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# JUDICIAL EXPERIMENTS IN CASEFLOW MANAGEMENT 1920-1970

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## Abstract

This article explores the evolution of a subordinate judicial office of the Official Referee which was the revolutionary creation of the Judicature Commission of 1872. What is described here is the innovation and evolution of a rudimentary form of case management more than 70 years before its formal introduction in the English courts under the Civil Procedure Rules. This article considers evidence of that evolution as well as the innovations and experiments of judges ahead of their time: Sir Francis Newbolt and his successor Official Referees. It argues that the consensual and business-like approach adopted by Newbolt and others facilitated earlier settlement by means of judicial encouragement during discussions in chambers at an early interlocutory stage. It considers the extent to which Newbolt's Scheme focused on what Marc Galanter has described as 'quality of outcome' and attempts to place this study in the context of the approach taken by Galanter. Such study would not be complete without reference to the work of the late Simon Roberts, which saw civil courts as being transformed into instruments of structured negotiation.

**Keywords:** Official Referee, judges, micro-caseflow management, Newbolt's Scheme, procedure, backlog, rules

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## [A] INTRODUCTION

In an earlier article published in *Amicus Curiae* (Reynolds 2020), I examined the extent to which the referees adopted the old Chancery practice of a reference to the master or chief clerk, or to an arbitrator under the Common Law Procedure Act 1854, a substitute for a lay jury.

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This Chancery practice was invented to overcome the deficiency in the Common Law Procedure Act 1854 of non-compulsory referral and needless expense of referral back to the court to correct erroneous awards of commercial arbitrators. The essential causes that facilitated a rudimentary form of caseflow management were the outmoded trial system, the divergent remedies in different courts of separate jurisdiction, and the backlog of cases, some of which involved complex factual matters of a scientific or technical nature. The nature of such cases, born of the industrial revolution, took precious time which busy High Court judges suffering increasing workloads did not have. Even when the referees were in place, time was not on their side, and it became necessary for them to adopt a more flexible and informal process in some areas. Investigating that era and those methods is difficult, but even with the remnants of surviving records it is possible to present some evidence of a revolutionary process.<sup>2</sup>

In order to meet this challenge, a leading referee, Sir Francis Newbolt,<sup>3</sup> invented what I might term as his ‘Scheme’. Some elements of it may be identified from his article *Expedition and Economy in Litigation* (Newbolt 1923) and from his reports to the Lord Chancellor. The purpose of this paper is to explore the nature and significance of that Scheme. It survived Newbolt and evolved into the practice and procedures of the Technology and Construction Court today.

In this Scheme there are important elements I recognize as an inception of micro-caseflow management. These elements may be identified in summary as:

- a) special procedures in chambers enabling informal referee resolution and early settlement;
- b) judicial encouragement at various stages of the process to effect settlement;
- c) the use of a single joint expert/court expert;

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<sup>2</sup> As with all historiography, existing evidence of times past is not so comprehensive that we can be certain that all cases were recorded or catalogued, or that those recorded represented all the cases tried. The Lord Chancellor’s Office only retained samples of Minute Books and Notebooks for reasons of space and cost.

<sup>3</sup> KC 1914; Hon RA; JP, MA, FCS, ARE Hon Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court and Out of Court*. Official Referee 1920-1936. He was educated at Clifton, and later at Balliol College, Oxford, where he read natural science (chemistry) obtaining honours in 1887. Newbolt read law with Sir Thomas Wilkes Chitty, called to the Bar by the Inner Temple in 1890 and joined the Western Circuit. He remained in Wilkes Chitty’s Chambers for 10 years but did not enjoy an extensive practice. Newbolt took Silk in 1914. While at the Bar he continued his interest in science and gave over 1,000 experimental science lectures in board schools. He became a referee after Sir Henry Verrey’s resignation in 1920. He was the author of a number of books in law, art and literature.

- d) the implementation of a proportionate approach to costs so that the costs of the case should bear some reasonable relationship to the value of the item in dispute;
- e) the innovation of special forms of submission such as a Referees' Schedule;
- f) the formulation of preliminary issues or questions for the court; and
- g) the facilitation of a more convenient and economic place for the hearing and judicial attendances to view works on site.

The primary reason why Newbolt exercised such innovative powers, usually with the consent of both parties, was principally to achieve expedition and economy in litigation. That was his objective and that is what he confirmed to Lord Birkenhead, and what is described in his article in the *Law Quarterly Review* (Newbolt 1923: 427-435). There is a certain symmetry between Newbolt's and the Judicature Commissioners<sup>4</sup> objectives because Newbolt understood their idea of ways to promote the more effective and efficient conduct of court business at micromanagement level. The Commissioners' objective was to reconcile the rival systems of Common Law and Equity and to resolve technically complex cases where a jury of laymen had difficulty. It was 'to provide a system of tribunals adapted to the trial of all classes of cases that were *capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried*' (Parliamentary Papers 1869: 13). At the core of this was 'the more speedy economical and satisfactory despatch of the judicial business transacted by the courts' (Newbolt 1923: 435).

In addition to the seven elements of caseflow management identified above from Newbolt's work, he was also concerned that the case be referred as soon as possible. The earlier the case was considered for directions by the referee the better (Newbolt 1923: 435-437). It was also his view that the trial judge should take his own summonses for directions, as was the referees' practice. It was that unique practice that

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<sup>4</sup> In September 1867 Queen Victoria appointed the Judicature Commissioners. They included: Lord Justice Cairns of the Court of Appeal in Chancery; Sir James Wilde, a judge of the Court of Probate, Divorce and Matrimonial Causes; Sir William Page Wood, a Vice-Chancellor; Sir Colin Blackburn, a judge of the Court of Queen's Bench; Sir Montague Smith, a judge of the Court of Common Pleas; Sir John Karlake, Attorney General; William Jones, Vice Chancellor of the County Palatine of Lancaster; Henry Rothey, Registrar of the High Court of Admiralty; Sir William Phillimore, a judge of the High Court of Admiralty; Sir Robert Collier and Sir John Duke Coleridge as Solicitor General appointed as Commissioners on 25 January 1869. They were appointed to investigate the operation of the constitution of the courts in England and Wales; the separation and division of jurisdictions between the various courts at macro level; and the distribution and transaction of judicial business of the courts, and courts in chambers at micro level. Additionally, the Commission considered whether there were sufficient judges and the position of juries.

gave Newbolt his chance to exploit his scheme of efficiency and economy. It was at the first directions hearing in chambers where 'mere discussions across a table which costs nothing in comparison with the costs per minute in court' (Newbolt 1923: 435) were held. These would have been held shortly after the referral and used by him to understand the issues and promote either an effective process or encourage settlement. How far the latter went is not certain, but a quantitative analysis indicates some marginal effect (Reynolds: 2008). Newbolt also suggested that a second summons be taken before trial, a practice followed by his successor Sir Thomas Eastham. By these means the court exerted more control over the process.

Newbolt's use of experts was of particular advantage to litigants, resulting in cost and time savings. Newbolt wrote that this saved litigants four-fifths of the time normally spent on such matters (Newbolt 1923: 427).

Just as the invention of the referee was conceived as a means to relieve the pressure on the High Court judges, Newbolt's Scheme was necessary due to the overload and backlog of the referees' lists when Newbolt became a referee. Coinciding with Newbolt's appointment was the acquisition of the non-jury list which trebled references in the three years 1919-1921. In his letter dated July 1920 to Lord Birkenhead 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* in 1892: 'how much is it likely to cost and how soon at the latest is the thing likely to be over?' (*The Times* 10 August 1892: 13).

Newbolt's resourcefulness linked cost and time in the utilization and subordination of his office for the benefit of the parties. He did this by means of his informal discussions in chambers which facilitated a greater understanding between the parties at an early stage of the proceedings, which in many cases encouraged settlement, saving costs and time to the participants.

What emerges from a study of the Official Referees' court in the period 1919-1970 (Reynolds 2008) is the view that the referees in many cases succeeded in trying cases 'within a few weeks after the order of reference'. (Eastham 12 July 1954). That would mean an efficient completion rate for those times and harmonization with the objectives of Newbolt's Scheme. Eastham made that comment in a memorandum to the Lord Chancellor dated 13 July 1954. In that year 302 cases or 46 per cent of the 657 referrals were tried: there was a backlog of 225 cases, with 130 others being disposed by settlement or otherwise. The percentage of

disposals (otherwise than by trial) that year was down at 15 per cent below the post-war average percentage of 24 per cent (Reynolds 2008).

From the evidence obtained by means of a review of Judicial Statistics, Minute Books of the Court and the Judges' Notebooks that have survived it has been possible to approximate the time that may have been taken in cases during the research period 1919-1970.

From Table T1 there appears to be a significant average time-saving in those cases where evidence of micro-caseflow management or elements of Newbolt's Scheme were identified. Newbolt himself attested to the fact that his use of experts could cut trial times by up to 80 per cent. Thus, in a number of cases, I conclude that he achieved an overall saving as he recorded. We do not know in how many cases or how much time and cost was saved because the court records for the period 1919-1938 do not exist and appear to have been destroyed by enemy action in World War II. I have his reports to the Lord Chancellor and other contemporaneous evidence, but it is patchy. What I analyse, however, are the cases coming into the list and the cases settled or tried during that time. When statistical analysis was undertaken on this period it was found that the settlement disposal rate, particularly in the context of what Newbolt describes as his 'discussions in chambers', showed an increase of 21 per

**Table T1**

<b>1919-1938 Average time per case according to Judicial Statistics</b>	
<b>Average time taken per case</b>	<b>Average time taken per case using caseflow management</b>
2¼ days [Taking an average referee day at 3 hours 20 minutes] 7 hrs 30 mins	No record  But Newbolt says use of court expert reduced time by 80%.

*Sources: Judicial Statistics 1919-1938*

**Table T2**

<b>1947-1970 Average time per case according to Judicial Statistics</b>	
<b>Average time taken per case</b>	<b>Average time taken per case using caseflow management</b>
8 hrs 40 mins	No record  66 cases recorded in Notebooks examined

*Sources: Judicial Statistics 1947-1970*

**Table T3**

<b>1959-1962</b>		<b>1965-1967</b>	
<b>Average time taken per case</b>	<b>Average time taken per case using caseflow management</b>	<b>Average time taken per case</b>	<b>Average time taken per case using caseflow management</b>
7 hrs 56 mins 83 cases in Minute Books 4 & 5 and J 114/41	4hrs 11 mins 17 cases identified in Minute Books 4 & 5 examined	15hrs.5 mins 43 cases identified in Minute Books 4 & 5	3hrs 45 mins 11 cases in J 116/2, 3, 4

*Sources: Minute Books and Judges' Notebooks as listed in the Appendix*

cent between 1919 and 1929 and in 1931. In the latter part of the period 1932-1936 there was found to be a 9 per cent drop in settlement rates.

I can be a little more certain, however, in the two post-war periods, 1959-1962 and 1965-1967 for which more direct evidence from the judges and their clerks was available. If I take the evidence of the Minute Books and Judges' Notebooks which record the time spent in interlocutory applications and hearings, I found that in the period 1959-1962 the average time an official referee spent on the proceedings was 7 hours and 56 minutes (Table T3). Where elements of Newbolt's Scheme were identified in the record of the proceedings, the average time taken was 4 hours and 11 minutes. In other words, a saving in time of 3 hours 45 minutes. This analysis was compiled from National Archive files: J 116/1 and 2, Carter: Minute Book Nos 4 (1959-1962) and 5 (1962-1965); Notebook (1959-63); J 114/41 Notebook (1959-63) and J 114/44 Notebook (1962-1965)

In respect of the period 1965-1967, the records for time spent on the proceedings on average was 15 hours and 5 minutes but, where elements of the Scheme were identified, the average time spent was 3 hours 45 minutes: a time-saving of 11 hours and 20 minutes. This analysis was compiled from National Archive files: J 116/2 Minute Book No 5 (January-March 1965); J 116/3 Minute Book No 6 Court "C" (March 1965-October 1967); Minute Book No 7 Court "C" (January-October 1967); J 116/4 (January-December 1967): Notebooks: J 114/47 (1965-1966); J 114/49 (1963-1966); J 114/50; (1966-1968); J 114/51 (1967); J 114/52 (1967-1968)

**Table T4 Increase in caseload**

Period	No of years	Referral	Average referrals per year	Trials, disposals, withdrawals, settlements, transfers	Average disposals per year	Backlog	Average backlog per year
1919-1938	20	7,683	384	5,255	263	2,427	121
1947-1970	24	13,932	581	8,370	349	5,489	229

Sources: *Civil Judicial Statistics 1919-1937 and 1947-1970*

Whilst these computations demonstrate a reduction in time spent by the court on cases, there was an increasing backlog indicating that, despite the efforts of the judges and lawyers, such a scheme was unable to cope with the rising trend of a backlog. This may be demonstrated by Table T4.

According to Judicial Statistics presented in Table T4, the average referrals in the pre-war period were 384 per year with an average backlog of 121 cases per year or 35 per cent of the annual average number of referrals. What this table shows is an 81 per cent increase in referrals after the war from 7,683 to 13,932. It also shows a 59 per cent increase in the rate of the disposal of cases in that period from 5,255 to 8,370. Whilst the latter figure would support a theory of efficient micro-caseflow management, the increase in case backlog after the war from 2,427 to 5,489 amounting to an increase of 126 per cent would militate against such a theory. It also demonstrates that inter-referee transfers were not as efficient as might have been expected.<sup>5</sup>

Most of the work of the referees concerned matters of account and building cases, although factually complex, they did not take up as much time as other cases in the 1959-1962 period, but in the 1965-1967 period, after more complex RIBA standard form construction contracts had been introduced, the average time spent on building cases increased on average 10 to 13 hours beyond the time spent on other types of case.

Apart from these analyses the *Final Report of the Committee on Supreme Court Practice and Procedure* (Parliamentary Papers 1953)<sup>6</sup> acknowledged the 'more expeditious form of trial before an Official Referee'. Whilst the

<sup>5</sup> Made possible by RSC (No 3) 1949.

<sup>6</sup> This had been appointed on 22 April 1947 under the chairmanship of Sir Raymond Evershed, subsequently Master of the Rolls, to enquire into the practice and procedure of the Supreme Court and to consider what reforms should be introduced for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.

comment was made in the context of a possible right of appeal on matters of fact, the acknowledgment of their reputation is sustained.

## [B] PROMOTING SETTLEMENT AND SAVING COSTS

It may be said that judges decide cases; they do not settle disputes. The judge cannot enter the arena of adversarial contest between the parties. Newbolt's scheme was primarily concerned with settling cases early to save time and costs but also to lessen the case load. Thus, the extent to which settlement was promoted and succeeded is a true test of Newbolt's scheme. Whilst Lord Birkenhead, did not consider this matter to be the function of the trial judge, Newbolt thought it was his duty to compromise the case so far as the parties allowed him to do so. He did not appear to have any reservation about that. It was easier for him, a subordinate judge, to effect settlement by business-like discussions in chambers than it was for a High Court judge. This could be facilitated by the referees who could adopt a more informal and flexible approach at directions hearings. Birkenhead's unease about settlement discussions goes to the heart of a dilemma here: on the one hand, the referees wanted to have a status akin to High Court judges which Newbolt felt they were 'all but in name'. On the other hand, Newbolt wanted to dispense justice informally because this was the only way he could expedite his list. Newbolt's approach might be reconciled to the Judicature Commissioners' objective of a process being 'capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried'. Birkenhead thought that Newbolt should have special regard to 'the interests and the pockets of the litigants', and he also felt some 'uneasiness' in that there were dangers in judges 'exerting any undue pressure towards a settlement'. On the other hand, he was alive to 'the waste of public time'. Birkenhead could not sanction an overt encouragement of settlement because of his unease in the light of his own experience in sitting as a judge and anxiety over 'undue pressure' from the bench. On the other hand, Birkenhead and the Permanent Secretary, Claude Schuster, cautiously supported Newbolt's resourcefulness. It is fortunate that Newbolt's early experimentation in this field coincided with Birkenhead's tenure as Lord Chancellor and that Birkenhead did not discourage Newbolt in his reports, his experimentation, or his Scheme.

The genesis of Newbolt's Scheme may be inferred from the *First Report* (Parliamentary Papers 1869: 13) where the Commissioners were charged with establishing tribunals that were: 'capable of adjusting the rights of



the litigant parties in the manner most suitable to the nature of the questions to be tried'. The referees carried out the mandate of their tribunal by adjusting the procedural norms to suit the parties and the case, dealing with the matter in a more business-like fashion. The referees were the substitute for expensive arbitral references which often entailed further references back to the High Court. They were also a substitute for juries that had difficulty with complex factual cases of a scientific and technical nature. Thus, referees avoided the useless expense of such ineffective processes. The adoption of experts' opinions, and referrals to experts for determination of certain technical questions, undoubtedly facilitated a more effective process. To an extent the referees adopted some practices of surveyors such as the Scott Schedule. In the arbitral context, it was the relative informality of the interlocutory process that contributed to the referees' success in micro-caseflow management. More particularly it was the seven elements of the Scheme that may have given referees the advantage over arbitrators because the referee could issue orders as a High Court judge, particularly in relation to matters of discovery and production of documents.<sup>7</sup> Under the same rule, the referee had power to enter judgment. The adjustment of 'the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried' encompassed not just the way the judge conducted the trial, but the interlocutory process that some referees undertook to achieve earlier settlement. In Newbolt's case this was at the core of his judicial philosophy which he expressed in *Expedition and Economy in Litigation* (Newbolt 1923: 427).

to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished.

It is debatable whether that philosophy was acceptable then or even now as the proper role of a judge in a court of law. According to Kelly (Kelly 1966: 148 and 150) and Roberts and Palmer, in Roman times the praetor actually encouraged a solution and opines that it was 'his duty to induce the parties to compose their differences' (Roberts and Palmer 2005: 16). This very much accords with Newbolt's thinking in the context of the referee's function. Newbolt had that debate with Birkenhead. In sum the conclusions that can be drawn from Birkenhead's reply to Newbolt are that settlement was of obvious importance to the lay client; there were 'dangers' in the judge doing this; and that clients sometimes desired to

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<sup>7</sup> RSC (1883) Order 36, rule 50.

have a fight and were sometimes more content with defeat rather than an 'inglorious peace' (Letter from Sir Claude Schuster 1922).

That view was probably the view of the senior judiciary of those days. That view does not take into account the financial disparity that often existed between parties to a building dispute which entailed disproportionate legal and expert expense. It does not take account of the financially weaker party being unable to pay either the damages or costs at the end of the case through the war of attrition that such litigation often became. I consider the examples of cases such as: *Louis Obermenter v Rodwell London & Provincial Properties Limited* (1966) where the trial lasted 19 days; and *Ancor Colour Print Laboratories Limited v J Burley & Sons Limited and F & D Hewitt Limited* (third parties) (1967) where the trial lasted 45 days. Pecuniary inequality can lead to procedural disparity, and complexity can lead to protracted proceedings and lengthy trial. In those circumstances, and in consideration of other court users, especially where in Newbolt's time the list trebled in three years, Newbolt considered intervention appropriate. Whilst a judge may have to do justice to each case on the particular facts and merits, he has to dispense justice to all cases in his list. In this latter context Birkenhead's approach would appear passé.<sup>8</sup>

Newbolt's letter to *The Times* dated 4 September 1930 not only confirms his views about the utility of the single joint expert, but also suggests numerous ways in which he could otherwise encourage settlement. Such methodology is further described in his article: *Expedition and Economy in Litigation* (Newbolt 1923) and in his reports to the Lord Chancellor. There are a number of cases recorded in the Notebooks which settled at the commencement of the case, the terms of which were embodied in the referee's order.

In other areas the referees differed in their interventions. For example, Walker Carter in *Cowley Concrete Limited v Alderton Construction Co Limited* (1962) issued a number of interlocutory orders. The case lasted for four years starting in 1962. Whilst there was some degree of case management, it seems it was at the behest of the parties not the judge. On the other hand, Carter's notes for *W J Barrs Limited v Thomas Foulkes* (1965) record a clear instance of effective judicial intervention regarding expert evidence. Carter was not satisfied and ordered a site visit as a result of which the counterclaim was dismissed. His initiative brought

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<sup>8</sup> Birkenhead was a scholar of international law amongst many other subjects and, although he did not overtly encourage Newbolt, he may have cast a blind eye for he well appreciated Newbolt's work.

about a swift resolution of the case. *Clifton Shipways Co Limited v Charles Lane* (1960) and Carter's notes dated 2 and 3 March 1960 indicate judicial participation in the final terms of settlement in chambers. Another example of effective caseflow management is *Bogen v Honneyball & Rossal Estates Limited* (1973). Whilst that case is not a good example of expedition—it took six years to resolve—a significant intervention was made by Norman Richards QC when he directed further and better particulars, the exchange of experts reports, and set a trial date. This was the catalyst for settlement.

In many cases there was no clear evidence in the record of the Scheme, but some were marginally affected by these processes depending on case type and the parties' adoption of the judge's suggestions.

## The Backlog and its Effect

This study found that generally speaking the increased rate of settlement did not lower the backlog. An effective summation is provided in Table T5 and the percentage rates of disposals and settlements.

Taking the research periods before and after the war I measured the comparative disposal rates as shown in Table T5.

From this analysis we see that approximately a fifth to a third of cases were being disposed before trial. The mean average is just over 27 per cent, and these figures would tend to support a possibility that as many as a quarter of the cases may have been caseflow managed. Such conclusions appear to confirm a link between the more efficient disposal of business and micro-caseflow management. More so perhaps when I consider that the average rate of disposals to referrals before trial before the war was 27 per cent and after the war 24 per cent, the mean average being 25.5 per cent which equates to the proportion of cases caseflow-managed.

**Table T5**

<b>Year</b>	<b>Referrals</b>	<b>Disposals</b>	<b>Percentage disposed</b>
1919-1931	5,244	1,495	29%
1932-1938	2,439	538	23%
1948-1956	5,923	1,253	21%
1957-1970	7,624	2,707	36%

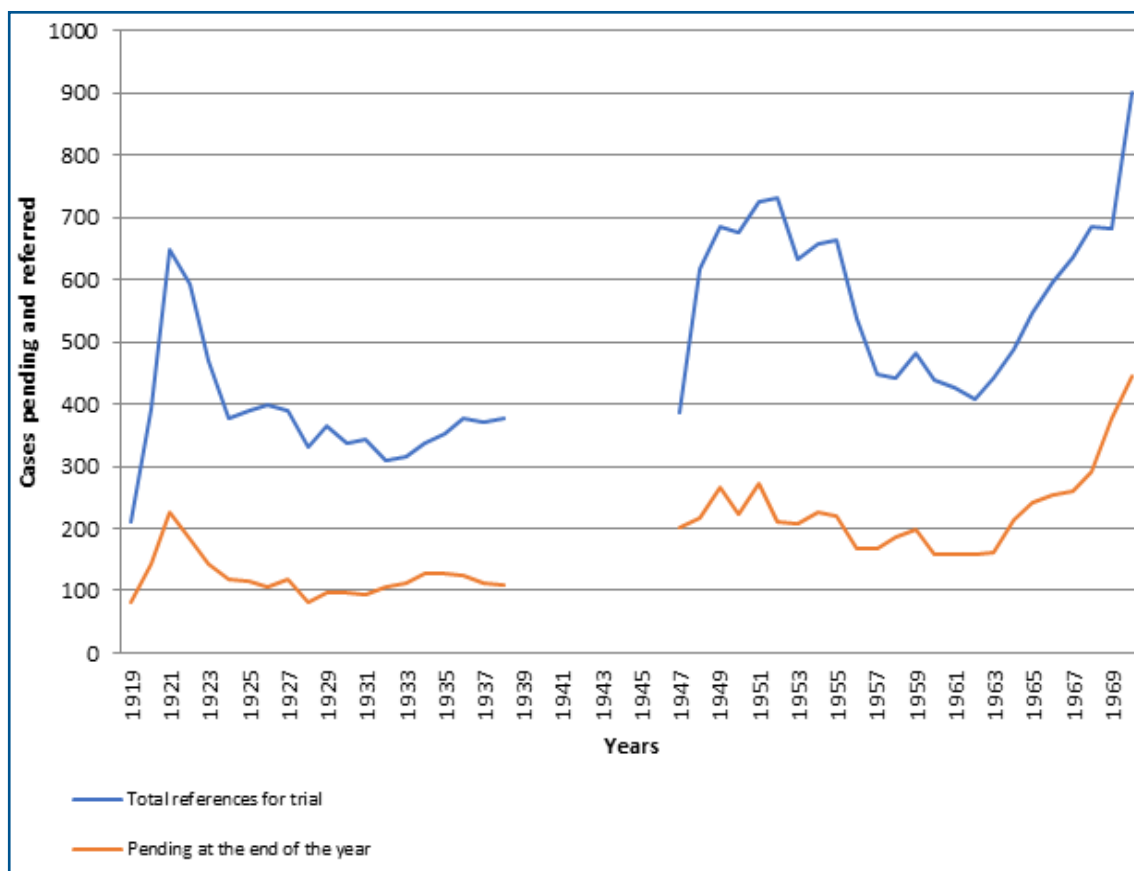
Sources: *Civil Judicial Statistics 1919-1938 and 1947-1970*

The general conclusion from my quantitative study (Reynolds 2008) was that the key to effective micro-caseflow management is early settlement or resolution giving an average disposal of 29 per cent of cases before trial, very slightly above the average and just slightly more effective. Evidence of this was found in the judges' Notebooks.

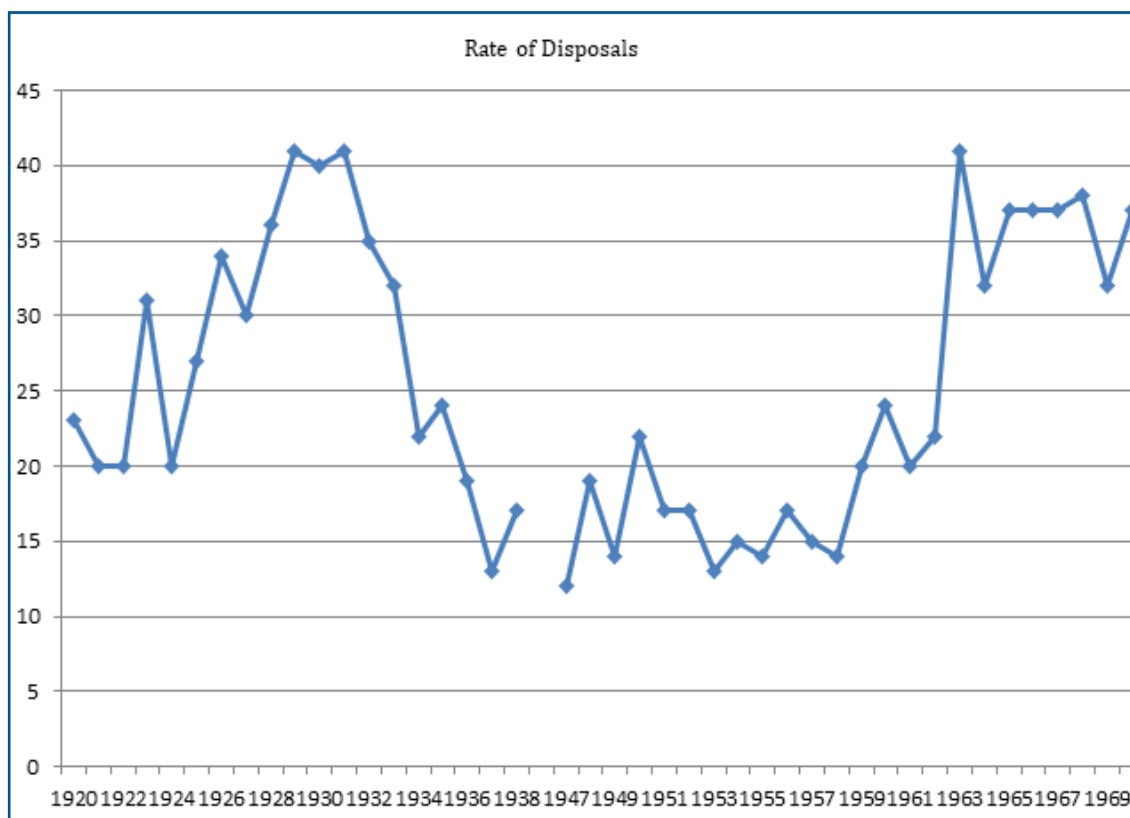
*Martin French v Kingswood Hill Limited* (1959) is a case in point where there is clear indication of judicial encouragement for settlement. Another example of prompting settlement is found in *Alexander Angell Limited v F C Pilbeam (Male)* (1968) where Percy Lamb's clerk issued the standard settlement enquiry to the parties. A further example was noted in the *Clifton Shipways Co Limited v Charles Lane* (1960).

As to overall comparative efficiency of Newbolt and Richard's times, Charts C 1 and 2 confirm that referrals in the Newbolt era more than doubled between 1919 and 1923, and disposals before trial more than trebled in the same period. This corresponds to an almost identical doubling increase in referrals between 1962 and 1970 with a similar trebling of disposals.

**Chart C1 Caseflow management analysis**



Sources: *Civil Judicial Statistics Analysis: Official Referees 1919-1970*

**Chart C2 Disposal rates 1919-1938 and 1947-1970**

Sources: *Civil Judicial Statistics 1919-1938 and 1947-1970*

More importantly the analyses of the Judicial Statistics in Chart C2 indicate support for the proposition that the referees were involved with judicial settlement. The substantial increase in disposal rates is demonstrated by Chart C2—from 20 per cent in 1921 to 41 per cent in 1931. This is significant. It is arguable that this extraordinary doubling of such rates is due to a more activist role and is consistent with the procedural measures Newbolt was advocating. On the other hand, this is followed by a decline in disposal rates, from 41 per cent in 1931 to 13 per cent in 1937, amounting to a 27 per cent decline which in those years was possibly due to a higher focus on reducing the backlog of trials and a lack of manpower during the Great Depression. There were only two referees in post in that period.

## [C] DISCUSSION OF A HYPOTHESIS OF EFFICIENCY AND ECONOMY

I hypothesize that the invention and evolution of a rudimentary caseflow management and consensual interlocutory process made referees more effective. This has been the conclusion drawn from a qualitative and

quantitative examination (Reynolds 2008). The final discussion therefore centres on the implications of Newbolt's Scheme and on the supposition that this is more suitably addressed by Newbolt's idea of 'informal discussions in chambers' (Newbolt 1923: 438-439). This appears to be the major discovery of this study and unknown generally. The other extraordinary discovery is the instances of judicial intervention whether to facilitate settlement or to expedite proceedings. Judges did not overtly intervene to settle or expedite matters, but they often gave 'indications' as to the merits of submissions which could certainly dissuade litigants from pursuing the case (Roberts 2013). Apart from Birkenhead's warnings to Newbolt, Owen Fiss has argued that settlement is a negation of the judicial process (1984). Ross Cranston (2006) puts the Fiss position clearly:

In the judicial administration perspective, he would argue, the opportunity to articulate legal values gives way to an over-emphasis on efficiency and technique, which demonstrates the value of law.

In the case of the referees, 'efficiency and technique' was a necessity. The underlying argument being that referees like Newbolt had no real option other than to develop more efficient ways of dealing with long and complex cases. Contrary to Fiss's philosophy, Newbolt's way was not a means of undermining what Fiss calls the 'value of the law' (Fiss 1984). Newbolt used the law to provide an early answer and result that most probably would not have been very different from his judgment at the end of a trial. It is equally arguable that, if Newbolt had not expedited some cases, he and his colleagues could not have completed the job required. In this case it was very much a matter of practicality and doing justice to the merits of each case. Procedurally, some cases could be dealt with by preliminary issues, some by expert decision, some by a site visit, and some by 'informal discussions in chambers', and in many other cases, only by a full trial. To that extent Fiss's traditionalist view does not accord with the evidence of the referees' practice without which justice could not be done to the parties and the Judicature Commissioners' objectives of taking pressure off the High Court judges fulfilled. If the referees had followed the traditional view that judges could not intervene or encourage settlement, the delays and backlog would have been unacceptably greater.

To do justice to all the parties is the objective of caseflow management, and at micro-level it means having regard to the rights of others to be heard within a reasonable time. The referees had a contractual obligation to the Lord Chancellor to complete their lists and to some extent to the Treasury to ensure that court resources were not wasted. They were also directly accountable to the Lord Chief Justice, their Head of Division. In

that context they had an obligation to those whose cases they were to hear. Efficiency in this context was a necessity for justice to be done.

An essential element of micro-caseflow management is the allotment of sufficient time for the case. This must be considered from both a qualitative and quantitative standpoint. In the study (Reynolds 2008) numerous cases covered a wide range of subject matter; there was a considerable variance between the times allocated for certain cases. Some cases required more time than others for reasons of complexity, for example, *Ancor Colour Print Laboratories Limited v J Burley & Sons Limited and F & D Hewitt Limited (third parties)* (1967) which occupied the referee for 45 days. Others such as *Bickley v Dawson* (1966) required only 10 minutes. It is obvious that more complex and important cases require more judicial time, and case management requires that the appropriate allocation be made. This entails allocating a fair and reasonable time to the case according to its judicial requirements, having regard to its nature, complexity, importance, value of the claim, and resources of the parties. All this was encompassed in Newbolt's approach. His interventionist style did not apparently compromise the referee's neutrality or the principle of judicial independence. In most cases he operated his Scheme with the assent of the parties. If the case is not otherwise settled, the parties have a right, subject to the rules, to pursue the case to trial. However, in the context of restricted resources, such as were available to the courts in the 1860s through to the 1920s, the judiciary had to consider how justice could be apportioned economically and fairly to those who chose to litigate. In those circumstances, the referees were compelled to manage cases more effectively: it was a matter of necessity dictated by Treasury allowance.

## [D] SUPPORT FOR THE HYPOTHESIS OF EFFICIENCY AND ECONOMY

The interlocutory innovations invented by the referees for the more efficient conduct of business were recognized by the Evershed Committee on Supreme Court Practice and Procedure. This Committee, which was appointed on 22 April 1947, produced four reports, three of which are relevant here (Parliamentary Papers 1949, 1951 and 1953). Its primary purpose was to consider what forms of practice and procedure should be introduced 'for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business'. One of the recommendations of the First Report was to make it possible to transfer cases between referees (Parliamentary Papers 1949). This caused some

concern to the Lord Chancellor's Permanent Secretary, Sir George Coldstream, in 1954.<sup>9</sup> Historically, this was a link with arbitration which was finally severed by operation of the rota.<sup>10</sup> More importantly, Evershed's Final Report (Parliamentary Papers 1953) adds credence to the efficiency of Newbolt's Scheme.

In that report Evershed recommended that 'increased use should be made of the power under Order 37A R.S.C. to appoint a Court Expert'. This was Newbolt's innovation in the 1920s and an integral part of micro-caseflow management. Second, Evershed recommended that, where a plaintiff gave appropriate notice after the entry of an appearance by the defendant, the plaintiff could apply to the master for a dispensation of pleadings. In *Expedition and Economy in Litigation*, Newbolt (1923) referred to a case of dilapidations where he dispensed with pleadings. Third, Evershed said it was important that any further summons for directions should if practicable be heard by the same master. This followed the referee practice of referees taking their own summons for directions and, interestingly, Newbolt's earlier suggestion that a second summons before trial was beneficial (*The Times* 4 September 1930). Newbolt also wrote:

there is no greater check on wasteful expenditure than the arrangement by which the Trial Judge takes his own summonses (Newbolt 1923: 435).

Fourth, Evershed heralded a 'new approach' to litigation spearheaded by the robust summons for directions which would 'limit the issues to be tried and the expenses of proof' (Parliamentary Papers 1953: 324). Again, this coincides with the Newbolt philosophy of saving expense in the context of his article in *Law Quarterly Review*:

*the mere discussions across a table which costs nothing in comparison with the costs per minute in Court* [author's italics] discloses what issue it is exactly that the parties wish to try, and eliminates the very source of the litigants grievances (Newbolt 1923: 435-437).

Fifth, Evershed aimed to make the Summons for Directions 'a more effective instrument for reducing costs' (Parliamentary Papers 1953: 81). Again, in that article Newbolt had underlined the importance of the cost-saving utility of such summonses and hearings in chambers as opposed

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<sup>9</sup> Coldstream was a member of the Committee which produced the First Report and this recommendation which he later reviewed and revised in the form of RSC Order 36 rule 47(c) to prevent transfers of cases between referees without the parties' consent.

<sup>10</sup> This was implemented by RSC Order 36A on 1 October 1957 giving effect to section 15, Administration of Justice Act 1956.



to the 'costs per minute in court'. Sixth, at paragraph 73 of the Report, Evershed recommended that it was desirable in every case that pleadings should be available to the judge before he came to court (Parliamentary Papers 1953: 326). This is certainly a practice that was adopted by the referees as is evident from the case of *Alloy & Fireboard Co Limited v F Superstein* (1965).

## [E] THE ADVANTAGE OF A SUBORDINATE JUDICIAL OFFICIAL

Having established further support for the hypothesis as to the more effective referee processes, it remains, before drawing final conclusions, to consider the advantage, if any, of the subordinate judicial role. In this case it is submitted that the same strict judicial role that Fiss articulates might not apply to a subordinate judge especially where, as in this case, the judge has an important interlocutory function. The essence of this argument is Newbolt's view that 'the mere discussions across a table costs nothing in comparison with the costs per minute in Court'. This study sustains the argument for the use of expedient and economic measures by referees in the 20th century, and to some extent confirms the success of such measures, especially where the case settles before trial as a result of interlocutory intervention. It is arguable that in such cases a judicial officer has a duty in the best interests of justice to do so. Such a subordinate official has a greater flexibility when acting in a more informal chambers setting with the powers of a High Court judge. This in modern times is similar to that role that arbitrators adopt acting in a business-like setting. In acting with the consent of the parties Newbolt was in a stronger position to facilitate settlement. In many cases the parties are not in an equal bargaining position and such intervention is a useful neutral instrument to assuage fears of the more influential party. In the case of the referee he is in a stronger position to resist any such domination, more so than an arbitrator because he exercises all the powers of a High Court judge and sits daily in a national court. Thus, Newbolt may have been able to hold the balance in such chambers discussions whereas other non-judicial neutrals might not. By procedural innovation he was able to control the excesses of an adversarial process where settlement might otherwise have had a lower priority.<sup>11</sup>

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<sup>11</sup> Lord Woolf's *Interim Report* (Parliamentary Papers 1995), chapter 3, stated that 'questions of expense, delay, compromise and fairness may have only a low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable'.

## The Procedural Judge

Thus, in the procedural context it may be said that the referee or procedural judge might enjoy a unique advantage over higher-ranking judges. One of the central findings of this study is that judicial officers, exercising the ‘powers’ of an English High Court Judge, engaged in settlement discussions as long ago as the 1920s. This, so far as is known, is unprecedented.<sup>12</sup> This remarkable fact suggests that the role of a subordinate judge may be considered more flexibly in the context of judicial hierarchical structures and his or her place in the legal system. Although referees were abolished by the Courts Act 1970 and became circuit judges, and whilst there are now two grades of Technology and Construction Court Judge, High Court Judge and County Court Judge, there is possibly some consideration to be given to the maintenance of a subordinate grade, not to denigrate the office, but to facilitate the work of the court in the public interest where a more informal and flexible approach by a lesser judge might produce earlier resolution building upon some of the lessons from the Newbolt era and beyond. This subordinate judicial role has the advantage of combining the two key rudiments of dispute resolution in one forum: that of settlement and procedural management, in other words that radical notion that a judge can undertake a settlement role as well as a procedural one. This may well be revolutionary but then, as *The Times* proclaimed, the invention of the office itself was revolutionary.

## Assessment

It is possible to consider some overall conclusions for and against the effect that the referees contributed to the legal system in the form of a rudimentary micro-caseflow management process in the 1920s and its manifestations in an interventionist, and latterly a non-interventionist, judicial settlement process.

A preliminary analysis was conducted here to assess the general effectiveness of the referee. This demonstrated that the pre-war era was marginally more efficient than the post-war era for the disposal of cases whether by trial settlement or otherwise: 49 per cent before the war and 42 per cent after it. The overall average percentage of disposals to referrals was 27 per cent before the war, as opposed to 24 per cent after it. I also found that the percentage of trials to referrals was 41 per cent before the war and 32 per cent after it.

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<sup>12</sup> The author is not aware of any such.

The Judicature Commissioners established a Supreme Court of Judicature that had three essential macro-caseflow management forms in civil cases: trial by a single judge; trial by jury; and trial by a referee. All these modes of trial were to be 'capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried' (Parliamentary Papers 1869: 13). In terms of that objective, it is submitted that such objective was achieved by the referees, and it is that aim that facilitated their practice. This found expression in informal directions meetings in chambers; the more effective use of expert witnesses and experts, whether as investigators or determiners of fact or opinion, and the invention of procedural directions and special pleadings to shorten court hearings and crystallize issues. One of the important practices to emerge out of the Judicature Commissioners' objective was the referees' practice of an early summons for directions, plus the fixing of the date for trial within weeks of the reference. Another interesting and significant feature was the relationship between certain referees, the Lord Chancellors and other senior officials. Under section 83 of the Judicature Act 1873, the Lord Chancellor was responsible for their appointment, their qualifications and their tenure in office, with the concurrence of the Heads of Divisions subject to Treasury sanction. To that extent the Treasury played a very important part in the development of the court. Permanent Secretaries played a key role in the relationship and were kept well informed of developments. There were no complaints about the quality of work, but the court was under-resourced in terms of manpower and accommodation intermittently. Status and salary were perceived as a problem in not attracting the right recruits. All these somewhat negative factors would have increased pressure to expedite the list. In reading the correspondence between Newbolt and Birkenhead, there can be no doubt as to the depth of understanding and support Birkenhead gave, and how much he appreciated their work.

The Judicature Commissioners provided the office and the opportunity for the evolution of the referees' office and for caseflow management. This is explained in Newbolt's contemporaneous reports and articles as well as in Eastham's reports and memoranda and are further demonstrated from the various extracts from the judges' Notebooks after the war. Seven elements of micro-caseflow management were identified:

- ◇ early procedural evaluation by the referee in chambers;
- ◇ the efficient use of experts;
- ◇ directions resulting in proportionate costs and proportionate costs orders;

- ◇ special pleadings tailor-made for the case;
- ◇ and the more convenient sitting of the court.

The application of one or more of these practices facilitated caseload management in certain cases.

On further analysis, it was discovered that when Eastham was appointed in 1937 there were 372 referrals that year. When he retired in 1954 (the year Walker Carter took office), the court had 657 referrals. By 1970 it had 901 referrals. It was against this background that Eastham triumphed in his caseload management by confirming in a memorandum to the Lord Chancellor (Eastham 12 July 1954) that, despite a threefold increase in workload in the previous decade, referee cases were often tried within a few weeks of the order of reference. In contrast to Newbolt, it would appear that Eastham achieved some success by ordering a visit to the building site and seeing the progress of work for himself. In several instances this resulted in settlement being agreed afterwards in court. He also appears to have granted adjournments giving the parties time to reconsider their position before embarking on the trial. This reactive approach contrasts with Newbolt's active approach to caseload management. It must be considered that, just as some caseload management mechanisms resulted in quicker resolution, they were not suitable in all cases. It would appear that some measure of caseload management was used in almost a quarter of all cases between 1919 and 1970. Although there is some evidence of relative success with these procedural tools, it was also concluded: that Newbolt reduced the backlog by up to 51 per cent in the period 1919-1931; that in 1937 the referees were 88 per cent efficient in terms of trials to referrals and 84 per cent efficient in 1948 in that respect; that trial times could be halved or in Newbolt's cases reduced by as much as 80 per cent; and that in Newbolt's time the backlog was halved, and in Richard's time it trebled.

Experts were a particular tool of referee case managers like Newbolt. In the 20th century expert evidence was admitted by direction of the court or by agreement between the parties. Newbolt went further, with groundbreaking use of experts (Letter from S A Merlin 1921), thus inventing a role for the court expert on the way. He found that the expert could be instrumental in settlement in terms of estimating quantum, or deciding the issue referred for opinion or decision. Newbolt was also aware that experts could also be a wasteful expense if they were not managed. Where experts were used by him to determine facts or resolve issues it would appear that Newbolt briefed the expert with the consent of the parties. The expert answered his questions, thus saving time and costs. Other

processes used by the referees included special pleadings and schedules to reduce trial times and narrow issues.

Whilst there is evidence of chambers discussions resulting in settlement in Newbolt's time, there is little contemporaneous evidence. Subsequently though, *Clifton Shipways Co Limited v Charles Lane* (1960), *WJ Barrs v Thomas Foulkes* (1965) and *Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard* (1962) are all examples of similar chambers proceedings.

In conclusion, the existence of a form of caseflow management can be demonstrated to the extent that in 1919-1938 the percentage of trials and disposals to referrals was 68 per cent, and in 1947-1970 it was 61 per cent. Both results were achieved during a time when I concluded that a form of caseflow management was used in 25 per cent of cases: and that in the pre-war period 27 per cent of referrals were disposed of before trial and 24 per cent after the war. Thus, a mean average of 25 per cent of cases was disposed of before trial, at a time when I hypothesize that a form of caseflow management was used in 25 per cent of such cases. Perhaps the clearest demonstration of the Scheme's effectiveness is demonstrated in the doubling of the rate of disposals to referrals, from 20 per cent in 1921 to 41 per cent in 1931.

The post-war period was slightly more efficient in terms of trials. When contrasting two eight-year periods, one before and one after the war, the comparison demonstrated that referrals were slightly less efficient after the war in disposals and trials and that there was a higher backlog. There was a sharp decline in the number of trials from 144 in 1962 to 91 in 1970. This figure remained below the 100 mark until 1967. This coincided with a steep rise in settlement/disposal rates from 90 in 1962 to 329 in 1970.

In respect of the cases where it has been possible to identify caseflow management elements, time spent has been radically reduced. Newbolt wrote that issues could be so narrowed 'to something which occupies the Court for perhaps one fifth of what used to be considered the normal time' (Newbolt 1923: 437).

This meant an 80 per cent time saving.

After the war further examination of the two research periods, 1959-1962 and 1965-1967, showed that time reductions of more than 50 per cent and, practically, 80 per cent were possible. Caseflow management properly applied could cut trial times in half or by two-thirds of the time.

It may be surmised that 22 to 25 per cent of all referrals may have been caseflow-managed.

What this analysis demonstrates is how Newbolt's experiments evolved into a practice scheme extending beyond his tenure. He was ahead of his time, although selective in using the Scheme in particular cases. This may be considered an early form of what has become known as differential case management in the United States (Bakke and Solomon 1989).

Running counter to the arguments in favour of caseflow management's effectiveness, Judicial Statistics confirm that in the period 1957-1970 the number of disposals ranged from 66 to 329, higher than in other periods examined, whilst the backlog of cases increased from 167 in 1957 to 446 in 1970. Referrals increased from 449 in 1957 to 901 in 1970. Whilst referrals more than doubled, the backlog almost tripled. Failure to deal with backlog is not a sign of effective caseflow management. More cases were tried than were summarily disposed of between 1919 and 1938: there were 3,202 trials, and 2,048 cases otherwise disposed of. Between 1947 and 1970 there were 4,360 trials compared to 3,335 cases that were otherwise settled or disposed of. What this suggests is that the ratio of trials to disposals remained relatively stable in both periods, but that the comparative ratio of referrals to backlog indicates that caseflow management became less effective in the second period of analysis. Several reasons may explain this.

Despite the existence of caseflow management, the backlog of cases increased after the war. However, there were only three referees in post from 1957 to 1970 when the average annual intake was 586 referrals as compared to the earlier period from 1919 to 1938 when the average annual intake was 437 cases per year. It appears that diminution in manpower in the periods 1932-1938 and 1956-1970 was a critical factor. This was despite evidence of rudimentary caseflow management activity. The backlog rose from 82 cases in 1919 to 109 cases in 1938 and from 202 cases in 1947 to 446 by 1970. In terms of backlog, I found that each referee had an average backlog of 40 cases before the war and 76 after the war. In both periods I detected an increase in backlog and a lack of manpower. Despite this, in the first period backlog was kept below 130 cases per year with only two judges in post. In the second period the increasing backlog occurs at a time when the rate of disposal is above 32 per cent. What may also account for the build-up of the backlog in the latter period was the fact that it was a time of post-war recovery when construction and engineering expanded. With that expansion came new and more complex forms of building and engineering contract and

increasing input from claims quantity surveyors and formulaic applications determining loss and expense of projects. Cases took much longer with voluminous documentation and a growth in expert evidence.

## [F] CONCLUSIONS

### Scheme Quality of Outcome

In conclusion we may ask whether Newbolt and his successors and colleagues of the court also considered what Galanter called 'quality of outcome' (Galanter 1985: 1, 10-12). Galanter looked at court process in the United States and refers to some experiments in settlement conferences in the 1920s. There is no evidence that Newbolt knew of any of this, for example, the work of Justice Lauer of the Municipal Court in New York (Lauer 1928). The question is: did Newbolt's and other judicial interventions affect the quality of the outcome? It is clearly arguable that an early outcome benefitted the parties in saving on time and costs of proceedings which might otherwise have gone to trial.

If I take Galanter's tests as to the special effects of judicial participation and the wider systemic effects, I may conclude as follows (Galanter 1985: 11-12).

In terms of quality of process, the referees enjoyed a unique advantage over High Court judges. Their creation was influenced by a need to substitute for a jury in certain complex matters of account which a jury would find difficult. Like a master, who was a subordinate officer of the court and dealt with interlocutory procedural matters, referees also dealt with interlocutory issues, such as directions for trial, which gave them the opportunity to have business-like discussions on practical aspects such as time, expenses and amount of evidence. But, importantly, they were able to facilitate matters in acting with the parties' consent to enable negotiations to take place following discussions in chambers. Timing was important because the referee would undoubtedly consider fixing the date for trial which focused the parties' minds. One of the important practices to emerge out of the Judicature Commissioners' objective was the referees' practice of an early summons for directions and the fixing of the date for trial within weeks of the reference. Newbolt hinted at its effectiveness and that of a second interlocutory summons before trial. This had obvious advantages of giving the parties a further chance of settlement (Parliamentary Papers 1953: 257).

Furthermore, on timing, the referees facilitated resolution by granting adjournments or stays to assist settlement discussions between the parties. There were numerous examples of this in the judges' Notebooks.<sup>13</sup> Certainly, Newbolt would agree with Galanter that judicial involvement in settlement would result in lower costs in time and money to reach settlement, which was precisely Newbolt's objective as expressed to Birkenhead (Letter to Lord Birkenhead 1920). Galanter describes some American judges chairing settlement. Interestingly, Newbolt was *directly* involved in chambers discussions, as he put it: 'the mere discussion across a table' (Newbolt 1923).

The demands on the court must be considered in these cases as a factor as Lord Birkenhead expressed his concern for what he called: 'the waste of public time' (Letter from Sir Claude Schuster 1922). By settling cases early, more time could be spent on the more complex matters.

Galanter opined that lawyers' style was more co-operative before the judge (Galanter 1985: 11). As Newbolt said: 'This is not arbitration or conciliation or concession, but an intelligent use of a Court of justice by business men.' (Newbolt 1923: 438-439) As to experiences and perceptions of the parties, Newbolt had good support from the profession and litigants (Letter to Lord Birkenhead 1920).

As to Galanter's question of wider systemic effects, it can be said that the success of Newbolt's experiments resulted in a continuous practice for the referees that carried on until the time of the civil justice reforms of 1996 when a number of his ideas were adopted in those measures. It may be as Galanter suggests that an agreed settlement is more likely to elicit compliance, and that appears to be what Newbolt concluded. In the end, the quality result was achieved in the Newbolt Scheme because it was an agreed result which both parties could live with.

## Comparative Analysis

The findings of this study complement the role taken by American judges, although they have taken Newbolt's model to a far greater degree of intervention albeit most of them appear to 'intervene subtly' (Galanter 1985: 7). The lesson of the Scheme suggests that a triadic configuration and the interaction of the judge and the parties present an effective means, and this is a conclusion that Galanter confirms in relation to the American experience (Galanter 1985: 7.)

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<sup>13</sup> Fifty-four Notebooks of Sir Tom Eastham, Sir Kelly Carter-Walker and Sir Brett Cloutman VC, QC and three Minute Books were examined as part of the 3,800 documents reviewed in the course of the study.



Newbolt's perception of what is now called case management was wider than what Galanter considers. Galanter discusses settlement conferences, but the Scheme encompassed a form of early judicial evaluation in chambers discussions, the relevant use of a single joint expert and proportionate costs orders. This was all achieved with the consent of the parties and without, an essential element of the Scheme in that court-facilitated settlement prevents 'arm twisting' and 'churning' of cases by private mediators following the example of Newbolt's Scheme and the American examples (Genn 1998). Newbolt's Scheme was voluntary not mandatory, and this distinguishes it from some of the conferences described by Galanter as mandatory. Birkenhead, as noted above, would have been uneasy at undue pressure being brought to bear by a judge in that respect.

Galanter was told that judges saw their role as mediators (Galanter 1985: 4). Galanter also opined that it was the United States judiciary who took the lead in this field in terms of judges acting as mediators (Galanter 1986: 257-262). In this sense it seems that the Newbolt philosophy is now part of the judicial process in the United States, save that Newbolt did not perceive his role as that of a mediator. When he used an accountant expert, 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' (Letter to Lord Birkenhead 1920).

It should be remembered that the referees were subordinate judicial officers for much of their time and could exhibit a more business-like manner. Galanter does not describe the status of the judges in America, but they would rank higher than the referees when Newbolt invented his scheme. Also, the system in America is no longer tied to the English legal system as it was before the War of Independence, although their law derives from the Common Law of England.

Galanter's reference to rule 16 of the Federal Rules of Civil Procedure describes the pre-trial conference as that of an extrajudicial process. It appears that the practice of the federal judges varies, some being interventionist and others not so interventionist. This mirrors the practice of the referees after Newbolt's time. Some were interventionists and more activist than others. In my study I could not ask the judges as Galanter did for his was contemporary research. My research was based on the contemporaneous judges' and Lord Chancellors' records.

Galanter did not find that the settlement judge process increased judicial productivity. Notwithstanding Galanter's negative finding, the American courts seem to lean towards more judicial involvement

(Galanter 1985: 10). So far as the referees were concerned, my study demonstrated that, whilst there was a reduction in 1922-1923, 1924 and 1928 which may have some bearing on Newbolt's Scheme, it is difficult otherwise to find a very marked effect. After the war I found three reductions in the backlog: in 1952 of 61 cases; in 1956 of 51 cases; and in 1960 of 40 cases (Reynolds 2008).

Galanter concludes that judicial intervention is because of the increased volume of cases (Galanter 1985: 10). This was certainly the case when Newbolt invented his Scheme.

In his last work, Simon Roberts interpreted the role of the courts through the prism of its constitutional function as an organ of the state (Roberts 2013). Taking the executive's classical Hobbesian role of command and domination, he detected a transformation from this long-established approach to a form of inducement. Newbolt would have championed such an ambition. Roberts also considered this phenomenon something of a takeover of private settlement negotiations by the judiciary. Roberts rightly discerned that the focus of the court has pivoted to case management and away from trial, a transformation somewhat disguised by the traditional architecture and design of our courts.

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