

## LORD WOOLF'S ACCESS TO JUSTICE: PLUS ÇA CHANGE ...

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'The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous make the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.'

*Dickens, Bleak House, Ch XXXIX.*

The Lord Chancellor appointed Lord Woolf in March 1994 to review the rules of civil procedure with a view to improving access to justice, reducing the cost of litigation, and removing unnecessary complexity. One year later he produced an interim report, and now the final report has appeared.<sup>1</sup> Lord Woolf carried out his task with the assistance of a team consisting of some of the best brains in the Lord Chancellor's Department and in consultation with working parties on which all branches of the judiciary and the legal profession were represented. He also commissioned some important research. Before the publication of each report the ideas of reform were aired in public debates. As a result, the two reports and their annexes consist of the most far reaching review of civil procedure to have been conducted in living memory. Their recommendations offer bold and imaginative devices aimed at reducing the complexity of litigation.

The aim of this paper is not to provide a detailed commentary on the Woolf Report. Rather, the discussion will concentrate on the strategy adopted for reducing the cost of litigation. It will be argued that the cause of excessive cost lies not in the complexity of our procedure but in the incentives that lawyers have to complicate litigation. The Woolf proposals for reducing costs will then be considered. It will be suggested that the strategy, though admirable in intention and structure, is vulnerable to subversion by adverse forensic interests; the self-same forces that defeated all past attempts at reform. Lastly, the German strategy of fixed costs will be described and its practical ramifications discussed.

### High costs and their generating process

The cost of litigation in England is unpredictable, excessive and disproportionate. It seems to make little difference, in this regard, whether the dispute is complicated or simple, important or trivial. Even a dispute which is speedily resolved can run up huge litigation costs.<sup>2</sup> In commercial cases the costs may not only be enormous in absolute terms, but may themselves

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<sup>1</sup> *Access to Justice, Interim Report*, June 1995; *Access to Justice, Final Report*, July 1996. The former will be referred to as IR and the latter as FR, and references will be to chapters and paragraphs or to numbered recommendations.

<sup>2</sup> *Symphony Group plc v Hodgson* [1993] 4 All ER 143 involved an action to enforce a covenant in restraint of trade against an employee whose annual salary was about £ 10,000. The plaintiffs issued a writ, secured an interlocutory injunction, and obtained final judgment, all in just nine weeks. The cost to the plaintiffs alone was in excess of £ 100,000.

lead to further costly litigation.<sup>3</sup> The trend of spiraling costs is reflected in the inexorable rise in the legal aid budget. In the five years leading to 1995–96 the cost to the taxpayer doubled to reach £ 1.4 billion and is forecast to rise by £ 100 million in each of the next three years.<sup>4</sup> This despite dramatic falls in eligibility to legal aid. Even members of the judiciary have become alarmed by the phenomenon.<sup>5</sup> District Judge Greenslade, who was intimately involved in the Woolf inquiry, reports a general view amongst the numerous persons who attended the many seminars organised by the Woolf Inquiry Team that litigation is too expensive.<sup>6</sup>

If more than impressionistic evidence of the prevalence of this phenomenon were necessary, it is now provided in a survey of litigation costs by Professor Hazel Genn, which was commissioned by Lord Woolf and is annexed to the Final Report.<sup>7</sup> The survey found a lack of proportionality between the value of claims and the costs incurred in prosecuting them, especially at the lower end of the scale. Amongst cases with a value of less than £ 12,500, in 31% the costs to the successful party alone were between £ 10,000 and £ 20,000, with a further 9% incurring costs in excess of £ 20,000. These figures look even worse if one remembers that about half of the cases were concluded with a consent order and only one quarter by judgment. Amongst claims with a value of between £ 12,500 and £ 25,000, costs as a percentage of claim-value range from 41% among personal injury cases to 96% among Official Referees' cases. Again, these represent costs to the winning party alone and refer to cases that were settled as well as to cases that went to trial.<sup>8</sup> Commenting on these figures Samuel Issacharoff has written that 'the transaction costs associated with the legal system [ie the costs to both sides] exceed the merits of the dispute by a factor of two to one. This absolutely extraordinary level of expenditures means that the legal system is simply too expensive, too inefficient, and too sclerotic to provide a meaningful forum for dispute resolution in the commonplace social interactions that fall within the confines of tort, contract and property'.<sup>9</sup>

At the outset of his Interim Report Lord Woolf identified the cause of high costs as being not so much the complexity of procedure as the 'uncontrolled nature of the litigation process'.<sup>10</sup> 'Without effective judicial control,' he says, '... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply'.<sup>11</sup> He concludes that '[t]his situation arises because the conduct, pace and extent of litigation are left almost completely to

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<sup>3</sup> In *Re Macro (Ipswich) Ltd* [1996] 1 All ER 814, a petition under s 459 of the Companies Act 1985 was tried in court for 24 days, at the end of which the petitioners bill was £ 520,000 and that of the respondent £ 205,000. Taxation on the respondent's side was estimated to take as long as two weeks, thus leading to further substantial costs.

<sup>4</sup> *Striking the Balance - The Future of Legal Aid in England and Wales*, White paper published by the Lord Chancellor's Department, June 1996, Cm 3305, para 1.2.

<sup>5</sup> Three years ago Sir Thomas Bingham MR wrote: 'Day by day we read in the newspapers of the inordinate cost of litigation, of the congestion to which the courts are subject and, in very recent weeks, of proposals to cut back the legal aid budget because the costs of legal aid are spiraling out of control, those increases in legal aid expenditure being apparently due not to an increase in the number of litigants who are assisted but to the greatly increased cost of the actions in which they are supported.' *Wilkinson v Kenny* [1993] 3 All ER 9, 11.

<sup>6</sup> *Objections to Woolf*, NLJ, August 2 1996, 1147.

<sup>7</sup> FR, Annex III. See also costs statistics in the Annual reports of the Legal Aid Board.

<sup>8</sup> It is also to be borne in mind that the survey was conducted on the basis of bills submitted for taxation. Many disputes are settled without reference to taxation. It is reasonable to assume that settlement costs are also very high. One is informed by practitioners that it is not unknown for a dispute concerning a builder's bill of £ 12,000, which is settled, to generate legal fees of more than half that amount per party.

<sup>9</sup> S Issacharoff, *Too Much Lawyering, Too Little Law*, in Zuckerman and Cranston, *Reform of Civil Procedure - Essays on 'Access to Justice'*, OUP, 1995, 245–246.

<sup>10</sup> IR, Ch 3, para 1.

<sup>11</sup> IR, Ch 3, para 4.

the parties. There is no effective control of their worst excesses. Indeed, the complexity of the present rules facilitates the use of adversarial tactics and is considered by many to require it.<sup>12</sup>

Lord Woolf believes that in order to prevent litigious excesses we need to impose judicial control on litigation. The thrust of his strategy, therefore, is aimed at placing the litigation process under firm controls. These controls are to take two principal forms. The first is rule control. It consists of economical and tightly drawn procedures which, when applicable, will ensure that the litigation moves forward expeditiously and at more or less pre-determined direction and pace. The second form of control would involve judicial supervision. As soon as the defence has been served, judges will take the management of the litigation in hand. Thereafter, they and not the parties' lawyers, will determine the nature of the processes to be followed and their pace.

However, before we can assess the benefits of these controls and their chances of success, we need to have a better understanding of that which needs to be controlled. For unless we appreciate the forces that generate high costs, we can hardly hope to restrain them. There are, essentially, three factors which generate the upward pressure on costs: the system of remunerating lawyers on an hourly basis, which rewards complexity; the indemnity rule whereby the winner recovers his costs from the loser, which encourages a competition of investments in litigation; and, the availability of almost unlimited legal aid funds.

### **Lawyers' economic incentives to complicate and protract litigation<sup>13</sup>**

Solicitors are paid for their services on an hourly basis. In addition, they may charge an uplift for care and conduct which may, in a complex case, amount to 100 % of the fee.<sup>14</sup> Barristers have traditionally charged according to the complexity of the case, but there is an increasing trend for them too to seek an hourly rate of return. Where litigation is involved, a barrister will charge a brief fee, which covers preparation for representation at the trial and attendance on the first day of the trial. In addition a barrister will charge a refresher fee calculated as a certain amount per each day of trial.

The hourly rates vary greatly from one firm to another and from one area of the country to another. But some idea of prevailing rates may be gained from *Re a Company (No 004081 of 1989)*.<sup>15</sup> In that case reference was made to a survey carried out by the Central London Law Societies in 1992. In one part of central London, the average expense for a category I fee earner, a solicitor with three or more years' post-qualification experience, was £ 171.26 per hour.<sup>16</sup> This is only an average figure. In the case just referred to the solicitors in fact charged their clients £ 250 an hour. Further, as we have seen, the winning party's solicitor may be entitled to recover an uplift for "care and conduct" in addition to the hourly fee. The uplift will normally range from 50% to 100% of the taxed bill.<sup>17</sup> Barristers' brief and refresher fees also vary enormously. In a heavy case these can run into tens and even hundreds of thousands of pounds.

Virtually all economic activity tends to follow the most rewarding path, often without any self-conscious decision on the part of the actors. In our system, whether charging is by the hour, by the day or in proportion to complexity, lawyers have no direct incentive to economize in the provision of services. These two economic factors, the natural desire to maximise

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<sup>12</sup> IR, Ch 3, para 5.

<sup>13</sup> For an exhaustive description of the costs system see: P T Hurst, *Civil Costs*, Sweet & Maxwell, 1995.

<sup>14</sup> *Loveday v Renton (No 2)* [1992] 3 All ER 184.

<sup>15</sup> [1995] 2 All ER 155.

<sup>16</sup> In another recent case the hourly rate allowed was £ 75 in respect of costs prior to 1 April 1991 and £ 90 in respect of costs incurred thereafter; *Wraith v Sheffield Forgemasters* [1996] 2 All ER 527.

<sup>17</sup> *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169; *Re a Company (No 004081 of 1989)* [1995] 2 All ER 155.

reward and the systemic incentive, lead irresistibly to forensic practices designed to increase profits.<sup>18</sup> Bevan, Holland and Partington write: ‘The principal/agent problem and the potential it creates for supplier-induced demand offers one explanation why the current system of private provision of legal services is so expensive. Lawyers get paid for providing legal advice and remedies through the courts (even when other kinds of advice and other remedies would be more effective and less costly), and, typically under the current system, the more work the lawyer does, the more the lawyer gets paid’.<sup>19</sup> Judge Greenslade who participated in the Woolf Inquiry working parties writes—

‘With solicitors paid on an hourly “cost plus” basis there is no incentive to work in a fully efficient way ... There is little evidence to show that as a general rule solicitors work with any budget in mind or even with any consciousness of the amount of costs that have built up at any stage of the proceedings.’<sup>20</sup>

The influence exerted by these economic factors finds illustration in the law reports. In one case a ‘General Authority’ form obtained by a solicitor from his legal aid client, ‘which purported to make the plaintiff potentially liable to his solicitors for their pre-certificate [ie legal aid certificate] costs’, was held to be ‘illegal, a sham and a device to circumvent the restriction imposed by the legal aid legislation.’<sup>21</sup> Morland J, who reached this conclusion, was informed that the solicitors who drafted that contract had sent it to the Law Society for approval and it was approved by the ethics and guidance committee.<sup>22</sup> The resort to such tactics may not be widespread, but other more common ways of inflating costs may be employed. ‘There has been a tendency among some firms of solicitors’, Hobhouse J observed, ‘to put forward grossly inflated percentages by way of uplift ...’<sup>23</sup> The phenomenon is not confined to solicitors. In *Re a Company (No 004081 of 1989)*,<sup>24</sup> already mentioned, leading counsel who had already earned a brief fee of £ 20,000, put in a claim of £ 1,500 for attending a hearing without his junior, notwithstanding that the hearing was purely formal and lasted a mere 10 minutes. Lindsay J held the claim to be ‘beyond any doubt unreasonable’.<sup>25</sup> In another case leading counsel, who had submitted a brief fee of £ 130,000 and a refresher fee of £ 1,000 per day, put in additional claims in respect of preparation, consultation with other counsel in the case and the like amounting to nearly £ 80,000. The bulk of these additional fees was disallowed as being in respect of work covered by the brief fee.<sup>26</sup> It is therefore not surprising that in a lecture to the Bar Council Lord Woolf felt compelled to criticise the high level of fees charged by some members of the bar.<sup>27</sup>

Profits do matter in all occupations and professions and lawyers are no exception. The number of billable hours a solicitor generates is pertinent to promotion to partnership in certain firms. Even barristers tend to be graded by their hourly charges. There is nothing

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<sup>18</sup> Research suggests that the hourly fee can lead lawyers to put in more hours than the client would wish; E Johnson, ‘Lawyer’s Choice: A Theoretical Appraisal of Litigation Investment Decisions’ (1981) *Law and Society Rev* 15; M White, ‘Legal Complexity and Lawyers’ Benefits from Litigation’ (1992) 12 *International Review of Law and Economics* 381.

<sup>19</sup> *Organising Cost Effective Access to Justice*, Social Market Foundation Memorandum, July 1994.

<sup>20</sup> *Objections to Woolf*, NLJ August 16 1996, 1252, 1253.

<sup>21</sup> *Joyce v Kammac Ltd* [1966] 1 All ER 923, 925. Commenting on the proposed legal aid reforms a practitioner has recently written that a ‘conflict will arise with almost every decision that the solicitor has to take between his duty to the client and the need to maintain the profitability of the legal aid work for his practice’; J Gibbons, *The enemy within*, NLJ, June 16 1995, 898.

<sup>22</sup> *Id.*

<sup>23</sup> *Loveday v Renton (No 2)* [1992] 3 All ER 184.

<sup>24</sup> [1995] 2 All ER 155.

<sup>25</sup> *Id* at 167.

<sup>26</sup> *Loveday v Renton (No 2)* [1992] 3 All ER 184.

<sup>27</sup> Reported in the *Independent* on Sunday, 1 October 1995.

wrong with the desire for gain, but we need to acknowledge its existence and be prepared to assess its effect on the administration of justice.

The wholesome desire of service providers to generate rewards is normally counterbalanced by the equally wholesome desire of consumers to maximise their own benefits or, put differently, to maximise value for money. But when it comes to legal services this countervailing factor is seriously impaired because clients lack the means of protecting their interests vis-a-vis their lawyers. In order to secure value for money a client must be able to assess the quality of legal services. Due to the complexity of the law and its obscure terminology lay clients have few means of assessing the quality of service provided by their lawyers. Lord Woolf refers to 'the tendency of parties at present to make numerous interlocutory applications. These are generally of a tactical nature which may be of dubious benefit even to the party making the application and which may not be warranted by the costs involved'.<sup>28</sup> Clearly, lay clients have no way of judging the need for an interlocutory application. Nor does the opponent's lawyer have a particularly strong incentive to expose the wastefulness of such applications, since he or she would be better off fighting each interlocutory application as it comes up and charging for the work involved. Furthermore, it is hard to object to tactical posturing when, over time, it has become acceptable by virtue of being common.

As things stand clients may even lack information about how the costs charged to them will be calculated, let alone their eventual level. Few firms of solicitors advertise or even disclose their hourly charges and the same is true of barristers. The *Civil Justice Review* recommended in 1988 that '[s]olicitors and barristers should be encouraged and expected to provide information to the public by way of stated rates per case or per hour and should be entitled to free publicity about these rates in lawyers' referral lists.'<sup>29</sup> But little progress has been made and Lord Woolf echoes this recommendation by saying that it 'should be a professional obligation for lawyers, before they are retained ..., to explain to the prospective client how their charges for litigation are to be calculated and what the overall cost might be'.<sup>30</sup> The fact that cajoling is still needed is itself indicative of the legal profession's resistance to enabling consumers to question charges, let alone assess value for money.

### **The indemnity principle**

Clients' resistance to costs also tends to be undermined by the indemnity rule, whereby the loser in litigation has to pay the winner's costs. The fear of having to pay the opponent's costs acts as a deterrent to litigation, of course.<sup>31</sup> But once it is clear that a dispute is destined to go all the way to trial, the indemnity principle tends to erode resistance to cost. Given that success brings with it not only the sum claimed but also the expenses laid out, a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has good reason for progressively raising his stakes. Once one party has done so, the opponent would feel compelled to follow suit for fear that by using inferior procedural devices he could compromise his chances of success and run a greater risk of having to pay the other party's costs as well as losing the subject matter in dispute. Indeed, a point may come where the parties would have reason to persist with investment in litigation not so much for the sake of a

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<sup>28</sup> FR, Ch 7, para 23.

<sup>29</sup> *Report of the Review Body on Civil Justice*, June 1998, Cm 394, para 383.

<sup>30</sup> FR, recommendation 59.

<sup>31</sup> This deterrent can itself be a source of injustice as it affects litigants in inverse proportion to their wealth. See Zuckerman, *A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice*, (1995) 22 *Journal of Law and Society* 155.

favourable judgment on the merits, as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject matter in issue.<sup>32</sup>

The freedom a litigant has of running high costs may be used oppressively. A rich litigant may intimidate a poorer opponent simply by running a high cost litigation strategy. The litigant who cannot afford to raise the necessary funds to match the opponent's procedural stakes, may well feel obliged to settle on unfavourable terms. Further, it may happen that in order to persuade a defendant to enter into serious negotiations, a plaintiff has to demonstrate, through prosecuting pre-trial proceedings in earnest, a commitment to litigation, without which the defendant will not take the action seriously. It is clear, therefore, that the high cost of litigation could itself generate further upward pressure on costs.

### **The legal aid scheme**

The legal aid system sought to provide a level of legal services to the poor to ensure that they are not at a disadvantage compared with their richer opponents. But by aiming to match the legal services of the poor to those affordable by the rich, the level of legal aid support was pegged to what the financially endowed litigant could afford. As a result, the treasury was forced to allocate increasing funds for the purchase of legal services. It is not unreasonable to assume that this infusion of money into a system already liable to upward pressure on costs accelerated the rise in the unit cost of legal services.<sup>33</sup> Bevan, Holland and Partington who looked at the pattern of increase in the legal aid budget concluded—

'The picture that emerges from analysis of legal aid over seven years to 1993–94 is one consistent with the hypothesis of supplier-induced demand: legal aid provided scope for increases in volume in the number of acts of assistance for most categories ... and for hours per act in all categories (except the Duty Solicitor Scheme).'<sup>34</sup>

In his recent White Paper the Lord Chancellor has announced his intention to introduce measures to curb the inflationary tendencies of the legal aid budget,<sup>35</sup> but the effects of past policies on what has become accepted litigation practice will not disappear overnight.

### **The generating process**

Although we have identified three components in the process that generate costs, it is clear that the most potent one consists in the lawyers' economic incentive. Indeed, the remaining components operate to enhance the effect of this economic incentive. The indemnity principle blunts clients' resistance to costs, once litigation is underway. For a litigant who is informed that an increase in the intensity of litigation will increase the chances of success, will be less concerned about the immediate increase in cost and more interested in the prospect of winning and, thereby, recovering his total costs, as well as obtaining a favourable judgment. The legal aid system has increased the scope for the operation of the incentive. The Lord Chancellor's White Paper notes that 'in some ways the current scheme gives highest rewards to lawyers who do more work than is necessary.'<sup>36</sup> Further, the decision whether to provide legal aid funds 'has to rely heavily on the advice of the client's lawyers'.<sup>37</sup> Lastly, since the legal aid client does not have to pay for legal services nor meet the opponent's costs when the latter wins, the client has no reason to check expenditure by the lawyer.

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<sup>32</sup> Cf *Hanlon v The Law Society* [1981] AC 124, 142.

<sup>33</sup> For a fuller account see: Zuckerman, *A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice*, (1995) 22 *Journal of Law and Society* 155.

<sup>34</sup> *Organising Cost Effective Access to Justice*, Social Market Foundation Memorandum, July 1994.

<sup>35</sup> *Striking the Balance - The Future of Legal Aid in England and Wales*, June 1996, Cm 3305.

<sup>36</sup> *Striking the Balance - The Future of Legal Aid in England and Wales*, June 1996, Cm 3305, para 1.9.

<sup>37</sup> *Id.*, para 1.13.

Clearly then, there is in our system a deeply ingrained mechanism that generates high costs. Unfortunately, too little attention has been given to the operation of this mechanism even though its persistence and influence have been consistent in the history of English law. As a result, its power has remained intact and has defeated past reforms.

### **The defeat of procedural reform**

The grotesque procedures before the Judicature Acts and their extravagant delays and excessive costs were shown up by Dickens in *Bleak House*, written in 1852. The Judicature Acts of 1873 and 1875 abolished the arcane forms of action and introduced a new and much simplified procedure. Writing in 1880 Sir Mackenzie Chambers said that now ‘in a single action the same final result may be arrived at which under the old practice could only have been attained in a series of actions at law, supplemented, perhaps, by one or more suits in equity’.<sup>38</sup> But he went on to add that ‘it is said, and I believe with truth, that the expenses and delays of law, especially in the common law divisions, have much increased since the introduction of the new system of procedure under the Judicature Acts’. Six years later, Lord Bowen wrote—

‘The Judicature Acts ... placed within the reach of every litigant a very complete weapon, but one far too elaborate and precise for the necessities of every case. The first result was to increase by something like twenty per cent. the ordinary expenses of a common law action.’<sup>39</sup>

Things did not improve by 1931 when Mulins published his *Quest for Justice* which describes the public grievance at complexity and length of litigation and its excessive cost. Similar sentiments were expressed fifty seven years later in the *Civil Justice Review* and, a couple of years after that, in the Heilbronn-Hodge Report.<sup>40</sup> But perhaps the most telling commentary on this century’s history of Law reform is to be found in a letter written last year by Sir Frederick Lawton. He points out that the Woolf proposals follow the pattern of two earlier reform attempts—

‘The first was introduced in 1936. It was intended to apply to the smaller High Court claims. On the issue of the writ the case was allotted to a named judge who gave all the directions for trial and himself tried it. Neither judges nor lawyers liked this procedure, and by 1939 it had fallen into disuse.

The second attempt at reform was in 1950, following recommendations in the Evershed report. There were to be what were called “robust summons” for directions. Early in the litigation the parties were to disclose all the material relevant to the issues. The court would then give the appropriate directions for trial. Within about two years the robust summons had become memory.

Both reforms had been rendered naught largely by the legal profession’s dislike of, and resistance to, change. As your leader [in the Times] states: “No amount of change in structure or substance would matter if not accompanied by a change in outlook in those who practice the law.”

How would such a change be achieved? Not by exhortation. It would be regrettable if recourse had to be made to the use of discipline or penal orders for costs or the striking out of claims. Such means would be likely to prejudice the litigants. Effecting a change of attitude in the lawyers is likely to be more difficult than changing the rules of court.’<sup>41</sup>

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<sup>38</sup> Quoted by C Mullins, *In Quest of Justice*, London, 1931, 201–2.

<sup>39</sup> *Law courts under the Judicature Acts* (1886) 2 LQR 1.

<sup>40</sup> Report by the Independent Working party set up jointly by the General Council of the Bar and the Law Society, *Civil Justice on Trial—The Case for Change*, June 1993.

<sup>41</sup> The Times, 28 June, 1995. The 1936 reform referred to above followed the *Report of the Royal Commission on the Despatch of Business at Common Law*, 1934–6, Cmd 5065. The Evershed report was published in 1953 and not 1950: *Final Report of the Committee on Supreme Court Practice and Procedure*, Cmd 8878. See L C B Gower, *The Cost of Litigation* (1954) 17 MLR 1.

How little matters have improved over the years may be gauged from looking at discovery, which has been used as a means for generating a great deal of forensic work. ‘The scale of discovery, at least in the larger cases,’ Lord Woolf says, ‘is completely out of control. The principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency ...’<sup>42</sup> Yet discovery became a cause of excessive costs soon after the Judicature Acts.<sup>43</sup>

The capacity of the legal profession to undermine reform is illustrated by the recently devised procedure of exchange of witness statements. Under it parties are required to serve upon each other statements of the witnesses they propose to call at the trial. The aim of the new procedure was to increase efficiency by giving the opponent an opportunity to determine whether to challenge the witness and, if so, to prepare for cross-examination, and by dispensing with the need for evidence-in-chief at the trial. The procedure became generally applicable in 1992.<sup>44</sup> But, as Lord Woolf has observed, ‘[w]itness statements, a sensible innovation ... have in a very short time begun to follow the sad route as pleadings, with the draftsman’s skill often used to obscure the original words of the witness.’<sup>45</sup> In the drafting of lengthy witness statements lawyers may now notch up a substantial number of billable hours at great expense to their clients.

As this cursory look at the history of procedural reform shows, any attempt at rendering procedure more affordable can and will be defeated by those with an economic interest in doing so. It also provides us with a backdrop to the Woolf proposals.

## Lord Woolf’s Strategy

### The objective of new strategy

Lord Woolf’s principal plank consists in the imposition of external controls. ‘Ultimate responsibility for the control of litigation’, Lord Woolf says, ‘must move from the litigants and their legal advisers to the court’.<sup>46</sup> By means of judicial control, he believes, we would be able to control the amount of work that lawyers do, and thereby the fees that they charge.<sup>47</sup> However, constant policing of lawyers’ practices would be far too time consuming and would require enormous judicial resources. Accordingly, there ‘will be hands-on judicial intervention only in cases which will require and repay it. Basic management, with fixed timetable and standard procedure, will be used whenever possible, on the multi-track as well as the fast track’.<sup>48</sup>

The technique for implementing this strategy consists of a three-tier system: an increase in the small claims jurisdiction to £ 3,000 (which has already been implemented), a new fast track procedure for claims up to £ 10,000, and a new multi-track procedure for the remaining cases. The proposed structure is admirable in both its simplicity and flexibility. It establishes a mechanism, so far absent in our procedure, for husbanding procedural resources. The existence of different modes of processing disputes and the ever watchful eye of the judiciary will aim to ensure that the course of litigation adopted in any given case will be in reasonable proportion to the complexity and importance of the dispute. But judicial control, simplified

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<sup>42</sup> IR, Ch 3, para 10.

<sup>43</sup> Bowen, *op cit*; S Rosenbaum, *Studies in English procedure* (1915) 63 U Pa L Rev 273.

<sup>44</sup> RSC Ord 38, r 2A; SI 1992 No 1907, r 10; CCR Ord 20, r 12A.

<sup>45</sup> IR, Ch 3 para 9; see also Ch 22. Pleadings, it may be observed, were identified as a cause of rising costs immediately after the Judicature Acts; Bowen, *op cit*.

<sup>46</sup> FR, Ch 1, para 1.

<sup>47</sup> IR, Ch 3, para 24.

<sup>48</sup> FR, Ch 1, para 7.



rules and standardized procedures do not remove the incentives that lawyers have for complicating and protracting litigation. They merely aim to curb the scope for generating unnecessary litigation processes.

Lord Woolf is under no illusion about the prospects for improvement through simplification of procedure. He is acutely conscious of the fact that no amount of simplification of procedure will reduce the excesses of litigation, if litigants remain free to determine the extent of litigious process and its duration.<sup>49</sup> He too believes that a cultural change is necessary if we are to improve access to justice. The standards of the new culture would be set by new rules and would be enforced by the judiciary. But, we need to ask, what would prevent the legal profession from subverting the new arrangements as happened in the past? This is the nub of the matter. Upon the answer to this question the success of the Woolf reforms stands or falls. The answer turns on the effect that the new scheme will have on costs.

### **“Fixed costs” in the fast track**

Cases of up to £ 10,000 and cases of higher value which are sufficiently straightforward will be dealt with in a fast track procedure, subject to certain exceptions. Once a case has been allocated to the fast track, it will be subject to a strict timetable. Directions orders will be framed as a series of requirements which must be completed by specified dates. There will be no oral evidence from expert witnesses, but the parties will be able to put written questions to the experts. Wherever possible, a single expert should be instructed, and the court will have the power to appoint such an expert. There will be only standard discovery; involving the *parties’ own documents*, ie those on which a party relies in support of his/her contentions, and *adverse documents*, ie those of which a party is aware and which to a material extent adversely affect his/her own case or support another party’s case.<sup>50</sup>

In advance of the trial ‘brief witness statements’ will be served which witnesses will be allowed to amplify at the trial.<sup>51</sup> A listing questionnaire will be sent out by the court at the end of the pre-trial process, which is envisaged to last 10 weeks from the directions order. In it the parties will have to give account of the pre-trial process and estimate the length of the trial. Thereafter the court will give a fixed date for trial at a set time. The ‘trial length will be strictly limited and the judge will have responsibility for ensuring that effective and appropriate use is made of the allotted time.’<sup>52</sup> Normally, Lord Woolf hopes, cases should be completed in three hours but if necessary may go up to a day.

Since the fast track procedure will be simple and predictable, Lord Woolf believes that costs should be fixed. The fixed costs will only affect the costs recoverable by the winner from the loser. Otherwise, lawyers will be free to charge their own clients more than the fixed costs. The cost level remains to be worked out in the light of ‘further detailed work on the precise amounts which should be payable’.<sup>53</sup> But Lord Woolf believes that the maximum recoverable costs should be in the region of £ 2,500.

A closer look at the proposals reveals a number of weaknesses in the system which make it vulnerable to subversion by those with an incentive to do so. To begin with, the fixed costs of £ 2,500 will be exclusive of VAT and disbursements.<sup>54</sup> Payment for expert witnesses and for other litigation expenses will be additional to the fixed cost. Disbursements, including court fees, will therefore be recoverable on top of the fixed costs.<sup>55</sup> Although Lord Woolf does not

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<sup>49</sup> IR, Ch 3.

<sup>50</sup> FR, Ch 3, para 23.

<sup>51</sup> *Id.*, para 26.

<sup>52</sup> *Id.*, para 32.

<sup>53</sup> FR, Ch 4, para 5.

<sup>54</sup> FR, Ch 4, para 13.

<sup>55</sup> *Id.*, para 46.

propose setting a limit to disbursements he feels that at least expert fees should be subject to some limit. However, even if such limits are agreed, which is doubtful, they may still be quite high.

On top of indeterminate disbursements there will be ‘an advocacy fee covering the immediate preparation for trial (including a conference) and advocacy, payable only in cases which go to trial’.<sup>56</sup> However, there will not be included in the advocacy fee the preparation of bundles of documents and the notifying of witnesses which are not fixed and not subject to a limit.<sup>57</sup>

More striking still is the fact that interlocutory applications will also not be included in the fixed fee. Applications for extension of timetable or for relief from sanction will be subject to additional fees and costs will be awarded separately from the fixed fee.<sup>58</sup> Lord Woolf believes that such applications should be rare and that if they were caused by the default of one party, costs should be ordered to be paid forthwith. Where the default was the responsibility of the legal advisers, wasted costs orders may also follow. But whether such a regime will succeed in suppressing interlocutory applications remains to be seen. He also recommends that applications for interim injunctions, which will also not be included in the fixed fee.<sup>59</sup>

The fixed fee system is further complicated by a banding provision. Two value bands are proposed: up to £ 5,000 and up to £ 10,000. In addition, there will be two levels of costs within each value band, one for straightforward cases and the other for cases requiring additional work.<sup>60</sup> Once the defence is filed, the district judge will determine the costs band into which the case will fall.<sup>61</sup> The following will be considered to be indicators of additional work: the need for expert evidence; parties who require next of friend; parties who are unable to give instructions in English; multiple defendants with different interests. Accordingly, the system will consist of three bands:

- Band A - £ 5,000 ceiling and straightforward
- Band B - £ 5,000 ceiling and additional work  
£ 10,000 ceiling and straightforward
- Band C - £ 10,000 Ceiling and additional work.

Non-monetary claims will be assigned to band B. Litigants will have to file an allocation questionnaire with their claim or defence identifying the factors meeting the criteria for additional work and making representation about any desired changes to the standard timetable.<sup>62</sup>

The fixed costs will be related to the stage the case has reached. Where a case does not proceed to trial, only costs up to the stage that has been reached will be paid. The first stage will be the point at which the case is allocated to the fast track. The second will be the filing of the listing questionnaire. In respect of the first stage 40% of the total fee will be payable to the plaintiff’s lawyer and 25% to the defendant’s lawyer. In respect of the second stage 70% will be payable to each party.<sup>63</sup> But less may be payable in respect of claims for fixed amounts.<sup>64</sup>

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<sup>56</sup> *Id*, para 37. In calculating the fixed fee for solicitors it will be taken into account that solicitors would have to attend trial where counsel appears.

<sup>57</sup> *Id*, para 38.

<sup>58</sup> *Id*, para 51.

<sup>59</sup> *Id*, para 53.

<sup>60</sup> FR, Ch 4, recommendation 4, p 58.

<sup>61</sup> FR, Ch 4, para 18.

<sup>62</sup> *Id*, para 22.

<sup>63</sup> *Id*, paras 25–28.

<sup>64</sup> *Id*, para 31.

Although the system is intended to save costs by providing lawyers with incentives to avoid unnecessary and wasteful activity, its structure is such as to provide lawyers with strong incentives to complicate matters. To begin with, there is an incentive to exaggerate the value of claims and their complexity in order to escape the fast-track altogether. Then the method of determining the banding itself provides incentives for exaggerating the difficulty of litigation. The more complicated the dispute could be made to look, the more likely it is that a fee for additional work will be allowed. Indeed, lawyers on both sides will have a common interest in this regard, and a tendency could well develop for the lawyers on opposite sides to co-operate in complicating matters. As a result, we could expect the fixed fee to converge towards the top end of the scale. At the same time, lawyers will have no incentive to hasten settlements, since the successful party will be entitled to recover costs only up to the date of accepting settlement.<sup>65</sup> This will be particularly true of defendants' lawyers who would get only 25% of the fixed fee if the case reaches only stage one.

A further incentive to complicate proceedings lies in the provision that interlocutory applications are not included in the fixed fees, so that lawyers would have reason to find occasion for making such applications. Since disbursements are excluded from the fixed fee and are not limited in amount lawyers would continue to have reason, as they have today, to spend on activities included in disbursements. We can expect the costs of preparation of bundles of documents and of notifying witnesses, which are excluded from the fixed fee, to be pushed upwards steadily.

It might be argued that judges and taxing masters would have the duty to resist practices designed to augment costs. But past experience shows that *ex post facto* taxation has been a poor instrument for holding down costs. Besides, the whole point of fixed costs is to avoid the need to involve the judiciary in decisions on costs. And, in any event, a strategy of relying on judicial resistance to costs is bound to be less effective than a removal of the forensic incentive to push for ever increased costs. The proposed system will, therefore, create a good deal of additional work for district judges who, it is reasonable to predict, will be swamped with banding applications. At the same time, there is no guarantee that their efforts will bring marked savings.

Lastly, and perhaps most worrying, it is by no means clear that the new fixed costs regime would produce substantial savings compared with the present situation. Suppose that Lord Woolf's bench-mark figure of £ 2,500 is accepted (it is more likely that it would be taken as a base line from which the professional bodies will press their demands). As we have seen, this is exclusive of advocacy fee. It is reasonable to assume that barristers will not settle for a figure lower than the solicitors' fee and that, therefore, £ 2,500 will be chargeable for advocacy. It would therefore appear that for a fast track case going to trial the lawyers' fees alone could well be in the region of £ 5,000. To this we have to add court fees and disbursements; the latter being unlimited in amount. Even if this amounts to only £ 500 (which is probably over optimistic) we end up with a cost of £ 5,500 which represents 55% of the £ 10,000 claim. Were there to be interlocutory applications or applications for interlocutory remedies, the costs may well go up to match the value of the claim. At present the median costs for claims up to £ 12,500 is £ 8,318. Although the sum of £ 5,500 assumed here represents a considerable improvement, it could easily creep up for the reasons just outlined. Accordingly, the Woolf proposals may both generate costs comparable to those now prevailing and, in addition, create an even more complex system for low value claims.

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<sup>65</sup> *Id.*, para 32.

## Multi-track costs

The multi-track procedure will cover a wide range of cases, from straightforward cases just above the fast track limit to the most complex and important disputes. ‘The central principle is that the court will manage every case, but the type of management will vary according to the needs of the case.’<sup>66</sup> Judicial involvement will, therefore, vary from light control, and even standard directions, to full hands-on case management. Such management could include the following hearings and directions:<sup>67</sup> case management conference conducted by a procedural judge; directions in writing for the preparation of the case; fixing a trial date; specifying the period within which the trial will take place; pre-trial review by the trial judge.

For our present purpose it is not necessary to describe in detail the multi-track procedure other than set out its bare structure. For the case management conference, only the identity of witnesses and a brief note of the issues with which they deal will be prepared, in addition of course to the claim and defence. At that stage the issues will be identified, thereby determining which witnesses will need to be called. Only statements from these witnesses would then have to be exchanged. At the subsequent pre-trial review it will be decided which witnesses should be actually called and the issues on which they would testify. At the trial itself the parties would be allowed to ask their witnesses to amplify their statements (but they will not be allowed to raise new points without leave).

Lord Woolf recognises that the reduction of costs is paramount to the reform efforts and has designed his scheme with a view to—

‘(a) reduce the scale of costs by controlling what is required of the parties in the conduct of proceedings;

(b) make the amount of costs more predictable;

(c) make costs more proportionate to the nature of the dispute;

(d) make courts’ powers to make orders as to costs a more effective incentive for responsible behaviour and more compelling deterrent against unreasonable behaviour;

(e) provide litigants with more information as to costs so that they can exercise greater control of the expenses which are incurred by their lawyers on their behalf.’<sup>68</sup>

There is a simple and straightforward way of achieving these aims, short of a German type fixed costs system. It would involve setting a budget for the litigation. The case budget could be set by the procedural judge at the end of the case management conference. At that stage the judge in charge will give directions for the preparations for trial and will be in a position to assess the amount of work that needs to be carried out.<sup>69</sup> This suggestion, Lord Woolf observes, ‘occasioned a general outcry from the legal profession.’<sup>70</sup> The legal profession objected to budgets because the ‘imposition of fixed fees, even relating only to *inter partes* costs, was seen as unrealistic and as interference with parties’ rights to decide how to instruct their own lawyers. There was widespread concern that these suggestions heralded an attempt to control solicitor and own client costs.’<sup>71</sup>

The argument that clients are interested in keeping their lawyers free to run up costs is not very persuasive. Nor is it consistent with the profession’s argument that in order to limit costs one has to limit procedural activity.<sup>72</sup> Surely, external limits on procedural activity are just as

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<sup>66</sup> FN, Ch 3, para 2.

<sup>67</sup> FN, Ch 5.

<sup>68</sup> FN, Ch 7, para 5.

<sup>69</sup> This suggestion was made in a issues paper written by myself and published by the Woolf Inquiry.

<sup>70</sup> FR, Ch 7, para 17.

<sup>71</sup> *Id.*

<sup>72</sup> This view was put forward by the London Solicitors’ Litigation Association; *id.*, para 18.

much an interference with parties' rights to decide how to instruct their lawyers as are budgetary constraints. But although the profession's arguments against constraints may not be convincing, their motives for resisting budgets are not hard to fathom.

Faced with these objections, Lord Woolf concluded that 'it is not, practically speaking, possible to change the retrospective nature of taxation';<sup>73</sup> notwithstanding that as things stand taxation 'provides no encouragement to litigants to conduct litigation in the most economical manner'.<sup>74</sup> Instead, he seeks indirect ways of wrenching control over costs from the practitioners. As we have already seen, his main plank is to achieve a reduction in procedural activity by means of judicial case management.<sup>75</sup> This policy is buttressed with a number of specific provisions relating to costs. For our purposes we need only mention the principal ones.

In order to deter unnecessary interlocutory applications, the losing party will be ordered to pay the costs of the application forthwith.<sup>76</sup> Lord Woolf recommends that orders of costs should reflect not only the general outcome of the proceedings but also the judge's view on how the litigation was conducted. Different orders will, therefore, have to be made with regard to different stages or issues in the proceedings.<sup>77</sup>

Lord Woolf seeks to give clients greater control over costs. He believes that 'it should be a mandatory requirement for a solicitor to tell prospective clients how fees are to be calculated and what the overall costs might be.'<sup>78</sup> Further, lawyers should obtain the specific agreement of the client to every practice requiring major expense, such as major litigation strategy, hiring barristers and experts, and manning levels. Emphasis should be placed, he believes, on advance estimates of the costs of litigation so as to enable clients to assess the advisability of litigation or of particular ways of pursuing it. Indeed, he hopes that, in the course of time, benchmark costs will evolve to indicate the cost of common types of litigation involving standard procedures.<sup>79</sup>

Two recommendations are intended to assist poorer litigants. The first concerns disputes which require the multi-track treatment but where one of the litigants can afford only the fast track process. This could happen, for instance, where a patient sues for medical negligence and the defendant is a large institution or a medical practitioner supported by professional insurance. In such cases the court will have a discretion to order that the richer party who insists on the more expensive multi-track procedure should meet the difference in costs between this procedure and the fast track whatever the outcome.<sup>80</sup> He also recommends a jurisdiction to award, early in the litigation, interim costs against a litigant who has substantially greater resources and where there is a likelihood that the weaker party will be entitled to costs at the end of the case.<sup>81</sup> These two proposals would go some way towards removing the advantage that rich litigants have over their poorer opponents.<sup>82</sup>

Although admirable in many respects, the indirect strategy that Lord Woolf adopts for controlling multi-track costs has a soft underbelly. This due to the fact that the economic incentives possessed by lawyers to complicate litigation remain unaffected. True, judges will

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<sup>73</sup> *Id.*, para 42.

<sup>74</sup> *Id.*, para 41.

<sup>75</sup> *Id.*, para 20.

<sup>76</sup> *Id.*, para 23. At present payment is deferred to the end of the trial when it may be lost in the calculation of the overall costs in the proceedings.

<sup>77</sup> *Id.*, para 24.

<sup>78</sup> *Id.*, para 28.

<sup>79</sup> *Id.*, paras 35–37.

<sup>80</sup> *Id.*, para 38.

<sup>81</sup> *Id.*, para 40.

<sup>82</sup> For a discussion of this see: Zuckerman, *op cit.*, above n 33.

have the authority to resist lawyers' pressure to intensify the litigation process. But a system in which the courts continually pitch themselves against the lawyers' economic incentives is bound to be inefficient. First, there is no way in which all means of complicating procedure can be removed, no matter how admirable the procedural improvements recommended in the report.<sup>83</sup> If the history of procedural reform in England teaches us anything, it teaches us just that. Doubtless, judges will try valiantly to change the forensic attitudes but there is a two way traffic of influence between the courts and practitioners. In the long run the professional culture is as likely to influence the judicial outlook as the latter is to shape forensic practice. Experience in the United States suggests that, as Richard Marcus has pointed out, energetic case management causes lawyers to do more work under judicial scrutiny, which in turn may well have increased the cost of litigation.<sup>84</sup>

Although Lord Woolf seeks to confer a power on lay clients to resist lawyers' tendency to push up costs, clients are unlikely to be more successful in this regard than they are at present. Solicitors are already obliged, under their own rules of conduct, to provide clients with information about costs.<sup>85</sup> Clients find it difficult to resist costs not for lack of information about costs but because they cannot judge for themselves whether any proposed investment in procedure is worthwhile. For making such a judgment they will, of necessity, continue to depend on their lawyers and no improvement in information as to how the costs are calculated will change this.

The proposed sanctions regime is also likely to make little difference. To the extent that costs sanctions fall on clients, rather than on their lawyers, this is unjust (except where a client initiates procedural steps contrary to the lawyer's advice). Further, costs sanctions have been proved to be ineffective. Costs awards in respect of failed interlocutory applications have not put a stop to wasteful applications. Even the recently re-asserted jurisdiction of making wasted costs orders against legal representatives, has had very poor results. First, it has not succeeded in upholding high standards of proficiency and of cost efficiency.<sup>86</sup> Secondly, it has itself created expensive litigation. So much so that Lord Woolf is now recommending that the jurisdiction 'should be reserved for clear cases and not allowed to develop into satellite litigation.'<sup>87</sup>

We may therefore conclude that although the multi-track costs strategy seeks to place brakes on costs, these are unlikely to withstand the pressure any more than the present safeguards.

### **The German Way**

In its approach to costs the German system stands in sharp contrast to the English system. It addresses directly the problem of incentives by providing lawyers with powerful economic reasons to simplify litigation and economize in expense. As a result, German litigation is, by comparison to England, very cheap.

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<sup>83</sup> See Zuckerman, *Reform in the Shadow of Lawyers' Interests*, in A A S Zuckerman and Ross Cranston, *Reform of Civil Procedure - Essays on Access to Justice*, OUP, 1995, 61.

<sup>84</sup> R L Marcus, *D,j... Vu All Over Again? An American reaction to the Woolf Report*, in Zuckerman and Cranston, *Reform of Civil Procedure' - Essays on 'Access to Justice'*, OUP, 1995, 219, 233-34.

<sup>85</sup> *The Guide to the Professional Conduct of Solicitors*, 7th ed, The Law Society 1996, rule 15. Detailed description of the extensive obligation to give information on costs is to be found in ch 13.

<sup>86</sup> See *Ridehalgh v Horsefield* [1994] 3 All ER 848; and commentary in: Zuckerman, *Practice and Procedure* [1994] All ER Annual Review 334.

<sup>87</sup> FN, recommendation 547.

The account that follows represents the findings of a research paper commissioned as part of the Lord Woolf inquiry and published with the Report.<sup>88</sup> In looking at the German system an attempt was also made to examine the validity of certain reservations that English lawyers have expressed about this system. It has been suggested, for example, that German lawyers charge less than their English counterparts because German judges undertake much of the work carried out by lawyers in England. It has been said that the German substantive law makes it easier for personal injury plaintiffs to prove their claims. Anxiety has been expressed that due to the low level of fees German litigants with low value claims may not be able to find adequate legal representation.

### **An outline of German civil procedure<sup>89</sup>**

Ordinary proceedings at first instance are commenced by filing a statement of claim with the court. The statement of claim must set out the relief sought and the grounds for seeking it. In practice, the statement of claim would tend to outline the facts on which the plaintiff proposes to rely, to list the evidence establishing them and to attach copies of the documents relied upon. The statement of claim must be served on the defendant.

The court will then require the defendant to submit a written defence and fix a time for its submission. If the defendant does not give notice to defend within two weeks, default judgment may be given. When a written defence has been submitted, the court will usually set a time for the plaintiff's response. The statement of claim and defence are not subject to formal requirements. The emphasis is on informative content. There is no pre-trial discovery.

There then may be a preparatory hearing at which the court may ask the parties to comment on certain aspects or provide further particulars. Above all, the court will seek clarification about the issues in dispute and would try to narrow them down as much as possible. The preliminary hearing is essentially oral, though the court may ask for further clarifications in writing.

At this preparatory hearing the court will ascertain from the parties which evidence needs to be heard. The parties may be instructed to call witnesses, submit to expert report and provide certain documents. Where expert evidence is required, the parties are asked to agree on an expert. In the absence of agreement, an expert will be appointed by the court. Parties are free to submit their own expert reports, but seldom do so. One of the reasons is that costs are generally recoverable only in respect of witnesses, whether expert or not, which have been approved and called by the court. Parties do not need to submit witness statements and no depositions are admissible.

It is important to appreciate that German litigation, like its English counterpart, is not standardized. Some cases are more complex than others and therefore require deeper and more extensive treatment regardless of the value of the sum at stake. It is therefore not possible to say how long a preliminary hearing will take. What may, however, be stated is that it is most unlikely that a preliminary hearing will take more than half a day in the first instance. If the business is not concluded in this space of time, a further hearing will be arranged.

The preparatory hearing is not compulsory. If, once the statement of claim has been received by the court, the court believes that the matter could proceed to the main oral hearing without a preliminary hearing, it may give written directions to that effect. The pre-trial preparation, including the submission of the defence, will then be conducted in writing.

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<sup>88</sup> *Lord Woolf's Inquiry: Access to Justice - Research Conducted for the Final Report to the Lord Chancellor, July 1996*, - *German Litigation Costs: Survey of German Practitioners*, by Adrian A S Zuckerman.

<sup>89</sup> See G Dannemann, *An Introduction to German Civil and Commercial Law*, British Institute of International and Comparative Law, 1993.

Before proceeding to the main hearing, the court will try to get the parties to agree a settlement. Indeed, at the end of the preparatory hearing the judge may draw attention to weaknesses or difficulties he sees in each of the parties' cases in order to get them to take a more realistic view of their prospects and accept a compromise.

The main hearing is oral. Witnesses will be heard and expert opinion will be examined. Witnesses are questioned in the first instance by the judge, though the parties may suggest to the judge lines of questioning. The parties may then take a turn at examining the witnesses. Examination by the parties' lawyers is common, particularly when their clients are present at the hearing. The parties cannot be heard as witnesses (which also excludes their affidavits), but they may be interrogated by the court. This will take place where the evidence obtainable by other means is insufficient. Such formal interrogation is rarely practiced. However, the judge will seek the parties' personal views informally at the first opportunity.

Arguments by lawyers are limited, since much of what they might wish to say will have already been stated in the pleadings. Under German law, the court is presumed to know the law so that argument on points of law is not strictly necessary. However, it is good practice to draw the court's attention to issues of interpretation, to precedent and other sources of discussion on points of law.

Although the court may, after the main hearing, order a further hearing for further investigation of the facts, this is discouraged. The main hearing tends to be the final hearing in most cases in the lowest courts. In the higher courts and in complex litigation there may, however, be further hearings. It is unusual for a hearing to last continuously more than one day. If the litigation has not been concluded at the end of the day, the process will be postponed and a date will be fixed for a further hearing to take place as soon as practicable. There may be several hearings in this fashion, though the aim is to reduce the number of hearings as much as possible.

The lowest court, the *Amtsgericht*, has jurisdiction over claims valued up to DM10,000 (about £ 4,425). The *Landgericht*, the district court, has jurisdiction over claims of higher value. A party appearing in the latter, but not in the former, must be legally represented.

Although the German judge is in charge of the proceedings, the system is not an inquisitorial system. As Professor Leipold writes, 'it is not true (and in this point foreign descriptions of ... German civil procedure are not always correct) that the German civil procedure is an inquisitorial system. We also call our system a party system, which means that the objective of the litigation, the issues and also the evidence are first and foremost determined by the parties. But the judge has to help the parties if necessary and he has to take evidence whereas the duty of the parties is to bring forward the evidence (to name witnesses and so on)'.<sup>90</sup>

The German "party system" makes considerable demands of the litigants and their lawyers. The view is sometimes expressed that, when it comes to litigation, the task of the German lawyer is easier than that of his English counterpart. Perusal of the German system and discussions with German practitioners do not support this view. An examination of personal injuries litigation, for instance, suggests that while in certain respects the task of the German litigator is lighter, in others it turns out to be heavier than that of his English counterpart.

In Germany, as in England, the burden of proof lies on the plaintiff in respect of the facts upon which his claim is based. To the extent that the defendant pleads more than a denial of the facts asserted by the plaintiff, the burden is on him in respect of the defences raised. However, the German civil burden of proof is higher. In England a plaintiff wins if he proves

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<sup>90</sup> Dieter Leipold, *Limiting Costs for Better Access to Justice - The German Experience*, in Zuckerman and Cranston (eds), *Reform of Civil Procedure - Essays on 'Access to Justice'*, OUP, 1195, 265, 266.



his case on the balance of probabilities. German law considers this standard of proof to be far too light a burden. In Germany, a plaintiff wins only if he proves his case to the satisfaction of the judge; to the judge's full satisfaction and not just on the balance of probabilities.

In a German personal injury action, just as in England, the plaintiff bears the burden of proving all the facts which are necessary for establishing his claim and which are disputed, including the extent of the damage suffered by the plaintiff. However, in Germany the plaintiff need not prove heads of damage with the particularity that is required in England. But, by contrast, in Germany there is no claim for general damages, such as pain and suffering; the plaintiff must prove and substantiate the level of compensation claimed.

It is true that German substantive law makes more detailed provisions regarding the burden of proof, but this does not necessarily result in a substantial lightening of the burden of the German personal injuries plaintiff. For instance, negligence is assumed in actions arising from road traffic accidents. However, the defendant is free to prove that no amount of care on his part could have avoided the accident. In practice, it is doubtful that the position is different in this country; if a pedestrian is injured, his burden of proof would hardly be heavier here than in Germany.

Actions for medical malpractice actions also illustrate the way that German law allocates the burden of proof. In Germany, the plaintiff must prove treatment, violation of the standard of care, and that these caused his injuries. However, where he can prove gross negligence on the part of the medical practitioner, it is for the defendant to disprove the damage. But gross negligence is not easy to establish, and even then, the plaintiff's lawyer has to be prepared to rebut the defendant's attack on the causation front.

One more example will suffice. Recently, a German law was passed to facilitate the proof of liability in respect of environmental injuries. But this law only makes it easier to prove that the damaging substance was discharged by the defendant enterprise. A plaintiff bears the burden of proving the causal connection between his injury and the noxious substance in question. Accordingly, plaintiffs still have a heavy burden to discharge before benefiting from the complicated mechanism created by this legislation.

It would seem that, overall, there is no basis for assuming that there is a significant difference in the level of professional services required in German and English litigation.

### **A Comparative Burden to the Taxpayer**

One of the most frequently made observations is that the cost of the German administration of justice is higher than in England due to the far greater number of judges in Germany. This cross-border comparison is, however, far from straightforward.

First, English statistics of the judiciary leave out masters and magistrates, whose functionary counterparts in Germany would be included in the judicial count. Secondly, the German population is substantially larger. Thirdly, the German volume of litigation is very much larger than in England.<sup>91</sup> Having made some allowance for these, Dr Dannemann has calculated that the number of German judges is some ten times higher than in England.<sup>92</sup> However, one has to make a further allowance in respect of those functions fulfilled by German judges which in this country are carried out by the police (such as taking confessions in contested criminal prosecutions). If allowance is made for such quasi-investigatory functions, the ratio must be further reduced. Even so calibrated the number of judges in Germany will be found to be higher, maybe by a factor of 5 to 7.

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<sup>91</sup> Dannemann, *Access to Justice - An Anglo-German Comparison*, [1996] *European Public Law* 271, suggests that litigation in Germany is some 7 times higher per capita than in England.

<sup>92</sup> *Id.*

But the comparison cannot end here. When one considers the overall cost of the administration of justice to the taxpayer, a further factor has to be taken into account: the legal aid budget. It would appear that the English legal aid budget is far greater than its German counterpart, notwithstanding that Germany has a larger population. It has been suggested that, per capita, the English legal aid budget is several times higher than its German counterpart.<sup>93</sup>

It is therefore not possible to say with any confidence that the cost of the administration of justice in Germany is higher than in England. Indeed, it is probable that the cost of justice in England is greater, if calculated on a per case basis. Since the English courts process a much smaller number of cases, dividing the overall expenditure on the administration of justice by the number of cases before the courts would yield a higher figure than in Germany.<sup>94</sup> If this is the case, one would have to conclude that the German system provides access to justice to a larger section of the population at no greater cost.

However, a note of caution must be sounded here. Comparative estimates are difficult to make and are fraught with danger. Yet, at the very least, the above comparisons provide good reason for investigating further the relative cost of justice in England and Germany.

### **The German indemnity principle**

Both the incidence of litigation costs and their level is fixed by law. In Germany substantial court fees are also payable.

As in England, the principle is that costs follow the event. The loser must pay the winner's costs and his expenses, including the court fees. There are, though, two marked differences between the two systems. First, in Germany a party recovers costs only in proportion to what that party has succeeded in obtaining in final judgment. Thus, for instance, a plaintiff who recovers only 80% of his claim, will commensurably recover only 80% of his costs. Secondly, the cost shifting rule operates in Germany in all civil proceedings (other than family litigation with which this paper is not concerned). There is no exemption from costs in small claims as in England (though there are exceptions concerning first instance labour tribunals).

### **The court fee system<sup>95</sup>**

Court fees are substantial and are payable by the losing party. They are fixed by law as units representing a percentage of the value of the claim. In the court of first instance three units are payable if the procedure is concluded by judgment. The first unit is payable by the plaintiff as an advance on commencement of procedure. The remaining two units are payable on delivery of a reasoned judgment.<sup>96</sup> If the claim is brought to an end by withdrawal of the action, judgment on the basis of acknowledgment or settlement, only one unit is payable.

On appeal, four and a half units are payable if the case is concluded with a reasoned judgment. On a second appeal to the Federal court, up to five units may be payable.

The following figures provide an idea of the level of court fees. The table is derived from Professor Leipold's article<sup>97</sup> and converted into sterling to the approximate digital unit.

| <b>value of the claim</b> | <b>fee unit</b> | <b>three fee units</b> |
|---------------------------|-----------------|------------------------|
| £ 1,300                   | £ 57            | £ 171                  |

<sup>93</sup> Dannemann, above n 91.

<sup>94</sup> It would appear that, on a very rough and ready estimate, the total bill for judicial salaries (including pensions etc) in Germany is probably no greater than the English legal aid budget alone. At the same time, a roughly comparable figure is generated as income by court fees; ie, in Germany, court fees pay for judicial salaries, though not necessarily for overheads.

<sup>95</sup> See Leipold, above. See also Dannemann, above n 91.

<sup>96</sup> If the losing defendant is insolvent, the plaintiff will have to pay the court fees. There is thus a penalty for suing insolvent defendants.

<sup>97</sup> Cited above. £ 1=DM2.26

|           |          |          |
|-----------|----------|----------|
| £ 3,550   | £ 90     | £ 270    |
| £ 8,850   | £ 170    | £ 510    |
| £ 70,800  | £ 600    | £ 1,800  |
| £ 110,620 | £ 865    | £ 2,595  |
| £ 310,000 | £ 1,960  | £ 5,880  |
| £ 1.3m    | £ 5,270  | £ 15,810 |
| £ 4.5m    | £ 14,560 | £ 43,680 |

In debt or damages actions, the value of the claim is determined by the value of the sum sought to be recovered. Plaintiffs have no incentive to exaggerate the value of their claim since, as we have seen, costs are recovered in proportion that the final award bears to the initial claim. In claims other than for money, eg injunctions, the value is determined by the court on the basis of the monetary value of the right in question. Precedent tends to be of help in determining value in such situations.

### The lawyers' fee system

Lawyers' fees are also fixed by law. The fee scales are adjusted at infrequent intervals. The latest adjustment was made in 1994.

Again fees are payable in units fixed by law. The first fee unit (procedure fee) is charged for commencement of proceedings. A second fee unit is charged if there is an oral hearing, whether or not this hearing is preliminary or forms the basis for final judgment. The third fee unit is charged for representation in court while evidence is taken. If the litigation ends in settlement, the lawyer will receive an extra unit as settlement fee.<sup>98</sup> The provision for a settlement fee was introduced recently in order to encourage settlements.

The following figures provide an idea of the level of lawyers' fees. The table is derived from Professor Leipold's article<sup>99</sup> and converted into sterling to the approximate digital unit.

| value of the claim | fee unit | three fee units |
|--------------------|----------|-----------------|
| £ 1,300            | £ 93     | £ 279           |
| £ 3,550            | £ 215    | £ 645           |
| £ 8,850            | £ 420    | £ 1,260         |
| £ 70,800           | £ 1,080  | £ 3,240         |
| £ 110,620          | £ 1,295  | £ 3,885         |
| £ 310,000          | £ 2,200  | £ 6,600         |
| £ 1.3m             | £ 5,410  | £ 16,230        |
| £ 4.5m             | £ 14,700 | £ 44,100        |

As will have become apparent, although the units increase in real value as the value of the claim increases, they represent a decreasing percentage of the value as the value increases.

The fees in low value claims are low, notwithstanding that such claims may give rise to complex issues of fact or of law. The idea is that a lawyer would have a mixture of claims, some of high value some of low value, so that the higher fees earned in higher value cases, which may not be complex, would compensate for the time spent in the low value litigation.

Lawyers may not charge less than the fee scales, but they are allowed to charge more. One of the purposes of the survey has been to determine whether higher charges are common in

<sup>98</sup> The settlement fee will be added to the units already earned at the time of the settlement. Thus, if settlement takes place after the first hearing, but before evidence has been taken, the lawyer will receive the two units already earned plus a third settlement unit.

<sup>99</sup> Cited above. £ 1=DM2.26.

Germany. The client's agreement to higher charges must be obtained in advance and in clear written terms. However, the winner may recover from the loser only official scale fees.

In addition to court fees and his lawyer's fees, the winner is entitled to recover the cost of summoning witnesses and the like. A small additional lump sum of £ 18 is allowed for mail expenses.

On appeal the number of units increases, so that on the first appeal as many as 3.9 units may be earned and on a further appeal 4 units may be earned.

### **Survey of the German Practice**

The survey has sought to elicit the reaction of the German profession to a number of concerns which were expressed in England about the fixed cost system. Principal amongst these was the concern that in practice lawyers may in fact be charging above the official scales and that were they were not able to do so, clients would not be able to secure legal representation in low value litigation. A further worry was that where lawyers did take on low value claims, they would tend to provide superficial services to compensate for the low return.

These fears are not borne out by the replies given to the questionnaire. The general view is that lawyers do not, on the whole, charge more than the official scales. Some have suggested that there is a limited tendency to charge by the hour, but that, on occasion, this tends to be done under pressure from large repeat litigants who hope to pay less than the official scales for litigation involving large amounts of money. There was also some evidence of hourly charges in commercial cases but little evidence of hourly charge in low value claims.

There seems to be no difficulty in securing legal representation for low value claims. This general view is borne out by German litigation statistics which demonstrate a large volume of low value litigation in the courts of first instance.<sup>100</sup> In discussions it emerged that no lawyer has ever heard of a client who failed to secure legal representation because his case offered too little reward to the lawyer.

A number of factors combine to make this possible. German legal firms tend to be small. A two or three partner firm is common and a twenty or more partner firm is considered to be very large. Firms represent both plaintiffs and defendants, and there does not seem to be a specialisation in this respect. Young lawyers in their first years of practice would take on any litigation that comes their way. Provincial firms, especially in small towns, would have a general practice and would provide all the legal services required by the local population. Even large commercial firms feel obliged to undertake low value litigation out of a sense of loyalty to established clients or in order to secure future custom. While large firms specialising in commercial practice will attract high value litigation, small firms with a high reputation or a particular specialty will also secure high value cases. The impression obtained is that the German legal profession is quite competitive and that lawyers are willing to make considerable commitment to establish themselves in practice.

Lawyers accept the practice of cross-subsidisation; the higher value litigation would on occasion subsidise the low value one. Indeed, high value litigation may on occasion be more straightforward than a low value action. Cross-subsidisation may take place between litigation and non-contentious work. The large commercial firms, for instance, would feel obliged to represent their commercial clients even in small scale personal litigation.

The general impression is that lawyers do not provide less thorough service to low value litigants. A number of reasons were mentioned for this. It has been said that lawyers feel honour bound to do their best. But more practical reasons have also been given. Even if a low

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<sup>100</sup> See Dannemann, above n 91.

value case is complex, a lawyer would do his best in order to safeguard his reputation and attract future clients. By delivering good service in low value cases lawyers hope to attract high value cases, some of which would be quite straightforward and provide good returns for relatively light work. It makes commercial sense to invest work in a low value case which raises a complex but recurrent question so as to establish an expertise in the matter and attract future custom.

Although commercial firms would prefer to shun low value cases, there is abundant availability of manpower and skills for such cases. The level of service seems to be adequate.

There seems to be no shortage of litigation even in claims worth around £ 4,000. Two reasons account for this. There is a widespread take up of litigation cost insurance. Litigation cost insurance seems to be very popular in Germany. It covers all legal expenses, including those that the loser has to pay the winner. It seems that insurance companies do not nominate the lawyers when the costs are covered by insurance, though they may offer recommendations. Second, there is no shortage of lawyers willing to take up even low value claims; indeed, Germans feel that there is excessive litigation in the *Amtsgericht* where the jurisdiction is limited to DM10,000 or £ 4,000, and where the large proportion of litigants are legally represented.

It is widely accepted that litigation insurance has grown as a result of the predictable and fixed nature of litigation costs.

The questionnaire was particularly concerned to establish whether the system worked equally satisfactorily for low and high value claims. Some of the German participants, including the DAV,<sup>101</sup> said that the system worked equally well for both categories of cases, but others expressed reservations. However, when the reservations are analysed, it emerges that they were more concerned with how lawyers felt about their own remuneration rather than with defects in the treatment of low value cases. For instance, one of the participants said that he did not think the system worked equally well for low and high value claims. But the same participant also stated that the German “system, as a system, probably operates with the same degree of success in all cases.” Similarly, the participant who said that for “low values, the statutory fee table does not work well at all”, also said that clients always find lawyers and emphasised the professional and cultural obligation to render a good and conscientious service. The same participant concluded by saying that “although everybody would like to earn more, I believe that the German lawyers in general consider the German fee system as satisfactory”.

Although nearly all of those questioned about the adequacy of their remuneration said they would like to earn more, they all said that they felt well rewarded.

The general impression derived from the responses is that there is an abundance of clients and no shortage of lawyers willing to serve them, that the litigation is adequately conducted at all levels, and that the German profession is well rewarded.

## Conclusion

It is widely accepted that there is something wrong with a system of civil justice in which the cost of taking a dispute to court is unpredictable, disproportionate and unlimited. Lord Woolf has sought to bring about a cultural change. He has proposed measures for reducing the cost and duration of litigation and for achieving a measure of reasonable proportionality between the value of the subject matter in dispute and the cost of the legal resolution. His primary aim is to reduce the amount of work involved in litigation and thereby costs. He proposes to

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<sup>101</sup> Deutscher Anwalt Verein, one of the two national organisations of German lawyers, with a membership of some 40,000.

achieve this by judicial case management, which will pass the control over the intensity and pace of the litigious process from lawyers to judges. He also envisages greater standardization of procedure whereby straightforward cases will be litigated by fast simplified process.

Admirable as these proposals are, they do not directly address the cause of high costs. The high level of costs is the natural outcome of the economic incentives possessed by lawyers, whose remuneration rises as litigation becomes more complicated and lengthy. The history of law reform shows that a simplification of procedure is not enough to produce savings as long as there are incentives to devise new complications. Even judicial controls are vulnerable to being subverted by those with an economic interest to do so.

The German system proves the effectiveness of the strategy of reversing the economic incentives. In Germany lawyers are paid a fixed litigation fee, which represents a small and reasonable proportion of the value of the dispute. As a result, they have no reason to complicate litigation unnecessarily. Access to justice in Germany is affordable by large sections of the public because costs are low. The predictability of costs has led to a thriving market of litigation cost insurance which places litigation within the reach of even citizens of modest means. Consequently, there is a greater volume of litigation in Germany which, in turn, enables lawyers to generate high incomes without subvention by the public purse.<sup>102</sup>

Lord Woolf felt, presumably, that it was politically impractical to recommend even a mild form of fixed costs litigation due to implacable resistance by the legal profession to any limitation on the fees that lawyers may charge. His suggestions of fixed fees in the fast track procedure represents a valiant effort to introduce some kind of a fixed cost system. Unfortunately, the fees under this system are neither fixed nor cheap.

Indeed, by comparison to costs in Germany they are huge. In Germany the costs in respect of a claim for £ 8,850 would be as follows. The lawyer will receive £ 1,260, which is about half of what Lord Woolf envisages as solicitor's fees alone (assuming the top band) and a mere quarter of the combined figure of £ 5,000 in respect of solicitor's fee and advocacy fee. Germany law allows only a fixed disbursement fee of £ 18, whereas there is no limit on the English comparable expenses. However, in Germany there will be a court fee of £ 510 payable, which is considerably higher than the English court fee. Let us assume that some additional disbursements would be incurred in Germany in respect of expert witnesses and that they are of the same level as in England. The total cost in Germany will therefore be £ 2,288.<sup>103</sup> This is still only about half the £ 5,500 English figure which makes no allowance for court fees and which excludes any interlocutory applications.

The history of procedural reform, both recent and remote, shows the ineptness of the indirect approach. Attempts to cut down costs by simplifying procedure, by judicial pressure or by encouraging clients to resist rising costs have all been tried and found wanting. There is no alternative to a direct attack on the economic incentives to complicate and protract the litigation process. But a serious challenge to the vested interests of the legal profession cannot come just from a lone reformer, however bold and exalted. It must involve determined intervention at government level. Until this happens, experience will continue to dispel our hopes of improvement and litigation costs will remain as exorbitant as they have been for a very long time.

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<sup>102</sup> Experience in the US shows that alternative dispute resolution has been good for lawyers' business: 'When clients found they were resolving cases quicker and more cheaply than with the old slug-it-out litigation, they were so grateful, they started to throw out more work'; S Shapiro Quoted in Fiona Bawdon, *The settlement master*, NLJ July 5 1996, 987.

<sup>103</sup> This is made up of £ 1,260 lawyers' fees, £ 18 disbursements, £ 500 other disbursements, which is probably an exaggerated figure, and £ 510 court fees.