. Complex commercial, construction and engineering and international litigation—with all the complexities and witnesses of fact, and experts etc that may be required—may not easily be accommodated. Whilst matters of law can be debated in such *fora*, factual evidence is a problem. Those I have served with on national and international arbitration tribunals might agree.

In the final analysis, we should ask: is there any choice? Probably not is my answer. Learning from Newbolt’s experience, he had little room to manoeuvre: too few referees, increasing backlog, low status in the judicial ranking, against a backdrop of a global pandemic of so-called Spanish flu (Spinney 2018), the aftermath of the ‘war to end all wars’ and, in the 1930s, the Great Depression. Today we have emerged from one period of austerity to be followed by another period of economic uncertainty compounded by another pandemic and secession from the European Union amidst rising international tensions across the globe now exacerbated by a European War with serious consequent economic consequences. Practically speaking, there is little choice, if indeed any.

About the author

Michael Reynolds

Dr Michael Reynolds is a Solicitor and Chartered Arbitrator. He is also a senior lecturer at the University of East London and BPP University College London as well as a Visiting Senior Research Fellow at the Department of International Relations at the LSE. His latest book Instruments of Peacemaking (Hart 2021) explores the contribution of international jurists to dispute resolution between states 1870-1914.

Email: drmichaelreynolds@gmail.com

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