
ARTICLES

The UK Access to Justice Report: A Sheep in Woolf's Clothing



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In England as well as Australia judicial case management is proving controversial. Will it bring down the costs of administering the civil justice system? Is it compatible with the adversarial procedure as developed in England, Australia and other common law countries? Lord Woolf, the author of the recent Access to Justice report in the United Kingdom, has given an affirmative answer to both questions. In this article, Lord Browne-Wilkinson, the senior British Law Lord, offers a different view.

I HAVE decided to speak on a subject which I have long been interested in but which is now, in the United Kingdom at least, a dead letter. However, I believe the topic to be alive in Australia — the relationship between an adversarial system and judicial case management. Will judicial case management cut costs if the underlying system remains adversarial? If judicial case management is to be successful will not that involve eroding the forensic nature of the battle to such an extent as to emasculate its best features? In the interests of saving costs ought we not to look at a non-adversarial system where the court conducts the case with only limited intervention by lawyers?

[†] Lord of Appeal in Ordinary. This is an abridged version of a paper presented at the Australian Institute of Judicial Administration's Sixteenth Annual Conference (Melbourne, 4-6 Sept 1998) and subsequently at the Supreme Court of NSW Judges' Conference (Sydney, 11 Sept 1998).

At present, in common law systems, the vast majority of costs incurred in civil litigation consists of the bills payable to each party's legal advisers. So far as the litigant is concerned, these are usually the only costs which matter. In some cases experts' fees may also be incurred; however, apart from the comparatively small court fee, the litigant is not concerned with the costs of providing the judge, the courthouse or the other overheads of the legal system. From these very obvious facts two points follow. First, cost only inhibits the ordinary citizen from litigating to the extent that it is incurred by his or her legal advisers. Secondly, in so far as the legal system requires functions to be performed by the court rather than by the parties, to that extent the cost of the litigation *to the litigants* is reduced.

However, the cost of litigation, at least in the United Kingdom, has now become so great that few but major companies can afford quite ordinary litigation without the assistance of legal aid. When we say: 'Access to justice is being denied by reason of the cost', that is not strictly true. Access to justice is being denied by reason of the fact that the state is now unwilling to fund the ever-increasing legal aid bill and is cutting down on the legal aid available.

It seems to me, therefore, that, in assessing the merits of any proposed reforms to the civil justice system, the following points must be carefully considered:

1. Will the reforms achieve any reduction in legal bills for the litigants?
2. Will the reforms give rise to any consequential increased expenditure for the state?
3. Could a better result be achieved at less overall cost by adopting an investigatory system in place of the current adversarial system?
4. Even if an adversarial system is more expensive overall than an investigatory system, do the merits of the adversarial procedure so outweigh those of the investigatory procedure as to require us to continue with the former, even though it is more expensive?

I am going to consider each of these four points by reference to some of the proposals made in Lord Woolf's report, *Access to Justice*.¹ This involves expressing doubts about whether certain of his proposals will be effective. However, I would like to make it clear that if the adversarial system is to be maintained, there are no other proposals which occur to me that are preferable to those made by Lord Woolf. Moreover, I am not going to be able to provide any definite answers at this stage. The purpose of my remarks is merely to suggest that, as common lawyers, we must not close our eyes to other possible methods of doing things. If the adversarial system is too expensive — as it appears to be — should we not look at other systems which

1. HK Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

have been used successfully before we make fundamental alterations to the adversarial procedure which may well destroy some of its virtues?

WILL THE PROPOSALS MADE BY LORD WOOLF ACHIEVE COST SAVINGS FOR THE LITIGANTS?

It is impossible for me to do justice to Lord Woolf's proposals in the limited time available. Broadly stated, he makes no proposals to change away from the present adversarial system. He does not suggest doing away with pleadings or with discovery or with the oral trial. What he does propose is a number of interlocking improvements to existing procedures. In addition, and fundamentally, he proposes a system whereby the court will manage the progress of cases towards trial on the basis of a common system of rules regulating both the County Court and the High Court.² There will be three streams of cases — small claims, fast-track and multi-track — with the procedure for each stream appropriate to the calibre of the case.³ He will introduce a scheme of sanctions against legal advisers who fail to comply with time limits and other procedural requirements, and a system of fixed costs in fast-track cases. Lord Woolf's view is that if his proposals are adopted there will be an overall reduction in the amount of 'satellite litigation' currently thrown up by interlocutory skirmishing.⁴

Professor Zuckerman has argued that earlier attempts in English history to effect such economies have failed.⁵ In his view, the financial incentives to the legal profession to complicate and increase satellite litigation lead lawyers, consciously or unconsciously, to conduct enormously costly and useless tactical manoeuvres in the lead up to the trial. Up to 1875, during the period of formalism in English court procedure, cases could be finally lost through a failure to adopt the right procedures. Procedure was all: the merits nowhere. In the brave new world which followed the passing of the first Judicature Act in 1875 all this was to change. A party was not to be prevented from going to trial because of a procedural lapse; the substantial justice of the case required the case to be heard unless the procedural failure had caused irremediable harm to the other side. The courts were given wide discretions to relieve against procedural faults. It followed that applications had to be made to invoke these discretions. These applications for relief produced an even more prolific crop of procedural litigation: it was said by Lord Bowen, ten years after the Judicature Act 1875 came into force, that it had

2. *Ibid*, ch 20.

3. *Ibid*, chs 2-5.

4. *Ibid*, ch 6.

5. AAS Zuckerman 'Access to Justice — The Lessons of History' *Asia-Pacific Courts Conference* (Australian Institute of Judicial Administration, 22-24 Aug 1997).

increased the cost of the average common law action by 20 per cent.⁶ The question which Professor Zuckerman silently asks is this: why should this not happen again? Why should not the economic incentives to lawyers to complicate litigation by procedural wrangling apply equally under Lord Woolf's proposals? There is now a further and untested form of discretion to be queried: the need in exercising all discretions under the new Civil Procedure Rules to take into account whether the steps proposed are proportionate, in cost terms, to the value to be gained.

Being a cynic I fear that the new regime will not produce any decrease in procedural bickering and the consequential savings that would flow from it. One of the proposed reforms is the introduction of a brand new set of Civil Procedure Rules covering much the same ground as the old Rules but in different, and much clearer, words. Admirable as it will eventually be to have a well-drafted set of Rules, what a happy hunting ground there will be in the meantime for the lawyer seeking to delay a case or to use costs as a bargaining weapon against an impoverished opponent. The Lord Chancellor, in introducing some of the new Rules to the House of Lords for debate on 29 July 1998, said: 'Judges and lawyers must resist any temptation to look back unnecessarily at [the old Rules], old case law and old ways'.⁷ This is indeed a brave new world where we are going to throw away 120 years of experience in construing and working out the parameters of procedures which will continue to apply. Take discovery. New Rule 31.8 requires a party to disclose documents which are 'in his control'. It then provides that a person has a document in his control if it is 'in his physical possession ... [or] he has ... a right to possession of it ... or he has ... a right to inspect or take copies of it'. This new Rule inevitably has a number of potential doubts attached to it. Does the new Rule establish a comprehensive definition of the word 'control', or do the instances expressly mentioned provide examples of a wider concept? Does the concept of 'control' differ from the former concept of documents being 'in his possession, custody or power'? If so, what is the distinction? These are real questions: nobody raising such points could be said to be acting oppressively or frivolously.⁸

6. C Bowen 'The Law Courts Under the Judicature Acts' (1886) 2 LQR 1, 8.

7. *Hansard* (HL) 29 Jul 1998 (Col 1594). The new Rules came into force on 26 April 1999 and may be viewed at <http://www.open.gov.uk/lcd/civil/procrules_fin/crulesfr.htm>.

8. It should also be noted that discovery is to be limited, in the first instance, to documents for which a party has made 'a reasonable search': R 31.7(1). Rule 31.7(2) states that the factors relevant in deciding the reasonableness of a search 'include' the following: '(a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search.' The concept of a 'reasonable search' is wholly new. Are the matters itemised in Rule 31.7(2) a comprehensive statement of the relevant factors or — more probably — merely some of the relevant factors? To my mind, it is extremely unlikely, at least in the early years, that

Another case in which the new Rules are likely to increase, rather than diminish, procedural litigation is caused by the new Rule 1.1. This states that the overriding objective is to enable 'the court to deal with cases justly'. This is defined to include, amongst other things:

- (i) 'saving expense';
- (ii) 'dealing with the case in ways which are proportionate ... to the amount of money involved; ... to the importance of the case; ... and to the financial position of each party'; and
- (iii) 'allotting to [the case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'.

Under Rule 1.2 the court must seek to give effect to the 'overriding objective' when it 'exercises any power given to it by the Rules'. Moreover, Rule 1.3 states that it is the duty of the parties 'to help the court to further the overriding objective'. Here, cost to the parties and cost to the state are, for the first time, so far as I am aware, introduced into the exercise of judicial discretion. It seems to be inevitable that there will be very many applications to the court testing how the balance is to be struck between justice, in the old sense of justice between the parties to the litigation, and cost, in the sense of cost to the legal system as a whole.

How would Lord Woolf react to these fears of increased expenditure? First, I think he would say that by requiring all interlocutory questions to be dealt with at a case management conference, to be held early in the preparation of the case, the number of interlocutory applications will be reduced. Where have I heard this before? In my very early days at the Bar, on the recommendation of the Evershed Committee,⁹ there was introduced 'the robust summons for directions': all interlocutory applications were to be dealt with on the summons and the Master was to be active in his management of the case. The robust summons died the death within a very short time after its introduction — first, because the profession was not prepared to go along with it, and secondly, because on a large number of matters the Bar was not prepared to abide by the decision of the Master but appealed to the judge. Although all interlocutory appeals will now require leave,¹⁰ there will be no shortage of bona fide appeals on the application of the new Rules. What is more, these decisions at case management conferences, and the like, are to be taken by exactly the same group of men and women who are currently taking such decisions: Masters, Registrars and District Registrars. Although amongst their number there are many able and outstanding procedural judges, one is not facing reality if one

the parties will be able to agree on what constitutes 'a reasonable search': there will therefore have to be an application to the court to determine a discovery issue.

9. Committee on Supreme Court Practice and Procedure *Final Report* Cmnd 8878 (London: HMSO, 1953).

10. Woolf *supra* n 1, ch 14.

assumes that the same people who are now making decisions which are frequently overturned on appeal will suddenly start making better decisions. Case management is a marvellous idea if you have sufficient Solomons to administer it. But human nature is not going to change overnight: there are going to be errors and there are going to be appeals. The wider the area for appeal, the more appeals there will be.

Next, I have no doubt that Lord Woolf would urge that his reforms will necessitate a complete change in the attitude of the profession. In his Interim Report, he referred to the need for 'a new ethos of cooperation'.¹¹ In his Final Report, he referred to the need for the parties to adopt 'a sensible and cooperative approach'.¹² Both these remarks were directed to the pre-litigation stage of the dispute. But he plainly expects the same attitude to be displayed after the start of the proceedings. I have already referred to Rule 1.3, which imposes on the parties an affirmative duty to help the court to further the overriding objective. In his Final Report, Lord Woolf envisages that strong sanctions will be exercised against a party who, though not in breach of any specific Rule, frustrates the overriding objective by pursuing his litigation in an oppressive manner.¹³

Whether lawyers raised in an adversarial system will ever cooperate in the way envisaged is a matter of opinion. Lord Woolf believes they will; unfortunately, I do not. Time will show which of us is right. It is the essence of an adversarial system that the litigant has his champion who is seen to be fighting his battles for him. The manner of the common law advocate, however much concealed beneath a veneer of reason, is an aggressive, stagey one. The profile of an FE Smith or a Garfield Barwick is light years away from that of the German lawyer who, possibly incorrectly, normally comes over as a fairly grey figure. The common law adversarial system is macho, anti-authoritarian and powerfully on the side of individual rights. I do not believe, over any length of time, that a trial lawyer of the type I have described will learn genuinely to cooperate with the other side if he feels that he can gain a tactical or strategic advantage by not doing so. For these reasons, therefore, I fear that Lord Woolf's proposals may not produce the savings in cost which he anticipates.

WILL THE WOOLF PROPOSALS GIVE RISE TO INCREASED EXPENDITURE FOR THE STATE?

I have already referred to increased expenditure on interlocutory proceedings consequential upon the introduction of the new Rules. In addition, as the Woolf

11. HK Woolf *Access to Justice: Interim Report* (London: HMSO, 1995) ch 19.

12. Woolf *supra* n 1, ch 10.

13. *Ibid*, ch 6.

Report itself recognises,¹⁴ the additional work thrown onto the courts by the transfer of case management to them will have to be met by the appointment of additional judges and court staff and the installation of information technology. Lord Woolf believes that the savings flowing from his other proposals will make the additional resources required 'well within the bounds of what is possible'.¹⁵ In the absence of any costings of the proposals, it is impossible to test this assertion. But on a purely anecdotal basis my experience as Vice-Chancellor of the Chancery Division of the High Court suggests that his view may be unduly sanguine. Every year there would be a handful of particularly heavy cases giving rise to major interlocutory applications. I arranged for one judge to be in charge of each of these heavy cases so that he handled all interlocutory applications. So far as the major cases themselves were concerned this was extremely successful: the allotted judge knew the case, he did not have to have it explained to him on each occasion and he was genuinely in a position to manage the case. But so far as the rest of the business in the Chancery Division was concerned, it was wasteful of judicial time. The allotted judge had to be available on a given day and for that purpose had to be kept free from other work. Moreover, he had to be available in London. If, for some reason, the interlocutory application went short, or did not come on at all, that judge's time was wasted. In terms of obtaining the maximum use of judge hours, the larger the pool of both work and judges that the administrator has available, the easier it is to make efficient use of all the judges' time. The allocation of one judge to one case is the negation of that principle. I believe the tendency will be for Masters and District Registrars who are currently managing civil litigation to continue to do so in rather a different form. But I fear that the result may be the same: the legal profession will not pay any more respect to the decisions of Masters and District Registrars than they used to when dealing with the robust summons for direction. Accordingly, I consider that there is a substantial risk that, if effective case management is to be introduced and therefore County Court and High Court judges used in the management of cases, this will produce a substantially increased cost burden to the state by requiring the appointment of more judges.

WOULD AN INVESTIGATORY PROCEDURE BE BETTER?

If there is a possibility that the case management of civil litigation conducted on an adversarial basis will prove to be more expensive in total than the cost of such litigation has been in the past, it seems sensible to look at the possible alternative of an 'investigatory' system. The only such system on which there is

14. Ibid, ch 1, para 7.

15. Ibid, ch 1, para 8.

any readily available material is the German system, although German lawyers object to it being called an 'investigatory procedure'.¹⁶

Proceedings in Germany are started by filing with the court a statement of claim which sets out the facts in outline, lists the evidence to be relied upon and attaches the documents to be relied upon. It also states the relief claimed. The court requires the defendant to file a written defence containing the same information. There may then be a preparatory hearing at which the court seeks clarification of the issues and attempts to narrow them. The court instructs the parties which witnesses to call and (if necessary) submit to the report of a court expert. There are no witness statements or depositions. There is no discovery. The expert is not a witness but an assistant to the court. The parties can call their own experts if they wish, but they will not recover the costs of doing so. The parties themselves are not competent witnesses.

At the trial, which is not necessarily a single continuous event, proceedings start by the court summarising the case to the parties. The court then calls the witnesses and examines them orally. Afterwards, the parties' lawyers can examine them. After the evidence, the parties' lawyers can address the court, but in practice they seldom do so at any length, merely referring back to the statements they made in the opening documents. The court is taken to know the law. Judgment is given in writing at a later date.

All cases, save at the lowest level, are heard by three judges. Although I can get no accurate figures, a very high proportion of first instance decisions are appealed. Costs, including court fees which are substantial, follow the event. Costs are fixed. Taking figures from Professor Zuckerman's article,¹⁷ on a judgment of £8 850 the court's fixed fees will be £510 and the lawyer's fixed costs £1 260. On a judgment of £1.3 million the court's fixed fees will be £15 810 and the lawyer's fixed costs £16 230. Everyone is agreed that the lawyer's fixed costs are much lower than the average English bill of costs for similar work.

Before seeking to draw any conclusions from these facts, there is a point which needs to be dealt with. As I have said, German lawyers consider that their system is not 'investigatory' but a 'party system'. By that they mean that the parties fix the ambit of their dispute: the judge cannot call a witness not put forward by the parties and cannot give any relief if not claimed. However, it is equally clear that, although not investigatory, the German system is very far from the English concept

16. For this part of my speech, I have drawn on a research paper by Professor AAS Zuckerman conducted for the final Woolf Report, and also his article 'Lord Woolf's Access to Justice: Plus Ça Change...' (1996) 59 MLR 773. In that article Professor Zuckerman gives a short account of civil procedure in German courts for which I am much indebted, as I am to Professor Coester-Waltjen of the University of Munich for certain supplementary points.

17. *Ibid.*, 792-793.

of an adversarial system. There is no discovery; there is no opening of the case, however short, by the parties; witnesses are called by the court and not by the parties; and the court knows the law and does not require submissions upon it. In my view, the German system lacks practically every significant feature of our adversarial system whereby the parties deploy their own case as they wish to, produce their own evidence as they wish to, and cross-examine the other sides' witnesses as they wish to.

One of the conclusions reached by Professor Zuckerman, and adopted by Lord Woolf, was that the reason why German lawyers cost less than English lawyers in the conduct of litigation was *not* because the German lawyer had to do less or easier work.¹⁸ I find that conclusion astonishing and difficult to accept without further explanation. If asked to identify the most expensive item in litigation prior to trial I would have said that it was discovery. Another expensive item is the search for witnesses, the taking of statements and the filing of witness statements. Legal research, particularly if conducted by counsel, is extremely expensive. Yet all these things, which are the function of lawyers in England, are not primarily, or in some cases at all, to be dealt with by lawyers under the German system. On the information I have, it seems to me that both the quantity and the difficulty of the work of the German lawyer is very moderate when compared with that of the lawyer in common law litigation.

German law, which in the past was much more adversarial, has transferred a large proportion of the burdens of litigation from the shoulders of the litigants to the court. Hence the very modest charges with which the German lawyer is apparently content. But, of course, the corollary of this transfer is that the court system has to be larger in order to handle the work not done by the parties' lawyers. There are no accurate figures available to me, but there are approximately 20 000 judges in Germany. This figure includes a number of people whom we would not call judges, such as Masters, District Judges and chairmen of tribunals. But at a most conservative estimate the German judicial establishment is between five and ten times the size of the corresponding English establishment. To this must be added the support staff for the judges.

It will be apparent that the cost of maintaining the judicial establishment and the court system in Germany must be very much greater than in the United Kingdom. Finally, there is a limited amount of legal aid in Germany, the cost of which has to be taken into account. Broadly, then, the position is that in Germany the major cost of litigation to the state is the cost of the system itself (the cost of legal aid being minor) whereas in the United Kingdom both the cost of the system and of legal aid are great.

18. Woolf *supra* n 1, ch 7, para 14.

The position, therefore, is that in Germany the costs of litigation falling directly on the individual (court fees plus lawyers' fixed costs) are sufficiently moderate not to deter a large number of people litigating at their own expense or at small cost to legal aid. If, in the United Kingdom, we were to go over to the German system of non-adversarial trials and fixed fees, would the increase in public expenditure involved in appointing more judges and support staff exceed any reduction in the cost of legal aid?

Again, we have no cost-benefit analysis. But I strongly suspect that the non-adversarial German model is significantly cheaper than the Woolf model would be. There are four reasons for this. First, although the Germans consider three-judge courts to be essential, our experience indicates that they are not: a single judge sitting alone, preferably with support from a law clerk, should be as capable of handling the German system as an adversarial system. Accordingly, if we in the United Kingdom were to go over to something like the German system there would be an increase in the judicial establishment, but not so substantial as to make it comparable to the German judicial establishment. Secondly, if you relieve the parties of particular tasks by transferring them to the court, you are thereby saving one set of costs. The major expense of a forensic battle is that both sides have to do the same work. If that work is transferred to the court, and done by the court, only one set of costs will be incurred on any particular task. Thirdly, it is generally the case that the direct cost of employing people on the public payroll (ie, additional judges and court staff) is lower than the cost of employing the same people in the private sector — a cost which then has to be picked up by the legal aid fund. In effect, what one would be doing would be to introduce a state system providing for the resolution of disputes, the parties having a purely subsidiary role to play once the proceedings had begun.

Finally, if a German type of non-adversarial procedure was adopted, there is no reason why fixed costs should not be as much a part of the system in the United Kingdom as they are in Germany. This would remove the incentive on the lawyers to increase procedural activity since any such increase would merely reduce the amount of their net profits from the litigation. The amount payable by legal aid to the English litigant would therefore be very much reduced.

EVEN IF THE ADVERSARIAL PROCEDURE IS MORE EXPENSIVE, DO ITS ADVANTAGES OUTWEIGH THE ADDITIONAL COSTS INVOLVED?

This is an even more hypothetical question than the first three I have discussed. The correct answer to it must depend on the extent to which my crystal gazing is correct and Lord Woolf's wrong. But, as I have said, I am not trying to answer the question but only to show that serious research must be done on the likely overall

cost of the Woolf proposals and the likely overall cost of adopting a German-style procedure in the United Kingdom.

Having tried to do the costings accurately, one would then be able to start answering this last question. If the Woolf proposals are going to save sufficient expenditure to make the continuation of an adversarial procedure politically acceptable, no one would want to change it. Knowing as little as I do about the rival systems, I am strongly in favour of retaining an adversarial system if it can be afforded. But if, as I fear, Lord Woolf's proposals do not produce a substantial saving and, by reason of increased staff requirements, would cost more to run, the result would be disastrous and it would be necessary to look to some cheaper system such as the German procedure, if that is cheaper. My wish is that we should not be common law chauvinists. I have not heard any complaints about the German civil courts. On the contrary, I have heard them highly spoken of both for their efficiency and, particularly, for their cheapness. We cannot rule out as not good enough for us a system which regulates, in one form or another, more than one half of the developed world. If you cannot afford the Rolls-Royce system of the adversarial common law you will have to adopt a system you can afford. That alternative system may not be a Mini — it may be a Volkswagen, and today's VW is better than a Rolls-Royce of 10 years ago. But let us first of all try to get the facts having been persuaded that they may be relevant.
