

**“A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice”,
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A Reform of Civil Procedure - Rationing Procedure Rather than Access to Justice

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Introduction

The cost and delay involved in civil litigation have been a source of concern for some time now. One of the main purposes of the Civil Justice Review in 1988¹ was to seek ways of redressing these ills and some measures were taken as a result. Witness statements now take the place of examination in chief and skeleton arguments and written materials tend to reduce the scope for oral argument in the appeal courts. However, these and other measures have done little to stem the rising tide of cost and delay.² Alarmed by spiraling costs, the government has recently cut back on publicly funded legal aid services and has announced the intention to cap legal aid funding. Cost is also a source of much public dissatisfaction, because the expense of litigation places access to the courts beyond the reach of all but the rich and that diminishing category of persons entitled to legal aid.

Even a simple dispute which proceeds with uncommon speed could absorb vast sums of money. An action to enforce a covenant in restraint of trade against an employee whose annual salary was about £10,000, in which the plaintiffs issued a writ, secured an interlocutory injunction, and obtained final judgment, all in just nine weeks, cost the winning plaintiffs in excess of £100,000.³ We may safely assume that the cost to the legal aid fund in respect of the defendant's failed defence was commensurably substantial. A comprehensive costing of the process would also have to include the cost to the administration of justice in respect of judicial and court overheads. Such cases may not be typical, but the situation must be sufficiently serious, seeing that the Master of the Rolls has felt justified in painting this picture of the state of civil justice—

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¹ *Report of the Review Body on Civil Justice* (1988) Cm 394. For a discussion see T M Swanson, 'A Review of the Civil Justice Review: Economic Theories Behind the Delays in Tort Litigation' [1990] *Current Legal Problems* 185. More recently the Bar Council and the Law Society set up the Heilborn Committee which produced a report on the subject: *Civil Justice on trial—The Case for Change* (June 1993). See also: Australian Advisory Committee on Access to Justice report, *The Cost of Civil Litigation Before the Intermediate Courts in Australia*, 1994; R A Macdonald, 'Economical, Expeditious and Accessible Civil Justice Through Better Allocation of Civil Disputes - A Framework for Inquiry', Institute of Comparative Law, McGill University, 1994.

² C Glasser, 'Solving the Litigation Crisis', (1994) *The Litigator*, No 1, suggests that in London the average time between issuing proceedings in the High Court and setting down is 116 weeks, and between issuing proceedings and disposal it is 152 weeks in London and 177 weeks elsewhere.

³ *Symphony Group plc v Hodgson* [1993] 4 All ER 143. The process which consumed these sums involved the following steps. The writ was issued on 11 May 1992 in the High Court and on the same day the plaintiffs obtained an ex parte injunction. A statement of claim was served the following day. The interlocutory injunction was considered inter partes on 15 May, when it was continued until trial and speedy trial was directed. Pleadings were closed and discovery completed by the time trial started on 22 June. The hearings lasted eight days, culminating in a 31 page judgment delivered on 6 July 1992.

'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.'⁴

A cursory look at reported cases is enough to make one realise just how complicated and expensive civil proceedings can be, whether conducted in the High Court or the county court. In one case the issue of service, a purely formal question, had to be considered by a master and, on an appeal, by a judge and, on appeal therefrom, by the Court of Appeal, before the validity of the service was established.⁵ Recently there have been no fewer than four House of Lords decisions dealing with the extension of the validity of writs.⁶ In these hundreds of thousands of pounds must have been spent on litigating the most preliminary of issues: whether proceedings have or have not been started. The fate of an amendment of pleadings may not be finally decided before two appeal hearings have taken place.⁷ Delay itself has a way of generating litigation which leads to further delay. A great deal of money may be spent, long before discovery has even started, in litigating, at times all the way to the Court of Appeal and beyond, whether an extension of time should be granted or whether the action should be dismissed for want of prosecution.⁸

In the wake of the Civil Justice Review the county court jurisdiction has been extended right across the field of civil litigation in order to avoid as much as possible the expense of High Court proceedings.⁹ But the problem of cost extends to the county courts too. This is hardly surprising, since the county court practice is similar to that in the High Court. True, legal services in the county court are rendered at a lower unit cost and further savings are made because solicitors can represent clients, thus avoiding the need of employing a barrister as well as a solicitor. Yet costs could still be high in comparison with the sums in dispute, because there is a minimum below which the hourly charge for solicitors' services cannot fall, no matter how small the value of the claim itself.¹⁰ Although some important differences of procedure do exist, they do not on the whole translate themselves into massive savings, except with regard to small claims of £1000 or less.¹¹ Of the other differences the procedure of automatic directions in the county court deserves mention here. It was introduced in 1990 in order to cut down delays and it involves a fixed time table for pre-trial proceedings.¹² Under this regime, unless the plaintiff requests a hearing of his claim within 15 months of the day on

⁴ *Wilkinson v Kenny* [1993] 3 All ER 9, 11.

⁵ *Boocock v Hilton International Co* [1993] 4 All ER 19.

⁶ See *Dagnell v J L Freedman & Co (a firm)* [1993]. See also *Singh v Duport Harper Foundries Ltd* [1994] 2 All ER 889 which sets out to reconcile a number of inconsistent authorities on the subject.

⁷ *Easton v Ford Motor Co Ltd* [1993] 4 All ER 257.

⁸ See *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630; *Costellow v Somerset County Council* [1993] 1 All ER 952; *Roebuck v Mungovin* [1994] 1 All ER 568.

⁹ The High Court and County Courts Jurisdiction Order 1991 (1991 No. 724). See N Andrews, *Principles of Civil Procedure* (1994) 68.

¹⁰ Although not a county court case, *Keller v Keller and Legal Aid Board*, *The Independent*, 21 October 1994, illustrates this phenomenon. A wife incurred £34,000 in costs for the benefit of a financial provision order giving her a share in a matrimonial home worth £52,000.

¹¹ Such claims are automatically referred to arbitration before a district judge; CCR Ord 19, r 3. The arbitration hearing is informal, the district judge is not bound by the rules of evidence and the winning party cannot, generally speaking, recover costs in respect of legal representation. Accordingly, prosecuting or defending a claim within the £1000 limit may be fairly inexpensive, provided that the parties do not seek professional advice. Once professional advice is sought the costs may be substantial.

¹² CCR Ord 17, r 11; *The County Court Practice 1994*, 276. The rule ordains automatic discovery within 28 days of close of pleadings and inspection 7 days thereafter. It similarly makes provision for automatic disclosure of expert evidence and other materials and for the exchange of witness statements.

which pleadings are deemed to be closed, 'the action shall be automatically struck out'.¹³ However, while some speeding up of proceedings and savings have been achieved, costs have not come down dramatically.¹⁴

Indeed, the case in which the Master of the Rolls made the remarks quoted earlier involved an action for possession in the county court. 'It was in essence', the Master of the Rolls observed, 'the sort of action which county courts were established to deal with, and do deal with, on an almost daily basis involving no complex principles of law, no complex issues; a simple straightforward dispute crying out for summary determination.'¹⁵ Yet no sooner was it commenced than it became bogged down by 'applications being made for this, applications being made for that, various orders for this, orders for that, hearings in relation to this, hearings in relation to that, all of them of course increasing costs.'¹⁶

There is little doubt that the structure of our legal procedure, in both the lower and the upper judicial tiers, facilitates a good deal of avoidable procedural waste. As a result, critics and reformers have tended to devote most of their attention to improving court and case management and to simplifying the processes involved. Most significantly, Lord Woolf, who is chairing a committee appointed by the Lord Chancellor to consider reform of the administration of justice, seems to think that the solution lies in more extensive court supervision of the litigation process and in the enforcement of adherence to tight time tables.¹⁷ It is, however, insufficiently appreciated that the capacity of our procedure to absorb ever increasing amounts of funds is not due just to poor management of case flows or to the complex and cumbersome nature of the civil process. It is also promoted by certain underlying factors. The method of paying lawyers on an hourly basis ensures that they have no incentive to economize in the provision of legal services. Publicly funded legal aid provision was, at least until recently, determined by reference to the standard of legal services commonly employed by the affluent, rather than by what the taxpayer could reasonably afford to pay. These and other factors have reacted upon each other to produce conditions that favour rising costs and mounting delays.

A lack of attention to the interaction of different elements of the legal process has undermined at times the object of reform. For instance, when the legal aid system was introduced, hardly any consideration was given to the possibility that the injection of a massive subsidy into the purchase of legal services will combine with existing inflationary factors to produce a tremendous upward pressure on costs. Similarly, a failure to have regard to the possibility that while a new measure could achieve savings in certain respects, it might produce an equal or greater expense in another respect has led to waste. Thus, one of the purposes of exchange of witness statements on the eve of the trial was to obtain savings by obviating examination in chief. But the indications are that the resources invested in preparing witness statements may at times exceed the cost involved in oral testimony.¹⁸

¹³ CCR Ord 17, r 11(9). See also N Madge, 'Sudden Death in the County Court', (1994) 144 NLJ 1409. For an empirical study see N Armstrong, 'Perspective on Court Management', 144 NLJ 131, 28, January 1994.

¹⁴ R Williams, 'The Case for Change', 91 Gazette 24 (15 June 1994); and 'Mission Impossible' 91 Gazette 2 (6 July 1995). It has to be remembered that the court has a discretion to reinstate a struck out action (*Rastin v British Steel plc* [1994] 2 All ER 641) and that the courts find it hard to force compliance with fixed time tables when enforcement may result in dismissal (*Boyle v Ford Motor Co Ltd* [1992] 2 All ER 228). Further, the sanction of automatic striking out forces some plaintiffs to proceed to trial, when they would have preferred to leave their action to lay dormant because of the low prospects of recovery or for some other such reason.

¹⁵ *Wilkinson v Kenny* [1993] 3 All ER 9, 11.

¹⁶ *Id.*

¹⁷ *The Observer*, May 29, 1994.

¹⁸ This view seems to be shared by a large number of solicitors and barristers. See C Glasser, *Solving the Litigation Crisis*, (1994) *The Litigator*, No 1.

Future reform must avoid these pitfalls and ensure that it does not merely result in localized savings but does succeed in securing a reduction in overall cost and delays. To this end we need to fashion an overall strategy which takes account of the potential interaction between different aspects of the system. There would be little point, for instance, in simplifying procedure unless we also remove the incentives for increasing the complexity and duration of litigation. Similarly, it would be self-defeating to speed up the rate of case disposal, if this were going to produce an exponential increase in the volume of litigation that could overwhelm the courts.

The purpose of this paper is to highlight the main factors that contribute to cost and delay and to outline a strategy for reversing existing trends. Reform, it will be argued, should be guided by the idea that, when procedural resources are finite, we should ration their employment and not, as is the case at present, restrict access to court by means of prohibitive costs. To implement this idea we need to fashion a comprehensive and integrated approach consisting of three major limbs. First, we must render procedure simpler and cheaper in the majority of cases so as to make access to justice affordable by those who need it, even if this means some reduction in the quality of judgments. Second, we must ensure that litigation remains affordable in the long run by providing effective incentives to both lawyers and their clients to keep down costs. Third, we would need to counteract the likelihood that greater accessibility to justice will stimulate litigation by erecting powerful disincentives to litigation which, unlike the present ones, are fair and non-discriminatory.

Before outlining these proposals, however, two preliminary matters need to be addressed: the connection between the adversarial character of our procedure and its complexity, the relationship between cost and justice.

Adversarial Freedom and Proportionality in Procedure

There seems to be a perception that in an adversarial system latitude in the conduct of one's case is a requirement of justice.¹⁹ The reasoning runs as follows. Since the courts do not take it upon themselves to investigate the issues but confine themselves to the role of impartial umpires, litigants must be afforded the means with which to prepare their case and present it at the trial. Thus they need facilities for eliciting information about the opponent's case and the evidence he holds, for compelling witnesses to testify, for examining witnesses at the trial and the like. The processes of pleadings, interrogatories, discovery, exchange of witness statements and the rules of evidence are designed to meet these needs.

Given that these facilities have been placed at the parties' disposal, so the thinking proceeds, the law cannot then restrict the parties' freedom to use them. For example, if litigants have the right to obtain discovery of documents necessary for disposing of the matter or saving costs, the court can hardly turn round and say that this or that request for disclosure is not really necessary, or that the parties should content themselves with a more limited and cheaper form of discovery. Nor can a court tell the parties that the importance of the case or the nature of the issues involved do not justify the extensive and expensive procedural steps they propose to take. In an adversarial system litigants are free within the contours of the permissible, the argument concludes, to exploit to their own advantage the procedural devices that the law provides.

Even if the usefulness of the procedural devices provided by the law can be accepted, it does not follow that they are equally important or necessary in all cases, regardless of

¹⁹ For discussion of the adversarial philosophy see: Landsman, 'The Adversary System' (1984); Damaska, *The Faces of Justice and State Authority* (1986); D Luban, 'The Adversary System Excuse' in *The Good Lawyer*, D Luban ed (Totowa, NJ: Rowman and Allenheld, 1984) 90 ; D Luban, *Lawyers and Justice, An Ethical Study* (1988); McEwan, *Evidence and the Adversarial Process - The Modern Law* (Blackwell: Oxford, 1992).

complexity of issues and of the gravity of subject matter. Just as not all medical conditions require the employment of all the available diagnostic methods, so not all disputes in the courts justify the use of all available pre-trial tactics regardless of cost. It might be objected that merely because we might think that a case does not justify the deployment of all available procedural devices, it does not mean that such deployment should be restricted or forbidden. For just as citizens cannot be forbidden to have recourse to excessive medical services, if they choose to pay for them, litigants should be free to invest as much as they wish in legal services, including litigation. But this analogy is clearly flawed, because disproportionate legal measures affect not only the resources of those litigants who employ them but also increase the burden on their opponents and consume the resources of the court.²⁰

The idea of complete adversarial freedom is in any event at odds with the present state of the law, because some limitations are already placed on the use of procedure. Litigants who have only a flimsy defence may not insist on having recourse to the normal pre-trial and trial procedures. All they can expect is a summary adjudication. Thus, plaintiffs who believe that their defendant has no reasonable or credible defence, may apply for summary judgment under RSC Ord 14. Similarly, upon an application by one party, whether plaintiff or defendant, a court may strike out any pleading that 'discloses no reasonable cause of action or defence' in accordance with RSC Ord 18, r 19(1)(a). The object of these provisions is to block access to full pre-trial and trial procedures and enable litigants to obtain a quick judgment where the opponent's case is so weak as not to justify recourse to the normal process.²¹

The point to be noticed about these summary methods of adjudication is that they are concerned with proportionality. The full procedure is not waived because it is incapable of making a difference to the eventual outcome. A summary dismissal of a claim or of a defence may not be as reliable as a dismissal after trial. An argument which appears flimsy when tested by a summary process might turn out to be well founded, once the full pre-trial processes of pleadings, interrogatories and discovery have been employed and once the parties' respective cases have been exposed to close scrutiny at the trial. Discovery, for instance, may turn up something that sheds a different light on a defence which appears insubstantial at first glance, or cross-examination may show an otherwise unanswerable claim to be ill founded. Rather, the standard procedure is waived because, as the case stands at the time, it is unlikely to make a difference and it is therefore wasteful to employ it. These summary processes are accordingly illustrative of the notion of procedural proportionality, which holds that a dispute has to be sufficiently substantial to justify the use of the normal process.

Not only is the system prepared to shed some procedural provision where the issues are abundantly clear, it is also prepared to do so in situations of urgency. When a party is concerned that her rights would be harmed during the pendency of litigation, she may apply for an interlocutory injunction. Applications for interlocutory injunctions are determined without recourse to pleadings, interrogatories, discovery, exchange of witness statements and oral testimony. They are decided instead on the basis of affidavit evidence. It is important to appreciate that it is not the consideration that an interlocutory injunction does not finally

²⁰ Indeed, an unfettered freedom would confer an unjust advantage on the rich to the detriment of his poorer opponent and to the disadvantage of other litigants. For proposals to place limitations on adversarial zeal see: P A Batista, 'Symposium: Sanctioning Attorneys for Discovery Abuse - The recent Amendment to the Federal Rules of Civil Procedure: Views from the Bench and Bar' (1982-83) 57 St John's L Rev 671; J K Van Patten and R E Willard, 'The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation' (1984) 35 Hastings LJ 891.

²¹ *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation)* [1989] 3 All ER 74; *Supreme Court Practice 1995*, vol 1, para 18/19/7. Cf J A Jolowicz, 'Application for Summary Judgment - A Not So Summary Procedure' (1983) 42 CLJ 216. For an American perspective see: S A Wiegand, 'A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials' (1990) Oregon L Rev 87.

dispose of the case which provides the justification for doing away with the pre-trial processes. For this consideration does not always apply. Indeed, interlocutory injunctions may be obtained, provided that the criteria of urgency have been met, notwithstanding that they may permanently dispose of the case to all intents and purposes.²² Further, even where the interlocutory decision does not finally and conclusively dispose of the whole suit, it may still leave one party facing an irreparable loss, and thus permanently compromise his rights.²³ As a result, the idea that at the interlocutory stage the court need not concern itself with the merits of the parties respective claims has been much criticised and effectively abandoned.²⁴ The processes that are otherwise regarded as important for obtaining accurate decisions are shed in the interlocutory procedure not because of provisionality but due to the necessity of reaching a decision within a short time.²⁵

It would therefore appear that even as things stand, the system does not allow an unqualified access to the full procedural menu. The notion of proportionality, that not every dispute deserves equal procedural investment, is already ingrained in our procedural arrangements. There is therefore nothing in principle to prevent us from considering whether access to the full process of the law is too widely defined at present, and whether the balance between summary adjudication and standard adjudication should not be tilted further towards the former.

Accuracy and Economy in Procedure - a Matter of Compromise²⁶

The realisation that procedural provision may be relative leads to a more general discussion about the extent to which a system of procedure has to strive to ascertain the truth. It is axiomatic that the object of procedure is to render litigants their due; namely, to return judgments which correctly apply the law to the true facts. But this does not mean that the state has an obligation to provide the most accurate civil procedure regardless of cost. It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system. Yet it would be equally absurd to suggest that procedure need not strive to

²² *NWL Ltd v Woods* [1979] 3 All ER 614; *Cayne v Global Natural Resources plc* [1984] 1 All ER 225.

²³ *Athletes Foot Marketing Inc v Cobra Sports Ltd* [1980] RPC 343, 348–9. In *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85 the House of Lords dealt with an application to suspend a law prohibiting fishing by foreign nationals, pending litigation in the European court. It was clear that both parties were exposed to loss from an unfavourable decision at the interlocutory stage. If it emerged at the end of the day that the law suspended by an interim injunction was in fact valid, irreparable harm will have been caused to the public interest and, indeed, to British fishermen whose share of the quotas will have been diminished by the applicants' fishing. Similarly, if an injunction were refused and it turned out that the law was invalid, the applicants will have suffered serious loss for which they will not be entitled to compensation. In the event the House of Lords granted an interlocutory injunction suspending the Act in question because it was likely that judgment in the Community court would be favourable to the applicants.

²⁴ The idea gained prominence in *American Cyanamid v Ethicon Ltd* [1975] AC 396. For criticism and references see: Zuckerman, 'Interlocutory Remedies in Quest of Procedural Justice' (1993) 56 MLR 325.

²⁵ See Zuckerman, *id.* To a limited extent the interlocutory procedure is prepared to sacrifice correctness for the sake not only of speed but also for the sake of affordability. A plaintiff applying for an interlocutory injunction is normally required to give an undertaking in damages, whereby he undertakes to the court to compensate the defendant for any undue harm that may be occasioned to him through the restraint sought to be imposed on him. But a poor plaintiff is not to be denied an injunction merely because he is unable to pay under the undertaking in damages; *Apple Corps v Lingasong* [1977] FSR 345; *Vernon & Co (Pulp Products) Ltd v Universal Pulp Containers Ltd* [1980] FSR 179; *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502. Where an interlocutory injunction is granted for the benefit of a plaintiff who would not be able to pay damages, the court is willing to expose the defendant to the risk of uncompensable damage and take, therefore, a chance that it may not be able to protect his rights.

²⁶ For atheoretical discussion of efficiency see: J L Coleman, 'Efficiency, Utility and Wealth Maximization' (1981) 8 Hofstra L Rev 509.

achieve any level of accuracy to satisfy the demands of justice. We are therefore entitled to expect procedures which strive to provide a reasonable measure of protection of rights, commensurable with the resources that we can afford to spend on the administration of justice.²⁷

Once we have accepted that the commitment to accuracy is not absolute and boundless, we must also accept that the choice of procedure must involve compromises.²⁸ First and foremost, a compromise has to be struck between accuracy and cost.²⁹ A highly accurate system of adjudication would require intensive preparation and extensive judicial manpower and would therefore be very expensive. By contrast, a very cheap system may produce a very low level of accuracy. A legislature who cannot afford a limitless investment in the administration of justice, must achieve compromise whereby the level of accuracy that the administration of justice could produce will reflect the level of support that the state can reasonably be expected to give to legal services. It follows that in devising a system of procedure the legislature has a considerable scope for choice between different ways of balancing accuracy against cost.³⁰

Our existing system of civil justice represents, therefore, no more than one possible way of balancing cost and accuracy. Of course, it is not suggested that this system is the outcome of a deliberate and conscious cost benefit exercise carried out at a certain point in the past. Civil procedure has evolved into its present shape through a succession of choices, made by the law maker over many decades, which were necessitated by diverse legal, economic and other social factors. The important point to realise is that the present procedural arrangements are not sacrosanct. On the contrary, it is desirable we should ask periodically whether the administration of justice reflects an optimal compromise between accuracy and cost and whether it fulfills the needs of the community at the time.

This way of looking at procedure should help us deal with the kind of objection that is usually raised against suggestions for introducing measures of economies in the administration of justice: that economies that compromise accuracy also compromise justice. Quality, it might be said, must not be sacrificed for the sake of economy. We do not live in the days of Solomon but in a far more complex society which demands intricate legal arrangements. Under such conditions correct judgments may be obtained only through the investment of a good deal of time and resources. Justice bought cheaply and in haste, it could be suggested, may be so inferior as not to be worth having. The response to this type of objection has already been hinted at. There is simply no way of avoiding compromises. It is therefore inevitable that quality should, to some degree, be sacrificed for the sake of economy. The real question is whether any given procedural arrangements produce a satisfactory compromise.

In today's conditions civil procedure may be criticised for striking a compromise which tilts too far towards accuracy at the expense of economy. Our procedural arrangements

²⁷ R Dworkin, *A Matter of Principle* (1985) ch 3. For a purely economic approach see: R Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399, and Posner, *Economic Analysis of the Law* (3rd ed, 1986).

²⁸ See: Jolowicz, 'On the Nature and Purposes of Civil Procedural Law' in I Scott, (ed.), *International Perspective on Civil Justice* (Sweet & Maxwell, London, 1990), 27; Walker, Lind and Tyler, 'The Relationship between Procedural and Distributive Justice' (1979) 65 *Virginia L Rev* 1401; W Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *MLR* 380.

²⁹ The tensions between quality and economy and between speed and accuracy are discussed in Zuckerman, 'Quality and Economy in Civil Procedure - The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 *OJLS* 353.

³⁰ For an illuminating comparison of different approaches to adjudication see J Jaconelli, 'Solomonic Justice and the Common Law' (1992) 12 *OJLS* 480.

demonstrate a willingness to tolerate high costs for the sake of high standards of accuracy in judgments. As a result, it is becoming uncomfortably clear that access to the courts is being placed beyond the means of the vast majority of the population and that the exchequer is finding it increasingly hard to shoulder the support of poor litigants.³¹ It is therefore legitimate to ask whether it is really better to offer high quality justice to a few, rather than dispense justice, albeit of lesser quality, to a wider segment of society. Further, we may well wonder whether it is justified to ask the taxpayer to pour vast sums of money into the administration of civil justice, when justice may be bought more cheaply, if a little less accurately.

There is a further dimension to the tension between cost and accuracy in procedure, for a compromise must also be struck between accuracy and speed. We tend to think that the only requirement of justice is that a judgment should give the parties what is theirs by right. But time is also a dimension of justice, for, as we like to remind ourselves, justice delayed is justice denied. Delay may undermine the practical utility of judgments for the purpose of redressing rights and a judgment may come too late to be capable of putting things right.³² Clearly, a system of procedure which systematically allows delays to rob judgments of their practical usefulness, cannot be said to be a just procedure. It follows that while a just procedure cannot be wholly indifferent to the need to establish the truth, it also cannot be altogether indifferent to delay, because a just procedure must aim to deliver judgments when they can still do some good. Yet no system can be expected to invest limitless resources in achieving speedy justice. Accordingly, where resources are limited, accuracy in judgments may have to be sacrificed to some extent not only for the sake of economy but also for the sake of obtaining timely judgments.³³

When we consider the reform of civil procedure, we must therefore not be deterred by arguments that the introduction of savings may lead to a deterioration in the accuracy of judgments. What matters is not any particular level of accuracy but the correct balance between accuracy of justice and timeliness of justice and between accuracy and affordability.

A Ratcheting Up Mechanism - The Clogs on Access to Justice

A most cursory examination of statistical data is enough to make the grim picture of rising costs abundantly clear.³⁴ During 1987–88 legal aid payments amounted to £426m, but by 1993–94 they rose to £1,020m, of which £350m was spent on civil proceedings. These figures are expected to rise to £1,633m and £685m by 1996–97.³⁵ The cost of litigation, whether funded publicly or privately, has been on an inexorable rising curve. In 1974 hourly rates charged by solicitors were in the region of £25, but by 1994 they rose to an average of £185 with a high of £310; the price retail index for the same period rose only 6 times.³⁶ Legal aid statistics suggest that in 1974–75 the average cost of a non-matrimonial case in the High Court was £338, but by 1993–94 this figure rose to £4,462.³⁷ Over the last twenty years the income of solicitors and barristers has risen much faster than the Retail Price Index or the

³¹ The problem is far from new, see L C B Gower, 'The Cost of Litigation', (1954) 17 MLR 1. For the extent of the problem today see: *The Cost of Justice*, report published by the National Consumer Council, August 1994.

³² Delay may also undermine accuracy in the sense that it increases the risk of error, for example by allowing evidence to disappear or deteriorate. For discussion see Zuckerman, note 29 above.

³³ For instance, if we were dissatisfied with our existing case disposal rate and we wished to increase it by even as little as 25 per cent, a great deal of further investment in infrastructure and in legal services would be needed. But we could achieve such an improvement without extra cost, if we were to cut out some of the existing procedural stages, thus reducing accuracy.

³⁴ Much of the statistical information is derived from C Glasser, *Solving the Litigation Crisis*, note 2 above.

³⁵ Home Affairs Committee, 5th Report, The Lord Chancellors' Proposals (1992–93) HC 517, p 41; Legal Aid Annual Report 1993–94 (1994) HC 435, p 1.

³⁶ The figures are taken from Glasser, note 2 above.

³⁷ Of which £2,780 were paid to solicitors and £1,074 to barristers; see *id.*

average income in the country.³⁸ Several factors may have contributed to this upward movement, but there can be little doubt about the contributory effect of two features of our procedural arrangements: the method of remunerating lawyers on an hourly basis and the legal aid system.³⁹ A discussion of reform must therefore start by looking at these factors.

In England solicitors are paid for their services on an hourly basis. While barristers traditionally charged according to the complexity of the case, there is now an increasing trend for them too to charge on an hourly basis. Whether charging is by the hour or in proportion to complexity, it seems obvious that lawyers have no direct incentive to economize in the provision of services. On the contrary, the more complex and protracted litigation becomes the more they earn. It is not suggested that lawyers deliberately inflate their services for gain. But it is in the nature of things that economic activity should, probably without any self-conscious decision on the part of the actors, follow the most rewarding path.⁴⁰

Normally, resistance to price comes from the consumers of services. In the present context, however, this moderating mechanism is blunted by several factors. Laymen have to rely on lawyers to judge how necessary costs are in order to defend their rights and, further, it is largely in the hands of lawyers to render costs necessary. As a result, clients are poorly placed to bring down the cost of litigation. The indemnity rule, whereby the loser in litigation has to pay the winner's costs also makes a contribution here. As we shall shortly see, the main effect of this rule is to discourage litigation, but once it is clear that litigation is destined to go all the way to trial and beyond, it tends to erode resistance to cost. Given that success brings with it not only the sum claimed but also the expenses laid out in securing judgment, a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has a very good reason for progressively raising his stakes. Once one party has increased the stakes, the opponent would feel compelled to follow suit for fear that by using inferior procedural devices, be it a less celebrated lawyer or a less qualified expert, he would compromise his chances of success and run a greater risk of having to pay the other party's costs as well on 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 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.⁴¹

The legal aid system has by its very nature altered the pattern of cost resistance for it was designed to facilitate litigation by those who could not otherwise afford it. Its introduction was prompted by the realization that the cost of litigation was putting access to court beyond an increasingly wide proportion of the population. Behind the system lies, therefore, the wholly laudable consideration that when access to court is denied to those who cannot afford it, justice too is denied to them.⁴² But the method chosen for facilitating the poor access to justice could hardly have been more unfortunate from the point of view of cost inflation.

³⁸ Glasser, *id.*

³⁹ A further feature which will need to be addressed in the framework of reform, but which is left out of the discussion in the present paper, is the effect of the divided profession on costs.

⁴⁰ 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) *International Review of Law and Economics* 381.

⁴¹ Cf *Hanlon v The Law Society* [1981] AC 124, 142.

⁴² M Cappelletti and J Gordley, 'Legal Aid: Modern Themes and Variations' (1972) *24 Stanford L Rev* 347; F I Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights -Part I' [1973] *Duke LJ* 1153; G R Evans and A D Wolfson, 'Cui Bono - Who Benefits from Improved Access to Legal Services' in G R Evans & M J Trebilock (eds.) *Lawyers and Consumer Interest: Regulating the Market for Legal Services* (Butterworths, Toronto, 1982), Ch 1; D Luban, 'Political Legitimacy and the Right to Legal Services' (1985) *4 Business and Professional Ethics* 43; D Home, *Legal Aid In Canada* (The Edwin Mellen Press, Lewiston; Lanpetter, 1989); S E Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court*

At the basis of the system lies the idea that the state must afford the poor a level of legal services sufficient to ensure that they are not at a disadvantage compared with their richer opponents.⁴³ By aiming to match the legal services given to the poor to those affordable by the rich, the level of legal aid services was from the start determined by the then current litigation practices. Since litigation was already beyond the reach of the great majority of the population, these practices were governed by what the financially endowed litigant could afford. As a result, the treasury was forced to allocate massive 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 rate of price rises.⁴⁴ As the legal aid system was committed to a policy of keeping up the legal provision of poor in line with current litigation practices, a self-propelled mechanism was set in motion: once an increase in cost has taken place, additional public funds have to be put in; these, in turn, push the cost of legal services even further, thus calling for ever greater public subvention.⁴⁵

Although the rise in the cost of litigation may not have been due solely to price inflation,⁴⁶ there seems to be a coincidence, to put it mildly, between the availability of funds and lawyers' income. Over the past twenty years there has been a marked shift toward increased reliance by the profession on income generated from litigation work. In 1975–76 contentious work accounted for £141m, or 22 per cent, of solicitors' gross income.⁴⁷ By 1984–85 contentious work represented 32 per cent of gross income.⁴⁸ By 1992 it rose again to 40 per cent.⁴⁹ Glasser has calculated that the gross income that solicitors derive from non-matrimonial civil cases has increased 19 times in twenty years.⁵⁰ He concludes 'that professional incomes and the size of firms do seem to have increased substantially and to have been funded, to some considerable extent, by the increase in litigation over the last two decades.'⁵¹ Putting aside statistical analysis, it is only to be expected that if the major participants in the legal process benefit from the complexity and duration of litigation, litigation would become progressively more expensive and protracted.

The relentlessly increasing demands for legal aid support has presented the government with an unpalatable dilemma: it must keep paying up without limit, or, alternatively, it must

Decision Making (Princeton University Press, Princeton, New Jersey 1990); S Shute, 'The Effect of the Statutory Charge on Legally Aided Matrimonial Litigation' (1993) 109 LQR 636; J R Dirks, *Making Legal Aid Pay and Franchise Development*, (Sweet & Maxwell, London 1994).

⁴³ A Wertheimer, 'The Equalization of Legal Resources', (1988) 17 Phil & Pub Aff 303, argues for even more extensive and systematic ratcheting up of legal provision.

⁴⁴ An impression shared by the Master of the Rolls; see text relating to note 4 above. A Gray and Paul Fenn, 'The Rising Cost of Legally Aided Criminal Cases' NLJ, November 29, 1991, 1622, point out that over ten years between 1980 and 1990 the total cost of the legal aid system rose at a much faster rate than the increase in the Retail Price Index.

⁴⁵ Legal aid expenditure rose two and a half times between 1980–81 and 1988–89: C Glasser, 'Financing Legal Aid Services' (1988) Law Society Gazette, 20 April, p 11. See also: Gilvary, Law Society Gazette, 16 February, 1994; and text pertaining to note 4 above.

⁴⁶ Glasser, note 2 above, lists other causes, such as changes in divorce rate and the increase in legal representation for suspects in the police station.

⁴⁷ Non-matrimonial civil work represented £78m or 12 per cent and legal aid work £39m or 6 per cent. Royal Commission on Legal Services, 1978, Cmnd 7468, Vol 2, p 494.

⁴⁸ Of which two thirds was referable to non-matrimonial civil litigation. Law Society, Special Committee on Remuneration (1986) vol 2, Table 24.

⁴⁹ Centre for Interfirm Comparison, quoted by Smith, *The Future of the Legal Profession* (Legal Action Group publication, 1995) p 7.

⁵⁰ Note 2 above.

⁵¹ *Id.* One has to distinguish here between increase in volume and increase in unit cost. As the statistics cited earlier show, there has been an increase in unit cost as well as in volume.

cut its support for the poor.⁵² It chose the latter course and took two measures. It has cut down eligibility to legal aid,⁵³ and it has put a ceiling on its financial commitment by freezing the legal aid budget and by limiting the fees payable to lawyers for legal aid work.⁵⁴ The contraction of eligibility threatens to leave ever larger sections of the population worse off than before the introduction of the legal aid system, for in the meantime costs have increased in real terms.⁵⁵ Those who remain eligible to legal aid are also worse off because the limits on the support for individual litigants may mean that the poor would now consistently receive legal services which are inferior to those available to their richer opponents. This would undermine the principle of equality before the law. It would, however, be misguided to lay the blame for the contraction in the availability of legal aid services wholly on the treasury. A system whereby the level of publicly funded services is governed by what the affluent are used to purchase for themselves, rather than by what the taxpayer could afford, was destined to break down. The checks now placed on the legal aid budget are in large measure a sign of despair at the inability of the administration of civil justice to come to grips with the underlying problem of rising costs.

At the same time, it must not be forgotten that it is not just the burden on the public purse that has been getting heavier, but also the burden on those members of the community who have to finance litigation from their own resources. Inevitably, the combined effect of the pattern of rising litigation costs and of continual reductions in legal aid support has led to a progressive contraction in access to justice. Today, proceedings in the High Court are almost entirely funded either by legal aid funds or by large enterprises. For the majority of the population and for a large proportion of middle size businesses, High Court litigation is simply too costly and too risky. Even litigation in the county court is beyond the means of most.

Far from being a source of regret, the high cost of litigation is held by some to make a positive contribution to the policy of keeping down the volume of litigation. High cost, it is believed, discourages unmeritorious claims, encourages litigants to settle, and promotes the search for alternative dispute resolution methods, thus keeping many disputes out of the court system. It can hardly be doubted that cost is a very effective measure for controlling demand for justice, as it is for moderating the demand for any other services. But this cost based strategy also happens to be deeply iniquitous, since its effectiveness is in inverse proportion to a person's resources; the poorer a person, the more likely he is to be deterred from seeking the court's help to redress his grievances and the more probable it is that he will be forced to give up some of his entitlement for the sake of settlement.

The deterrent effect of cost is considerably intensified by the indemnity rule. Under this rule, popularly known as 'the winner takes all', the winner in litigation is entitled, generally

⁵² For analysis of the problems and proposals for reform see: A Gray, 'The Reform of Legal Aid' (1994) 10 *Oxford Review of Economic Policy* 51.

⁵³ Households in Great Britain entitled to civil legal aid on income grounds alone fell from 81 per cent to 41 per cent; Home Affairs Committee, 5th Report: Legal Aid, The Lord Chancellors Proposals (1992–1993) HC 517, p 41; see also 41st Legal Aid Annual Report (1993–94) HC 462, p 11. See also; C Glasser, note 45 above; 'Legal Aid: Decline and Fall' (1986) *Law Society Gazette*, 19 March, p 839; 'Legal Aid Eligibility' (1988) *Law Society Gazette*, 9 March, p 11; Shute, note 42 above. The Civil Legal Aid (General) (Amendment) Regulations 1994; C Glasser, *Solving the Litigation Crisis*, note 2 above.

⁵⁴ See: The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994; The Legal Aid in Family Proceedings (Remuneration) Regulations 1994; Bacon, 'Enhance or Die' *Solicitors Journal*, 22 April 1994, 386. See also *The Independent* 12 January 1995.

⁵⁵ See, for example, Smith, 'Immigration law Threatened by Legal Aid Cuts' *Solicitors Journal*, 19 March 1993, 247.

speaking, to recover his reasonable costs from the loser.⁵⁶ When proceedings have commenced and it has become clear that no default or summary judgment will be forthcoming, a litigant must accept that there is a risk that he will lose. Since litigation costs are high, paying the parties' combined costs in the case may amount to a massive financial burden. It follows that for every litigant the potential cost of litigation is heightened by the prospect of having to pay the opponent's costs as well as one's own. The prospect of loss is, of course, influenced by the strength of one's case on the merits and as a result the indemnity rule tends to discourage litigation by those whose prospects of winning are poor.⁵⁷ But the deterrent effect operates in inverse proportion to a litigant's financial position; the poorer a litigant, the more he will be discouraged from litigation, everything else being equal.⁵⁸ Thus the indemnity rule aggravates the already existing disadvantage under which the poor labour.

This last point deserves some further elaboration. The degree to which one is able to sustain litigation and bear the consequence of an eventual loss has a direct bearing on one's prospects of recovering one's entitlement in a settlement. If a potential defendant knows that the potential plaintiff cannot afford even the initial cost of commencing proceedings, he need hardly respond to the claim made against him. Similarly, a defendant who cannot make a show of being able to defend his case, must expect to pay in full the plaintiff's demand. Quite plainly, the less one is able to commit resources to litigation and bear the risk of failure, the less one can expect in settlement; and vice versa, the more a litigant can sustain litigation, the greater his prospect of biting into his opponent's entitlement.⁵⁹

It is not suggested that there is something wrong with giving up a proportion of one's claim for the sake of settlement. Indeed, the price paid in reduced entitlement may well bring in handsome benefits in avoided costs and delays. What is maintained is that settlements may be more or less just. A settlement is just if what the parties obtain from it is roughly proportionate to the strength of their respective claims.⁶⁰ Where the plaintiff has only a limited ability to sustain litigation, the defendant is in a position to insist on a settlement that is tailored not to the plaintiff's prospects of winning but to his ability to finance litigation. Where a decision to avoid litigation altogether or to settle a claim or a defence is driven not by the strength of a party's case on the merits but by his poverty, the outcome cannot be considered just.⁶¹ Furthermore, the indemnity rule enables the rich litigant to use his financial

⁵⁶ RSC Ord 62, r 3. A winning party is entitled to recover not everything he chose to spend but only such costs as have been reasonably incurred, with the result that, after taxation, the winning party is commonly left bearing some of his own costs, perhaps as much as one third. *Supreme Court Practice 1995*, vol 1, para 62/12/1.

⁵⁷ For a discussion of the effect of this phenomenon on the development of the substantial law see: J Roberts and S Pritchard, 'A Systematic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of Substantive Law' (1988) 17 *Journal of Legal Studies* 451.

⁵⁸ For analysis see S Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for Allocation of Legal Costs' (1982) 11 *Journal of Legal Studies* 55.

⁵⁹ H L Ross, 'Settled Out of Court: The Social Process of Insurance Claims Adjustment' (Aldine Pub Co, New York, 2nd ed, 1980); H Genn, 'Hard Bargaining: Out of Court Settlement in Personal Injury Action' (Clarendon Press, Oxford, 1987); A Katz, 'The Effect of Frivolous Law Suits on the Settlement of Litigation' (1990) 10 *Int Rev of Law and Economics* 3; J Kraus, 'Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favourable Settlement of Cases under the Civil Rights Attorney's Fees Awards Act of 1976' (1983) 29 *Villanova L Rev* 597.

⁶⁰ If the plaintiff has a 70 per cent chance of success, we would expect him to settle, everything else being equal, for roughly 70 per cent of his claim. Though further discounts would normally be made to represent an earlier recovery and the convenience of not having to litigate.

⁶¹ The same may be said of a settlement dictated by urgent need. Those who have an urgent need for a remedy may feel constrained to forego some of their entitlements, even if they could afford litigation, for the sake of an early remedy. See: The Report of the Committee on Personal Injury Litigation, 1968, Cmnd 3691; Rhonda Wasserman, 'Equity transformed: preliminary injunctions to require the payment of money' 70 *Boston U L Rev* 623-4, 634 (1990); and 'Equity renewed: Preliminary injunctions to secure potential money judgments' 67 *Washington L Rev* 257 (1992).

superiority to put pressure on his poorer opponent by raising his own investment in the litigation and thus increasing the potential burden of the poorer litigant, should the latter lose on the merits.

It is insufficiently appreciated that, quite apart from the injustice just described, relying on high cost to discourage recourse to court produces a great deal of economic waste. To persuade an opponent to enter serious negotiations, a litigant must demonstrate, through commencing or appearing to defend legal proceedings, a certain commitment to litigation. This forces many litigants to spend considerable resources in litigation steps, when there is no prospect of a trial taking place.⁶² Furthermore, the regime of high cost rebounds to a considerable degree on the taxpayer. The more the burden of litigation restricts access to justice, the greater is the pressure on the government to step in and finance the litigation of the poor. The strategy of using cost as a deterrent to litigation is therefore both wasteful and unjust.

A substantial and lasting improvement in the administration of civil justice may be obtained only by undoing the ratcheting up mechanism. To this end we need to devise a comprehensive strategy which addresses its different components. Such a strategy must therefore set out to achieve three goals. It must seek to limit the scope for complexity in litigation and render access to court more affordable. Second, it must remove those factors that encourage expenditure in, and protraction of, litigation and place in their stead deterrents to expenditure and delay. Third, it must replace cost-based incentives to settlement with fairer ones.

Rationing Procedural Resources⁶³

Our system of civil procedure affords litigants and their lawyers very considerable scope for complicating and protracting litigation. To an extent complexity in litigation is inevitable. A system of procedure must be able to cope with the entire range of disputes likely to be brought to court. Consequently, facilities must be in place for the determination of the most difficult of controversies. In a complex dispute, where the facts are ambiguous and contested and the law is uncertain and contentious, all the available procedural facilities may be necessary in order to clarify the issues and determine the facts and the law. But, not all cases are important, intricate and difficult, and not every case requires access to the maximal procedural provision. A well organised system should contain, therefore, a mechanism for husbanding procedural resources by ensuring that the procedure employed is proportionate to the needs of the particular case.

In our system such mechanism is conspicuous by its absence. As we have already seen, a litigant need only show an arguable case in order to have unimpeded access to the full panoply of procedural devices. Furthermore, while litigants are not obliged to take advantage of full access regardless of real need, there are benefits to be had from doing just that, because a litigant may thereby exhaust his opponent, or obtain a better settlement or improve his tactical position in some other way. Even litigants who would like to avoid waste are not always in a position to do so. In order to be able to make a judgment as to whether procedural economy is feasible, one has to have an overall view of the dispute. In an adversary system litigants can obtain such a view only at the end of an expensive and protracted pre-trial process. Yet this process could take on a life of its own and become a quagmire of

⁶² Glasser, note 2 above, has found that in 1993 some 211,00 of writs and other originating process were issued in the Queen's Bench Division. Only 4,950 cases set down for trial were disposed of in the year. But only 650 were determined after trial, with a further 250 ending during trial.

⁶³ See G C Hazard, 'Rationing Justice', (1965) 8Journal of Law and Economics 1.

applications and counter-applications, of appeals and counter-appeals which lead not so much to final judgment as to even more pre-trial proceedings.

When the consumption of the full procedural menu can impose a heavy burden on the opponent, on the administration of justice and, on occasion, on the legal aid funds, the threshold of an arguable case is far too low and causes a good deal of procedural waste. As a first step towards a more economical management of the administration of civil justice we must introduce a system of rationing the available procedural resources, as distinguished from rationing access to the court which leads to a denial of justice. The purpose of this section is to outline a number of available options, all of which are premised on the abolition of the principle that litigants must have unimpeded access to the full procedural provision.

Rationing by rules

At the heart of a rationing strategy lies the idea that different cases would get different procedural provision. This idea is not altogether new, it was embraced by the Civil Justice Review, which envisaged that High Court litigation would be confined to public law cases, specialist cases (such as commercial litigation and Admiralty) and cases involving important, complex or substantial claims.⁶⁴ However, the Review made no proposal for a radically simplified procedure in the county court. Absent a simpler, quicker and cheaper county court procedure, the transfer of cases to the county court is hardly likely to lead to significant improvements.

A more effective strategy would be to provide that certain categories of cases would be automatically directed to be tried by speedy process. It could be provided, for instance, that disputes up to a certain value, say £20,000, will be disposed of by summary adjudication. Alternatively, certain types of cases, such as debt, breach of contract, and perhaps even personal injuries, could be directed by rule to be tried by summary process. Whether all county court cases would be triable by such a procedure or only certain categories can be debated later. What is important to emphasise here is the need for a cheaper alternative.

Summary adjudication is not an untried method in our system. On the contrary, it has been employed for a long time in the field of interlocutory injunctions and related remedies and, moreover, it is now emerging as an acceptable mode for final disposition, as litigants show willingness to treat decisions given on applications for interlocutory injunctions as finally resolving their dispute.⁶⁵ The process is uncomplicated and fast. A party who seeks an interlocutory injunction has to support his application by affidavits. The defendant replies in a similar fashion, with written argument and affidavits of his own. Since cross-examination on affidavits hardly ever takes place, decisions turn on written materials and limited argument and judgments are speedily given.

This model of summary adjudication provides therefore a ready made alternative for the present standard procedure. But if it is thought that this form of adjudication is too rough, some beefing up could be considered. For instance, the parties could be required to exchange lists of documents and affidavits simultaneously, thus reducing the scope for concealment and evasiveness.⁶⁶ At the hearing the judge could exercise discretion in ordering some limited cross-examination.⁶⁷ However, since an increase in the procedural intensity of summary

⁶⁴ Report of the Review Body of Civil Justice, June 1988, Cm 394, para 117.

⁶⁵ Practitioners report that this is particularly common in copyright and patent litigation. In *Fellowes v Fisher* [1975] 2 All ER 829, 833 Lord Denning MR referred to interlocutory decisions in restrictive covenant cases and said: 'Nearly always, however, these cases do not go to trial. At any rate, in 99 cases out of 100 it goes no further.'; Gray, 'Interlocutory Injunctions since Cyanamid', (1981) 40 CLJ 307; J I H Jacob, *The Reform of Civil Procedure* (1982), pp. 261–262.

⁶⁶ A practice already adopted in Admiralty proceedings in some situations: RSC Ord 75, r 18.

⁶⁷ Although very rarely used, there is already a power to summon deponents of affidavits to testify: RSC Ord 31, r 7, Ord 38, r 7. In contrast to the English procedure, under American law if facts are in dispute, oral

adjudication could threaten speed and economy, it is probably better to retain the present model of trial by affidavits and limited orality.

The system need not be wholly inflexible. A residual discretion could be maintained for transferring cases which are of particular complexity or general public importance to the High Court, where something akin to the present procedure would continue to be in force. The measures discussed below for discouraging investment in litigation and for encouraging out of court settlement could operate differentially in the different courts or under different procedures. Thus, for example, fixed fee or contingency fee arrangements and pendulum adjudication⁶⁸ could be confined to the special county court procedure, leaving the High Court procedure unaffected by these measures. These are not the only permutations available within a system of procedural rationing. There may well be others, such as easier availability of summary judgment at all levels. What is crucial to appreciate is that for maximizing cost and time efficiencies we may well have to adopt a flexible approach to procedure and allow for the possibility that different types of disputes may demand or justify different levels of procedural investment.

A number of objections may be made to the idea of summary adjudication. It could be argued that it would reduce the scope for settlement. At present, a defendant does not have to decide whether to persist with his defence until he has obtained considerable information from the plaintiff, by means of pleadings, discovery and witness statements. Once the parties are in possession of comprehensive information about each other's case, they are better placed to compromise than when they are in the dark. Summary adjudication will not provide such extensive opportunities for mutual exchange of information and would, therefore, be less conducive to settlement. Litigants might feel obliged to commit themselves to litigation before they have had an opportunity to gauge the strength of their opponents' case. However, even if this were the case, the decrease in the rate of settlements would not necessarily render the process more expensive for the parties. For, in the absence of extensive pleadings, discovery and the like, summary adjudication will dispose of a case more cheaply. Further, settlements could be encouraged by stipulating that a plaintiff must commence his case by a statement of claim coupled with an offer to open his files to the defendant on terms of mutuality, thus giving the defendant an opportunity to assess his position as soon as proceedings have started.

A more serious objection would seek to challenge the assumption that underlines the idea of rationing procedural provision. It could be argued that rationing would not only remove wasteful and unproductive procedural provision, but could also compromise the standard of accuracy in judgments. No matter how straightforward a dispute, it could be objected, summary trial represents an inferior mode of adjudication which is likely to lead to a reduction in the level of accuracy in judicial finding. Affidavit evidence may conceal as much as reveal, and even if cross-examination were allowed, it might not make up for poor pre-trial preparation. Impressive as this line of argument may appear at first sight, it is very difficult to assess its validity for the simple reason that we know little about the accuracy of our non-summary procedure. All we know for certain is that it grinds more slowly and that it is more expensive than the summary interlocutory procedure, not that it is more accurate. Consequently, until empirical research proves the contrary, there is no reason to suppose that if summary adjudication were employed in cases which, on initial judicial appraisal, appear to be relatively uncomplicated there would be a major loss in the accuracy of adjudication.

evidence and cross-examination are encouraged in order to help the judge decide. Wright and Miller, *Federal Practice and Procedure: Civil*, vol 11, sec 2949, pp 475–482. Some courts have gone so far as to exclude affidavits when facts are in dispute; *id*, at p 476. In Canada too cross-examination is practiced: Sharpe, *Injunctions and Specific Performance*, 1992, para 2.269.

⁶⁸ See discussion relating to note 105 below.

Even if it does turn out that summary adjudication provides inferior accuracy, the case for summary adjudication would not necessarily founder. For we would then be presented with the question of principle of whether a loss in accuracy may be justified by the savings that will be made. This question cannot be answered in the abstract. Rather, it has to be considered in the context of the prevailing economic and social circumstances. Today we find ourselves in a situation where the cost of litigation is such that even the treasury cannot sustain its provision for the poor, not to mention that it is now beyond the means of the vast majority of the population. In these conditions, a system which offers affordable justice to a multitude, albeit at some lower level of accuracy, is to be preferred to a system which restricts justice, albeit of higher quality, to the few who can afford it and to that shrinking proportion of the poor whom the taxpayer can still bear to support.

Rationing by party decision

This point about affordability brings us to a further possible strategy for rationing access to full procedure: giving individual litigants an option to have the dispute resolved by summary adjudication.

At present a rich litigant has considerable scope, we have observed, for exploiting his superior financial position. By investing money in litigation he can intensify the procedural battle to a level where his poorer opponent will be unable to match his procedural facilities. It is not suggested, it must be emphasised, that a greater investment in litigation necessarily increases one's chances of success. What is, however, maintained is that few like fighting with weapons considered to be inferior to those in the hands of the opponent. This natural aversion to procedural inferiority tends to put pressure on the poorer litigant to make financial sacrifices in order to match his opponent's facilities. A litigant who cannot afford to raise the necessary funds, may well feel obliged to settle on terms that he regards as unfair. These and other similar pressures created by economic inequality lead to inequality of procedural advantage.⁶⁹

The administration of justice, needless to say, is not responsible for the economic inequality between citizens. But the extent to which inequality of resources can lead to inequality of procedural standing is very much a function of our procedural arrangements. Accordingly, it is legitimate to question whether it is right to allow as great a scope for procedural inequality as is afforded at present. Is it really right that the rich litigant should have an unfettered opportunity to choose the terms on which the litigation is to be conducted? The question need only be framed in this way for the answer to become evident. There is no principle of justice or other social dimension which requires that the financially endowed litigant should have an unrestricted freedom to gain procedural advantage by dint of his wealth. A more equitable arrangement would be one in which the poor, rather than the rich, is given the right to choose the procedure for determining the dispute. A choice of a cheap procedure by the poor litigant does not, as such, place the rich at a disadvantage, whereas the choice by the rich of an expensive procedure does place the poor at a disadvantage. However, since it is wholly impractical to subject litigants to means testing, the right to choose the mode of adjudication cannot be restricted to litigants who are in an inferior financial position vis a vis their adversaries. The choice must therefore be available to all. Accordingly, all litigants, be they poor or rich, plaintiffs or defendants, could be given the liberty to opt for a cheaper form of adjudication regardless of the opponent's wishes. Such a universal option would provide a largely self-regulating mechanism for husbanding procedural resources and would lead to a considerable reduction in the average cost and duration of litigation. The form of adjudication may take the form of the summary procedure already discussed.

⁶⁹ A Wertheimer, note 43 above.

However, this option cannot be entirely unfettered and some restrictions would have to be imposed. Some types of litigation, such as constitutional disputes or mass tort actions, would always necessitate full procedural treatment on account of their complexity or general public importance, regardless of the litigants' wishes. Disputes of wide public significance could be excluded from summary adjudication either by a priori definitions or in the exercise of judicial discretion. Judicial discretion would also need to safeguard against abuse in the choice of summary adjudication. For example, a litigant, who fears that a thorough investigation of his claim could reveal it to be false, may opt for summary resolution in order to conceal the weakness of his case. Similarly, it would be advisable to avoid summary adjudication in situations of a marked disparity of information between the parties. If, for example, a personal injury victim sues his employer in negligence and the latter applies for summary adjudication, the plaintiff may object on the grounds that, given his limited knowledge of the defendant's safety measures, it would be unfair to settle the case without recourse to discovery and to the testing of expert opinion in full trial.

It should, however, be appreciated that any procedure makes room for strategic behaviour, which is directed not so much to the elucidation of the issues as to the maximization of one's procedural advantage.⁷⁰ It is therefore only to be expected that the proposed procedure would give rise to new strategies; the desirability of which will have to be considered in the context of experience and the available alternatives.

Rationing by managerial judges

Rather than rationing by rule or by election of the parties, rationing may be exercised by the judges themselves. The advocacy of greater judicial control over the consumption of procedural resources is not new. Concern about the expense and complexity of the civil process has led, in recent years, to frequent calls for an increase in judicial involvement in litigation.⁷¹ It is now almost universally acknowledged that it is no longer sensible to leave the extent and duration of the litigation process solely in the parties' control.⁷² Drawing on his own experience Judge Peter Heerey of the Federal Court of Australia observed that the more time is given to the parties the more litigation work they generate, subject only to the limit of resources.⁷³ Accordingly, many have argued that judges should be placed in charge of the pre-trial process, direct and supervise the procedural steps taken by the litigants and ensure that the process is conducted effectively and swiftly.⁷⁴

There is no doubt that cutting down the duration of litigation can be beneficial. Since delays tend to endanger entitlements and to increase costs, a reduction in the time taken to resolve disputes would increase the value of judgments to those entitled to them and would decrease the cost of litigation. But a bare speeding up of proceedings will not necessarily

⁷⁰ Under our existing procedure, for instance, defendants have an incentive to adopt delaying tactics in order to extract favourable settlements.

⁷¹ Attempts to speed the pre-trial process by the imposition of fixed time-tables have come up against some judicial reluctance to enforce compliance at the cost of dismissing claims or defences. See, for instance, *Boyle v Ford Motor Co Ltd* [1992] 2 All ER 228.

⁷² The Australian case of *Toyota Motor Corporation Australia Ltd v Ken Morgan Motors Pty* [1994] 2 VR 106 illustrates the excess that party control may generate. A trial that was estimated to last three weeks took in fact eight months of the court's time and the written materials occupied five linear meters of shelf space.

⁷³ A Kwong, *A Year in Santos: Litigation Under Part IV of the Trade Practices Act* (Published by the Federal Court of Australia).

⁷⁴ Friedenthal, 'A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure' (1981) 69 California L Rev 806; Peckham, 'The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition' (1981) 69 Calif L Rev 770; Resnik, 'Managerial Judges' (1982) 96 Harv L Rev 374; P E Longan, 'The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials' (1993) 35 Arizona L Rev 663. Cf A D Twerski, A S Weinstein, W A Donaher and H R P Phler, 'The Use and Abuse of Warnings in Product Liability - Design Defect Litigation Comes of Age' (1976) 61 Cornell L Rev 495; J C Reitz, 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure' (1990) 75 Iowa L Rev 987.

result in a serious reduction in costs. Active judicial involvement in litigation would require a massive increase in judicial manpower, the cost of which would be considerable and would fall on litigants and taxpayers. More significantly, if we were to introduce judicial management and, at the same time, leave all other aspects of procedure unchanged, litigation would still be capable of absorbing considerable financial resources. Pre-trial proceedings would be hurried along, but the procedure would still be complex, demand considerable investment in legal services and generate substantial costs, albeit in a shorter space of time.⁷⁵ Given the culture of the legal profession and of the judiciary, Professor Zander is right to doubt whether the mere assumption of a managerial role would lead to the desired reduction in costs or delay.⁷⁶

Such experience as we have with judicial management has not been encouraging. The courts have a power to strike out an action for want of prosecution, ie for inordinate and inexcusable delay. Yet the exercise of this power has not had a marked effect on the conduct of proceedings because of the leniency that the courts have shown towards lax attitudes to litigation.⁷⁷ Although a more exacting policy towards delays seems to be emerging,⁷⁸ it is doubtful whether it will make a marked difference. Indeed, it has recently been decided that even automatic striking out under CCR Ord 17, r 11(9) is not irreversible.⁷⁹ The courts already have the power, under section 51 of the Supreme Court Act 1981 (as substituted by s 4 of the Courts and Legal Services Act 1990), to order legal representative to meet the cost of the proceedings personally. Such orders, known as wasted costs orders, may be made where costs were incurred as a result of any improper, unreasonable or negligent act on the part of the legal representatives, be they barristers or solicitors. But the leading Court of Appeal decision on the exercise of this power reveals a remarkably forgiving attitude.⁸⁰ Furthermore, litigation over wasted costs orders has itself consumed a good deal of court resources. Indeed, the sheer extent of litigation on procedural matters of all kinds is indicative of a judicial inability to confine disputes to the merits.

Clearly then, a managerial policy will not bear the desired fruit unless it is guided by a well articulated policy of rationing procedural resources and is buttressed by specific rules that promote this policy. This would require both a cultural change and a material change in procedure. To attain such a cultural change it is of vital importance that judges come to see their role not only in terms of arbiters of individual disputes but also as guardians of scarce judicial resources which have to be carefully rationed and equitably distributed amongst all litigants, actual and potential.

In practical terms, to facilitate the judicial supervision of litigation judges would have to take control soon after the commencement of proceedings. If there were to be alternative modes of trial, the judge's first task would be to determine to which mode litigation should be directed. For instance, if a form of summary adjudication were to be introduced, we would need to replace the present principle of free access to procedure with a presumption in favour of summary adjudication. All disputes would be referred to summary adjudication unless a litigant could persuade the judge at the outset of the proceedings that there is justification for employing the full procedure. If party choice in procedure is to be allowed, the judge would deal with objections to the choice of summary adjudication. Once it has been determined that

⁷⁵ See for example case mentioned in note 3 above and related text.

⁷⁶ 'Are there any Clothes for the Emperor to wear?' (1995) 145 NLJ 154.

⁷⁷ *Birkett v James* [1977] 2 All ER 801; *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543.

⁷⁸ *Roebuck v Mungovin* [1994] 1 All ER 568.

⁷⁹ *Rastin v British Steel plc* [1994] 2 All ER 641.

⁸⁰ *Ridehalgh v Horsefield* [1994] 3 All ER 848; For commentary see Zuckerman, 'Practice and Procedure' [1994] All ER Annual Review xxx.

the case will be summarily adjudicated, the judge will proceed to dispose of the dispute accordingly.

The judge's managerial role could be of particular importance in rationing the procedural resources when it comes to fully fledged litigation. The process of defining the issues by exchange of pleadings requires intensive legal services on account of the technical nature of the process and the risks involved in getting the pleadings wrong. Further, it is not uncommon for the process to lead to disputes which involve interlocutory applications to the court and even appeals from the court's decision. There is already a broad consensus that the process of defining the issues must be simplified. Pleadings could be replaced by a requirement that the parties provide, at the outset, a straightforward and economical account of the nature of their case and its essential circumstances, as well as a description of the relief sought. The purpose of this process would be to inform the judge of the nature of the dispute, so that he may, at an early pre-trial hearing and with the assistance of the parties, identify the essential issues and give directions accordingly. If robustly and sensibly exercised, this judicial involvement is bound to lead to a reduction in the number of issues, and quite possibly even help the parties settle at that stage.

A further aim of this pre-trial process would be to cut down discovery to the size of the dispute and its real needs. It is generally recognised now that discovery can be a major cause of waste of resources. In the *Collegiate Response of the Judge of the Commercial Court* to Lord Woolf's inquiry the judges expressed 'the firm opinion that there should be a reconsideration and restrictive revision of the principles and practice of discovery which has become an overwhelming factor in terms of time and expense in many substantial cases'.⁸¹ We should therefore seriously consider the replacement of the discovery rule by an arrangement whereby at the pre-trial hearing the judge himself would determine, on the basis of the issues which he has helped to shape, what documents the parties should place at each other's disposal.

The type of pre-trial process envisaged here is akin to the procedure in commercial litigation in Scotland. The Rules for Commercial Actions in the Court of Sessions⁸² provide for the commencement of proceedings by summons which must include: the relief sought, a description of the transactional dispute from which the dispute arises, a summary of the circumstances, and the grounds for the action. To these the litigant must append a list of the documents founded upon or adopted in the summons. The defendant has to respond in like manner. The court then holds a "Preliminary Hearing" at which it considers whether further specification of the parties' claims is necessary, asks for the identity of witnesses and requests the lodging of documents which appear to constitute evidence or are related to the matter of the action, and gives directions about expert evidence. At a subsequent "Procedural Hearing" the parties will provide lists of witnesses, expert reports and the like and the court will give the necessary directions for trial. Although in their collegiate response the judges of the English Commercial Court are not advocating the adoption of the Scottish system, they voice support for greater judicial control, particularly where discovery is concerned.⁸³

A tentative step in this direction has already been made by the Lord Chief Justice in a recent practice direction.⁸⁴ It exhorts judges to place restrictions on discovery, the length of oral submissions, the time allowed for the examination of witnesses, the issues they wish addressed and the reading aloud of documents and authorities. It is quite possible that if the

⁸¹ Draft of which has been kindly provided by Mr Justice Potter. For the position in America see: A W Albright, 'The Texas Discovery Privileges - A Fool's Game?' (1991-92) 70 Texas L Rev 781; E G Thornburg, *Interlocutory Review on Discovery Orders* (1990) 44 Southwestern L J 1045.

⁸² September 1994.

⁸³ See Draft referred to in note 81 above.

⁸⁴ Practice Direction [1995] 1 All ER 385.

extent of oral argument and oral testimony were to be determined on a case by case basis, there would be a considerable reduction in the average duration of trials.⁸⁵ But it remains to be seen whether judges would be able to exercise a self-denying policy regarding their own preparedness to entertain disputes about purely procedural matters.

A new managerial culture will have widespread consequences. It is only to be expected that once judges take on an active role, they will no longer be able to remain uninvolved in the dispute between the parties.⁸⁶ Both before and during the trial, they would have to make decisions that could affect individual litigants' chances of success.⁸⁷ But this is no threat to impartiality. It is merely a result of recognising that it is no longer acceptable to leave litigants to their own devices, regardless of how expensive this may be to their opponents and to the administration of justice.

Discouraging litigation expenditure

We observed earlier that the existing structure of litigation contains incentives for increasing expenditure in litigation. The second major objective of reform should therefore be to reverse the trend and provide disincentives to expenditure in litigation.

It must be clear to most objective observers that no measure of procedural simplification, streamlining and judicial intervention would have lasting effects as long as lawyers have an incentive to complicate and protract litigation. That is, as long as legal services rendered in litigation are remunerated on an hourly basis without limit and regardless of outcome. It is therefore imperative that we abandon this system.

Several options present themselves in this respect. One possible solution is to adopt some form of contingency fee system.⁸⁸ Lawyers whose fees are contingent on their clients' recovery have a strong incentive for keeping down the investment in litigation, so as to secure a reasonable gain. Further, under this system there is less scope for a conflict of interest between lawyers and their clients during litigation, whereas under the hourly payment system a conflict of interest exists because lawyers benefit in proportion that the trial is more complex and protracted. However, this system is not devoid of fault.⁸⁹ It creates room for considerable conflict of interest when it comes to settlement. Since lawyers receive a fixed proportion of clients' recovery, whether it is obtained by trial or by settlement, they have an interest in settling without investing in litigation even when litigating could yield a higher recovery for their clients.⁹⁰ But there may well be ways of overcoming this problem⁹¹ and,

⁸⁵ Dispensing with the rule against hearsay and the technicalities attendant upon adducing hearsay under the Civil Evidence Act 1968 will further limit the need for oral testimony.

⁸⁶ Cf J Alfini, 'Doing Justice in a Bureaucracy: The Need to Reconcile Contemporary Judicial Roles in the Light of Ethical and Administrative Imperatives' (1989) 54 *Missouri L Rev* 323.

⁸⁷ Even in the matter of devising a time table for the pre-trial stage judges would have to make choices with implications for the parties' relative prospects of success. A tighter time table, for instance, could favour one party but disadvantage the other.

⁸⁸ For analysis see: M Schwartz and D Mitchell, 'An Economic Analysis of the Contingent Fee in Personal Injury Litigation' (1970) 22 *Stanford L Rev* 1125; R C A White, 'Contingent Fees: A Supplement for Legal Aid?' (1978) 41 *MLR* 286; T Thomason, 'Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process' (1991) 20 *Journal of Legal Studies* 187; T J Miceli and K Segerson, 'Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention' (1991) 20 *Journal of Legal Studies* 381; N Rickman, 'The Economics of Contingency Fees in Personal Injury Litigation' (1994) 10 *Oxford Review of Economic Policy* 34.

⁸⁹ See note 88 above.

⁹⁰ See: *Final Report of the Royal Commission on Legal Services (I & II)*, Cmnd 7648, London HMSO, 177; M L Schwartz and D J B Mitchell, 'An Economic Analysis of Contingency Fee and Personal Injury Litigation' (1970) 22 *Stanford L Rev* 1125; B L Smith, 'Three Attorney Fee-Shifting Rules and Contingency Fees: Their impact on Settlement Incentives' (1992) 90 *Michigan L Rev* 2154. For a comparison of contingency pavements

besides, it is not clear that the conflict of interest between lawyers and clients under this system is worse than the different conflict of interest that is generated by our present system. A further difficulty is that the contingency fee system is better suited to the relationship between lawyer and plaintiff than to that between lawyer and defendant.

It is a measure of the dissatisfaction with our present system that the Lord Chancellor's Department is now considering a move towards a form of conditional fees. The proposal is that plaintiffs' lawyers will be paid an uplift of 100 per cent on their taxed fees out of damages recovered in the action.⁹² This is not the only change that the Lord Chancellor has been considering. In a drive to keep down the cost of legal aid his department is investigating the possibility of introducing standard fees in civil cases.⁹³ The German approach is particularly instructive in this regard.

In Germany legal fees are determined by law. Lawyers are paid for litigation in units that represent a small proportion of the value of the claim.⁹⁴ For commencement of proceedings lawyers are paid one unit. A second unit is payable for representation at the next stage, which consists of a hearing before a judge. At this hearing the judge tries to procure a settlement and, failing that, gives directions for the preparation of evidence. Lawyers earn their third and final fee unit if the case proceeds to collection of evidence and its presentation before the judge.

Clearly, since lawyers earn only a fixed fee they have no incentive to prolong any one of the litigation stages. On the contrary, they have an interest in seeing these processes through as swiftly as possible so as to secure a reasonable return for their work. This incentive to keep down complexity has also the tendency of easing the judicial role. However, it was found that lawyers tended to push litigation to its third stage in order to secure a full three unit payment which resulted in an overloading of the judicial system. In order to counteract this trend it has been laid down recently that a lawyer is entitled to the entire three unit fee if the case is settled in its early stages.

If the practice of hourly payment cannot be banished, we should at least provide clients with better means with which to resist costs. Two fairly straightforward measures would greatly improve clients' ability to influence cost: better information and greater competition from within and without the profession. On the first head, the Australian Advisory Committee on Access to Justice has made useful recommendations.⁹⁵ They suggest that lawyers should at the outset provide clients with the following information: details of the method of costing, an estimate of the total likely costs, comparative market information on costs, likely chances of success and the implications of failure in the litigation, an explanation of the process of taxation and, lastly, information about alternative means of dealing with the matter and their cost. On the competitive side, the Australian committee made recommendation for promoting both internal and external competition. A discussion of these methods and, indeed, of the pros

and hourly payments see H M Kritzer, W L F Felstiner, A Sarat and D M Trubek, 'The Impact of Fee Arrangement on Lawyer Effort' (1985) 19 Law and Society Rev 251.

⁹¹ For example by lowering the remuneration for settlement recovery.

⁹² The Law Society is concerned that such a system may in some cases wipe out the plaintiff's damages altogether. It is therefore proposing a cap on the uplift.

⁹³ (1994) LSG 20 April, p 4.

⁹⁴ A few examples will illustrate the nature of the German fee scales. For a claim worth DM100,000 (£25,000) the lawyer's unit fee is DM2,125 (£531) and the court fee is DM955 (£238). For a claim worth DM520,000 (£130,000) the figures are DM4,225 (£1,056) and DM3,545 (£886) respectively, while for a claim worth DM1m (£250k) the figures are DM6,225 (£1,556) and DM5,905 (£1,476) respectively. To counteract the incentive of inflating the value of claims, German law provides that if winners, who as in England recover their costs from the losers, fail to obtain judgment for their full claim, they are regarded as having partially lost and have to pay the defendants' costs in that respect.

⁹⁵ *The Cost of Civil Litigation Before the Intermediate Courts in Australia*, 1994.

and cons of self-regulation, is beyond the scope of this paper.⁹⁶ Suffice to say here that, as in any other context, in the absence of a determined effort to expose legal practices to market forces clients' interests will suffer.

The further inflationary factor present in our system presents different problems. We have seen that the indemnity rule encourages the continual raising of the procedural stakes, once litigation is well under way. The American system avoids this problem by providing that each party carries his own costs.⁹⁷ The combination of this rule with the contingency fee system ensures that even poor litigants can have access to court. However, this system has its own defects, not least of which is that victims of violations of the law have to see a substantial part of their damages disappear in legal fees.⁹⁸ Further, the American system does not offer adequate access to poor litigants whose cases are not economically attractive for lawyers. As a result, both courts and legislatures have created inroads into the non-recovery rule by providing for recouping attorney fees in certain cases.⁹⁹ In particular, statute provides for the recovery of costs in civil rights cases.¹⁰⁰

Instead of adopting the American system in its present form, we could seek a middle ground solution, laying somewhere between full recovery and nil recovery. We could, for example, limit the amount of costs that a winning party may recover to the proportion that the sum awarded bears to the sum claimed. A plaintiff who recovers only 70 percent of the claim will, accordingly, recover only 70 per cent of the costs. As far as defendants are concerned, a defendant who succeeds only in part will be denied costs in proportion to loss on the merits. Such a rule would discourage insubstantial claims and defences and thus reduce the pressure on costs. Another possible arrangement would be for a judge to fix at the outset of the proceedings the cost recoverable by the winner.¹⁰¹ Lastly, recoverable costs could be limited to the amount spent by the loser on litigation.¹⁰² This will go some way towards ensuring that cases are fought in a way that is affordable by the poorest of the two opponents.

Discouraging litigation

As soon as we bring down the cost of litigation we are bound to come up against the perennial problem that a reduction in the cost and delay of litigation could stimulate more litigation. An increase in the volume of litigation could then threaten any improvements gained.¹⁰³ A reform aimed at reducing the cost of litigation must therefore be accompanied by fair measures

⁹⁶ For an excellent analysis see Ogus, 'Rethinking Self-Regulation' (1995) 15 OJLS 97.

⁹⁷ B L Smith, 'Three Attorney Fee-Shifting Rules and Contingency Fees: Their impact on Settlement Incentives' (1992) 90 Michigan L Rev 2154. For a comparison of the American and the English systems see A Katz, xxx ; S Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for Allocation of Legal Costs' (1982) 11 Journal of Legal Studies 55.

⁹⁸ Leubsdorf has mounted a powerful argument for the recovery of attorney fees as part of the damages: 'Recovering Attorney Fees as Damages' (1986) 38 Rutgers L Rev 439.

⁹⁹ J Leubsdorf, 'Toward a History of the American Rule on Attorney Fee Recovery' (1984) 47 Law and Contemporary Problems 9. Indeed, some American lawyers have advocated the adoption of the English system; see Smith, note 97 above.

¹⁰⁰ The Civil Rights Attorney's Fees Award Act of 1976, 42 USC s 1988, provides that in proceedings for civil rights under certain statutes, 'the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.' See also *Evans v Jeff D* 475 US 717 (1986); *City of Riverside v Rivera* 477 US 561 (1986).

¹⁰¹ Glasser, note 2 above.

¹⁰² The idea is put forward by B L Smith, note 97 above.

¹⁰³ For a discussion of the phenomenon see: H T Edwards, 'The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies' (1983) 68 Iowa L Rev 871; J Resnik, 'Precluding Appeals' (1985) 70 Cornell L Rev 603; Hugh Gravelle, 'Notes on the Economics of Legal Procedure', paper presented to the conference on the Economics of the Legal System, Institute for Advanced Legal Studies, June 1994.

designed to deter litigation. However, before addressing this problem two preliminary points need be made.

When we come to assess the probable consequences of improvements in efficiency, it is important that we keep the problem of increase in the volume of litigation in perspective. As will have become clear, cost and delay are in themselves conducive to litigation. It is unfortunately the case that the more litigation can be protracted, the more costly to the plaintiff recovery would be, and the greater a benefit defendants could extract from a settlement. Some defendants have, therefore, good reason for resisting claims and protracting litigation for as long as possible. By denying defendants the weapon of cost and delay we would make it less likely that they would force plaintiffs to take legal action and we could thereby achieve some reduction in litigation. This said, it remains probable that an increase in efficiency would draw more litigation into the courts. But it is important to note that this consequence would not cancel out improvements in efficiency already achieved, because a reduction in the time that it takes to dispose of an action will enable the courts to deal with more cases, even if there remains an overhang of volume with which the system cannot cope.¹⁰⁴

The problematic correlation between cost and delay, on the one hand, and the volume of litigation, on the other, is not confined to reform. Any system of civil justice has to contain a mechanism for balancing the supply of justice against the demand for it. The present method of discouraging litigation through high cost is, as has been observed, objectionable on grounds of both injustice and inefficiency. It is fashionable to think that the solution to the problem can be found in alternative dispute resolution. There may well be a great advantage in making available parallel systems of conciliation and arbitration. But existence of such systems cannot provide an excuse for failing to reform the administration of civil justice in the courts. Surely, citizens are entitled to expect equal access to courts of law and are right to demand that they not be barred from them on grounds of poverty. It is a requirement of justice that any measures adopted for discouraging litigation in the courts and for encouraging alternative forms of dispute resolution should be non-discriminatory in terms of wealth or the lack of it.

One possible measure for discouraging litigation is the pendulum system of adjudication under which the judge can only decide to accept the plaintiff's claim in full or, alternatively, wholly accept the defendant's defence and reject the plaintiff's claim altogether.¹⁰⁵ Under this system a judge has no jurisdiction to award part only of the claim or accept part only of a defence. It stands to reason that a judge faced with such a choice will tend to decide in favour of the party whose position is closest to what the judge believes to be the correct solution. Hence, a party who advances an excessive claim or defence runs a serious risk of losing everything. Accordingly, this feature of the system provides a powerful mechanism for narrowing the divergence between the competing positions of plaintiffs and defendants, with the result that mutually agreed settlements become much more likely.¹⁰⁶ Naturally, pendulum

¹⁰⁴ Suppose that we doubled the case disposal rate without an increase in judicial and related manpower. Suppose further that as a result the number of cases brought to court increases threefold. Although delays would build up again, it will still be the case that twice as many actions will be disposed of than before the increase in efficiency.

¹⁰⁵ Or award such sum as the defendant admits and no more. For discussion of the procedure see: J Wood, 'Last Offer Arbitration' *British Journal of Industrial Relations*, November 1985; R Singh, 'Final Offer arbitration in Theory and Practice' *Industrial Relations Journal*, Winter, 1986.

¹⁰⁶ This system of adjudication is available for the resolution of disputes arising from National Health Service contracts under the National Health and Community Care Act, 1990. See Department of Health, *Contracts for Health Services: Operational Principles*, 1989. The scheme is discussed by D Hughes, J V McHale and L Griffiths, 'NHS Arbitration - A Redundant Remedy?' Paper prepared for ESRC *Contracts and Competition programme Workshop*, Robinson College, Cambridge, 19-20 September, 1994. For experience in the industrial

adjudication would not be suitable for all types of litigation, such as constitutional cases where the courts are expected to establish rules of general application. Accordingly, in this context too a flexible approach is called for, whereby pendulum adjudication is employed in only certain types of cases.

Pendulum adjudication may not be the only method available for discouraging litigation.¹⁰⁷ The important point to realise is that any reform of the system of civil procedure must go hand in hand with an effective strategy for discouraging litigation.

The need for empirical research

A serious attempt to reform the system of procedure would have to be grounded on sound factual assumptions about the workings of our existing procedure and on reasonably reliable projections of the consequences of proposed changes.¹⁰⁸ A few examples will suffice to illustrate this point. One of the themes advocated here has been that we should consider trading in some accuracy for the sake of economy or timeliness. To this end we need to form an idea of the extent to which, if at all, a curtailment of the present processes may undermine accuracy. Some useful indications may be obtained from a comparison of the accuracy of the procedure for determining applications for interlocutory injunctions with the accuracy of the normal procedure. It should be possible to ascertain in how many of the cases, which proceed to trial after an interlocutory decision, judgments go in favour of the winner at the interlocutory stage. If it is shown that judgments tend to go the same way as the interlocutory decision, one will have established that a move towards summary adjudication would not involve a massive sacrifice in accuracy.¹⁰⁹ Equally, if it is shown that in a high proportion of cases a decision to grant or refuse an interlocutory injunction disposes finally of the case, we will have established the legitimacy of this procedure as a method for final adjudication.

Information is required about other aspects of our pre-trial procedure too. Discovery may be extremely costly, yet we have little knowledge about its usefulness. Although it may prove impractical to gauge the correlation between discovery and the determination of truth, we should be able to obtain other kinds of useful information. For instance, it would be interesting to know what leads litigants to engage in cheaper or more expensive discovery practices and the correlation between discovery and the willingness to settle. The phenomenon of settlements itself needs to be better understood, as it is so important to the running of the administration of civil justice. We need to acquire reliable data about the way in which different factors, such as delay and cost, influence settlement. In particular, it is important to determine to what extent settlements operate unfavorably towards poorer litigants and how legal aid affects settlements. As far as the legal aid system is concerned, much is already known but its effect on cost inflation is not sufficiently understood. We need to have a much better grasp of the reasons for the steady increase in demand for legal aid funds, about the degree to which this is due to increases in demand for services or to sheer inflationary pressures.

At present there is virtually no empirical data about the workings of our system of litigation.¹¹⁰ No information about costs, about the relationship between costs and the value of the dispute or the cost of the different segments of litigation. The position is somewhat better

relations field see: H Gennard, 'How Pendulum Arbitration Agreements Have Actually Worked in Practice' ACAS, Sept, 1987.

¹⁰⁷ See discussion by T B Metzloff, 'Resolving Malpractice Disputes: Imaging the Jury's Shadow' [1991] Law and Contemporary Problems 43.

¹⁰⁸ T D Row, 'Study on Paths to a "Better Way": Litigation, Alternatives and Accommodation' [1983] Duke LJ 824, provides an instructive illustration.

¹⁰⁹ At any rate in the types of cases that show a high correlation between the interlocutory and the final result.

¹¹⁰ M Zander, 'Are there any clothes for the Emperor to wear?' (1995) 145 NLJ 154.

in other common law jurisdictions.¹¹¹ The implications of any contemplated changes would also need to be investigated. For instance, although a considerable body of knowledge exists about the operation of cost shifting and about remuneration for legal services in other jurisdictions, we could hardly extrapolate directly such information. To understand how ideas borrowed from other systems would work here we would have to construct models that can accommodate the interaction between new processes and the existing structure.

While empirical data about the workings of the administration of justice is important, it is also important that we do not seize upon the paucity of information as an excuse for taking no steps to improve matters. The problem of access to justice demands urgent attention. Some progress may be made right away, especially with regard to the simplification of procedure and in respect of lawyers' fees. At the same time, we need to put in place monitoring mechanisms to ensure that changes do have the desired effects and in order to inform proposals for further improvements.

Conclusion

The exorbitant cost and the delays involved in civil litigation have greatly restricted access to justice and have placed a considerable strain on legal aid funding. At the same time, the volume of litigation has stretched court resources to their limit and beyond. As a result, an attempt to reform civil procedure is almost inevitable now. The theme advocated here has been that reform can succeed only if a comprehensive strategy is adopted which deals with the different factors that contribute to the malaise. This strategy should aim to husband procedural resources so that access to procedure, as distinct from access to the court, would be allowed in proportion to the importance and complexity of disputes.

At present, a powerful mechanism which encourages complexity and pushes up the cost of litigation is at work. A litigant need only show a bare arguable case in order to avail himself of the full procedural provision. He is then free to consume everything on the procedural menu, regardless of the difficulty or importance of the issues, of the inconvenience or cost to the opponent, and of the resulting strain upon the court system. The method of remunerating for legal services on an hourly basis provides lawyers with an incentive to complicate and protract litigation. Once litigation looks like proceeding to trial, the indemnity rule, whereby the winner recovers his costs from the loser, provides litigants with a reason for continually raising their stakes in the litigation, whether by employing expensive procedural devices or by intensifying the use of the process. Coming on top of these mechanisms, the injection of massive public funds into the purchase of legal aid, on the basis that poor litigants have to match the standards commonly employed by affluent litigants, has had the natural result of fanning the cost of litigation even further. The complexity of litigation can therefore be seen as the effect of this inexorable ratcheting up mechanism rather than its cause.

To reverse the present trend we must start by reducing the complexity and duration of litigation. This could be achieved by rationing procedural provision, so that access to procedural devices would be controlled. Different methods of control have been mentioned, such as a presumption in favour of summary adjudication, leaving those litigants who wish to have access to the full procedure to justify the need for intensive consumption of the courts' resources and for the imposition on their opponents, as well as judicial case management. Above all, a cultural change is called for whereby judges come to see their role not only in terms of arbiters of individual disputes but also as guardians of scarce judicial resources which have to be equitably distributed amongst all litigants, actual and potential. Even if this

¹¹¹ See, for instance, Williams et al, *The Cost of Civil Litigation Before the Intermediate Courts in Australia* (The Australian Institute of Judicial Administration, 1992); *Access to Justice - An Action Plan*, Report of Access to Justice Advisory Committee, 1994.

results in some diminution in the level of accuracy in judgments, it seems preferable to dispense justice to a larger number of citizens, albeit at a somewhat reduced quality, than to dispense higher quality justice to the very few.

Such a cultural change will not have a lasting effect unless it is supported by concrete measures that provide effective incentives for litigants and lawyers alike to spare procedural resources. The system of hourly remuneration for legal services must be changed so that lawyers too would have an interest in speed and economy. Clients should be provided with better means to resist costs. At the same time we need to be conscious of the possibility that, as litigation becomes cheaper and swifter, many more would be encouraged to litigate, thus threatening the build up of fresh backlogs. It is therefore essential to provide effective inducements for out-of-court settlements. At present litigation is discouraged by cost and delay, but this method is both wasteful and unjust. A much more equitable system must be found, and pendulum adjudication is mentioned as a possible solution.

Lastly, little progress is likely to be made without thorough research into the working of civil justice here and abroad. For unless we are prepared to look beyond the confines of our jurisdiction,¹¹² and extend the discussion beyond the horizons of purely legal questions, into economics and social studies, no sensible and well informed debate about the reform of civil procedure could take place. Besides, firm empirical information and sound analysis of its implications is a pre-requisite to forming a consensus about changes that may have wide ranging social implications.

¹¹² See: J A Jolowicz, “‘General Ideas’ and the Reform of Civil Procedure’ (1983) 3 Legal Studies 295; J A Jolowicz, ‘Comparative Law and the Reform of Civil Procedure’ (1988) 8 Legal Studies 1.