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Procedural systems in comparison. Combine efficiency, justice, and equality of the parties. Current solutions and projects under the sign of European unity. Directive ADR?

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Procedural systems in comparison.
Combining efficiency, justice, and equality of parties

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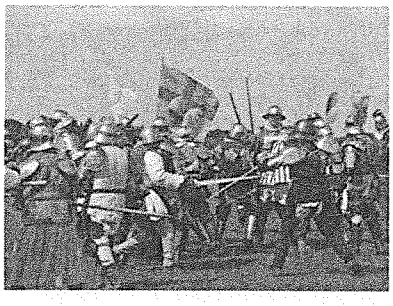
Civil Justice Reform in England & Wales: The Constant Revolution

Part I



Like all purely common law jurisdictions, the determination of justice is effected through the adversarial process. The concept at least is of two parties battling it out and the winner being determined by a neutral party being the judge. The judge does not (in concept at least) undertake their own research but simply listens to the arguments that are presented to him or her and determines which one he/she favours.

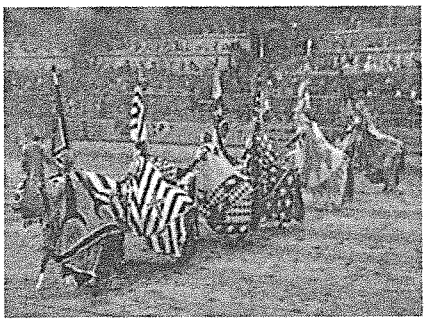
The cost of the dispute resolution process by trial in common law jurisdictions is thrown on the parties rather than the State. The judge has no inquisitorial role and

simply listens to the arguments put to him or her. Indeed there are tight rules on what a judge can take into account when determining the dispute. If the judge has his/her own ideas then they must be put to the parties to allow them to fight out over the issue.

Not only is the cost of the common law process thrown on the parties but also those that use the court process also pay for the whole infrastructure. The court service is required to be self-funding from the fees it charges to its customers. Some may argue that the poor therefore pay for our civil court process, a foundation of a democratic nation. They are more often defendants in debt collection, the charge for which is added to the judgment.

In some jurisdictions and in parts of the jurisdiction of England and Wales, there are jury trials for civil disputes. These are more prevalent in the United States where the power of a jury to award penal damages is renowned.

In crime we have juries and in very limited civil disputes. In those circumstances the judge takes even less part in the process since the jury decides the questions before it and, of course, in crime whether the defendant is guilty or not guilty. The result sometimes is that judges have been known to fall asleep on the job, particularly after a heavy lunch in the judges common room.



One reform that has taken place over the past few years is the dress code for advocates and judges. In civil procedure wigs and gowns are largely gone and whilst robes are worn these are in a new simplified form and no longer as below save for special occasions..

Whilst there are some broad similarities between the Civil Code process and the common law process, perhaps the marked difference is the precedential system. By this, decisions made by courts can be binding on courts of equal standing or lower courts.

The adversarial process has a standard running order

The common law process for determining disputes in front of the court follows a standard course throughout the common law world.

We have to present a letter before action setting out the claim. This has to be a fairly full letter seeking redress.

If the matter is not resolved then proceedings may be issued. Proceedings are accompanied by particulars of claim which set out in some detail the nature of the claim, the supporting facts and the relief sought.

The defendant then has the opportunity to file a defence. Again this sets out the counter arguments against the claim and puts into dispute the relevant issues.

We are entitled to ask for further information in relation to both the claim and the defence.

The court will usually make directions for the process then to trial, setting a timetable with dates. The next stage will be the disclosure of documents on both sides. This has been a particular point of friction and reform over the past few years.

Having received the documents, we then exchange witness statements. These set out the evidence on both sides. Again, this has been a matter of reform over the past few years.

If there are experts required to determine some aspects of the claim such as the measure of damages, then they will serve their reports and exchange views. Again this has been the subject of reform.

Finally the matter goes to trial. If I started a claim today I would expect to be in trial in about 18 months depending on the court and the dispute.

Generally trials are short and we would think a five day trial is a trial of some considerable length. The usual trial procedure is that the claimant puts their case and evidence; the defendant responds; the claimant then has a right of reply; and the judge determines the issue. Very often judgments are reserved to be delivered some little time later. This again can be a problem for judges because they are required to deliver judgments fairly quickly. There was a case of one judge delaying by 18 months and, having lost his notes of the hearing, he found it rather difficult to determine issues.

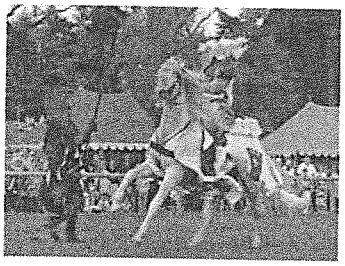
The adversarial process is expensive for the parties and can lead to inequality between the two parties. My own practice is to act on behalf of claimants and funding their claims against companies of substance and expensive lawyers can be difficult. Some attempts have been made to give an even playing field but, as I will say, those have been undone recently.

Until 2000, procedure determined by Rules of Supreme Court and County Court Rules

Until 2000 we had some old rules of the Supreme Court which dated back 100 years and some County Court rules that followed very much the rules of the Supreme Court. These were contained in two separate books – one was coloured white and other green. You will be unsurprised to hear that they are often referred to as the White Book and the Green Book. For some time I was editor of the Green Book.

In the mid-1990's a judge was designated the task of seeking to reform the rules of the Supreme Court and the County Court rules to produce a unified procedure for all courts. The judge was Harry Woolf or Lord Woolf as he is now in retirement.

I sat on the committee that invoked the reforms which came into effect in 2000 under the Access to Justice Act 1999.



Addressing procedure and the cost of the process

Lord Woolf addressed what were seen as the main problems in the system. It was regarded as slow, expensive and inflexible. Further, statistically, although proceedings were commenced and went through the procedure, most settled just before trial. One of the tasks that Lord Woolf set himself was to try and bring that settlement process to an earlier stage.

Main Woolf Reform Changes

The main Woolf reforms are on the slide. He required parties to set out in letters before action the full details of the claim. This was regulated by what became known as pre-action protocols. Initially they applied to specialist proceedings but they have been widened to cover all proceedings.

The second reform was in relation to the pleadings so the claim and the defence. Lord Woolf wanted to simplify that process and move away from the old rules of pleading. His view was that everything could go in the pleading including facts and witness evidence accompanied by documents. Whilst that has happened to some extent we still very much follow the concept of pleadings setting out the essential

facts, the basis of the claim and the damages. Those of you who are familiar with the US procedure will know that there the courts follow very much the Woolf idea of throwing everything into the claim and the defence in what we regard as quite extraordinary and lengthy documents.

Under the old rules we had a uniform procedure for all claims. Lord Woolf recommended that this should be divided into three tracks – the small claims track, the fast track and the multi track. The small claims track was going to be cost-free so that the losing party had no liability for the costs save for very limited court fees. The procedure in the small claims track is a much shortened version of the usual procedure. There are potential reforms in the small claims track and indeed the adoption of an inquisitorial process rather than an adversarial process.

The fast track also has as a rather simplified process whereas the multi track for larger claims provides a process much as I have explained above.

Disclosure, or discovery as the Americans would put it, has always been a problem, particularly with electronic data. The general view from the judiciary is that disclosure does not generally prove to be as important as the parties think. Judges complain that huge amounts of documents are produced to the court that are of no significance at all. Lord Woolf set about the idea of cutting down disclosure in order to make it manageable and less costly. I can, for instance, give you a recent example of the potential cost. We had a claim on behalf of consumers against a company. That company is telling us that the disclosure process will cost us in excess of £2 million.

Witness statement reform preceded Woolf. The idea was that witnesses should give their evidence before the trial so that there could be no ambush at the trial. That development started in the 1980's. Lord Woolf proposed that it should be adopted widely. We now see it as a normal part of the procedure. As you would guess, however, when lawyers got hold of the idea they started drafting the witness statements.

The trial procedure was addressed. It was intended to try and shorten the trial procedure and allow the trial judge to manage the case to ensure that the relevant issues were dealt with rather than a bevy of issues that really had little relevance.

Perhaps one of the biggest reforms to which we all refer for Lord Woolf is the settlement offer process. As you know, the loser pays the costs in most common law jurisdictions (but not the United States). Lord Woolf alighted upon the idea that there should be a settlement process by which the penalty of costs might either be relieved or imposed on the losing party. The system introduced (referred to as Part 36 because that is the relevant part in the civil procedure rules) provides that either party can make an offer and if the offer is beaten at trial then penalties are imposed on the losing party. Part 36 has been regarded as a great success and indeed was recently reformed again, to which I refer later.

Part II

1997-99 changes to costs regime in face of Legal Aid cuts

Coincidentally with the Woolf reforms, the Government proceeded to cut back the Legal Aid budget and cut out State assistance to claimants, particularly in relation to personal injury claims which are the vast bulk of litigation in front of the courts. To compensate for that, the Government introduced legislation to allow lawyers to enter into contingency agreements with their clients, often referred to as "no win no fee" agreements. These were not US style contingency agreements but the contingency allowed lawyers to increase their hourly charge. In addition, the Government decreed that the winning party should be able to recover the contingency payment as well as the insurance premium to cover the down side. That insurance is often referred to as "after-the-event" insurance.

It must be said that the result of this was that the cost of litigation increased substantially, particularly for defendants having to pay all these costs over the next ten years.

This became an intolerable burden according to some but, on the other hand, for many it provided access to the court. It produced to some extent a level playing field between consumer claimants and large corporations or insurance companies.

Subsequent Reforms

Overall theme of cost cutting in courts

Case management

Pre-trial review

Jackson Reforms 2013

In 2008 Lord Justice Jacksons was appointed to review civil procedure, particularly in relation to the costs of it and to suggest changes. He reported in 2010 and his reforms were brought into effect in April 2013. These addressed both the procedure and larger costs issues. To some extent the changes were intended to give judges much more control over the litigation process and to allow them to drive the costs by costs and case management.

The result is that there is a new procedure by which parties have to submit budgets for the litigation process to be approved by the court or agreed with the opposing party. Many of us complain that this is simply leading to satellite litigation but it is starting to embed itself in the standard procedure. I would presume that over time we will get used to it. Whether it will drive down costs remains to be seen. Most lawyers say that in fact the reforms will increase costs rather than reducing them. I remember when I was working with Lord Woolf, someone saying to me that there has been no change in the law yet that did not give some advantage to lawyers.

As well as the changes in the costs process, there have been other changes partly invoked by Lord Justice Jackson. One of those developments is having a significant effect in reducing the number of disputes in front of the court. These are referred to as portals. This is an internet process by which claims in personal injury can be

resolved without any reference to the court. Originally this applied to road traffic personal injury but it has been expanded to, for instance, dealing with employers' liability to employees for personal injury.

I addressed Part 36 previously. Lord Justice Jackson wanted to increase the effect of Part 36 and his reforms introduced more penalties for the losing party in not accepting an offer made in accordance with Part 36.

Ongoing Reforms

We are still in the early stages of the Jackson reforms. It remains to be seen how they will work out. The budgeting process is being developed as well as a much more hands-on process of the court in case management.

E-disclosure remains a problem. I have given you an example of the expense of it. Procedures are being developed to deal with e-disclosure and to provide the court with considerable control over the disclosure management. We now have to complete proposals for disclosure and seek to limit it as far as possible to ensure a cost effective and proportionate process.

There are continuing developments also in relation to experts. We now have a fairly standard procedure by which experts exchange reports but then have to meet discuss their reports to see what issues can be agreed and what remain to be decide by the court. There is then a final report to the court as to what is in issue.

Some of you may be familiar with the concept of hot-tubbing – not in a hot tub in the garden but in front of the court. This is a process used in the US in which the experts come before the court at the same time and deal with the same issues at the same time. One puts the case and the other responds. Hot-tubbing because they are in the hot-tub at the same time.

The question of costs is one that particularly interests lawyers and parties because it remains a significant problem that the cost of the process puts people off resorting to

the courts. Indeed we are seeing a very sharp rise in the number of people acting themselves in front of the court. Judges find that an extremely difficult development.

Further reductions in Legal Aid and access to justice with change in costs regime

Cuts in budget of infrastructure

We have much to learn from each other. As I have said, in the small claims track we are seeing a much more inquisitorial process with judges asking the parties questions. This is partly because of this increase in litigants in person.

Civil justice has been for me and many others who have been in practice for a long time a constant revolution over the past 20 years and it looks set to continue in that fashion.