2. Civil justice's "songs of innocence and experience". The gap between expectation and experience

Canções da Justiça Civil: inocência e experiência. A distância entre esperanças e experiência

(Autor)

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Resumo:

Este artigo trata de diversos temas relacionados com a disfunção entre o direito "nos livros" e o direito "na realidade": os códigos processuais nacionais e a experiência real das partes sujeitas a esses sistemas. O texto apresenta seis tópicos, do ponto de vista Inglês. O autor trata dos elementos humanos: juízes e advogados, e das relações necessárias entre eles. As funções do juiz, a revogação de sanções, decisões cautelares, comunicações "privilegiadas", peritos, julgamento, recursos e execução. Antes de suas conclusões, aborda problemas ligados aos custos e às despesas. No final, as principais conclusões são manifestadas em tópicos especiais e são indicados outros tópicos merecedores de uma discussão mais aprofundada.

Abstract:

This article deals with many topics related to the dysfunction between law "in books" and law "in act": national procedural codes and the real experience of parties subject to those legal systems. The text deals with six topics seen from the English point of view. The author deals with the human elements: judges and lawyers, and the necessary relations between them. Them the text deals with the functions of the judge, relief from sanctions, protective relief, disclosure, privileged communications, experts, trial, appeals and enforcement. Before his conclusions, the subjects dealt with are costs and expenses. At the end, main conclusions are exposed and special topics are indicated as requiring further discussion.

Palavra Chave: Direito "nos livros" - Direito "na realidade" - Juízes - Advogados - Disclosure - Recursos - Execução - Custas e despesas.

Keywords: Law "in books" - Law "in act" - Judges - Lawyers - Disclosure - Appeals - Enforcement - Costs and expense.

INTRODUCTION

The inspiration for this paper is Marcel Storme's seminal discussion, in his keynote Moscow address, "Best Science, Worst Practice?". In that remarkable paper he explores many points of dysfunction between national procedural codes and the real experience of litigants subject to those legal systems. Marcel Storme proposes "Ten remedies for bridging the gap": (1) greater State financial support for civil justice; (2) better training of citizens in dispute-resolution; (3) improving the training of lawyers; (4) fostering cooperation between courts and lawyers; (5) promoting greater professional discipline amongst lawyers. Marcel Storme also recommends that: (6) attention be given to the operation of the burden of proof in certain categories of case; (7) legal systems should show greater sensitivity to the peculiarities of various types of procedure; (8) opportunity to resort to appeal should be reduced; (9) media interference in high-profile cases should be curbed; (10) and that the influence of scientific comparative associations should be strengthened.

The themes which form the substance of the following paper, and which were discussed at the Gent
symposium, draw heavily on the critique so attractively presented by Marcel Storme. It was a great pleasure to participate in this celebration of his great achievement as a scholar and of his long-standing influence in promoting the global family of procedural experts.

I. INFORMATION OVERLOAD: DROWNING IN A SEA OF COMPLICATED RULES

Legal systems permit citizens and business to bring civil claims for decision before public courts. The aim is to promote the rule of law, protect rights, uphold financial entitlements. Procedural rules are made available. These tend to be closely drafted. Such rules proliferate and become complex.

On 28 March 1994, Lord Mackay LC of Clashfern (Lord Chancellor 1987-1997) appointed Lord Woolf to make recommendations concerning civil procedure, with the following aims: (i) improving access to justice and reducing the cost of litigation; (ii) reducing the complexity of the rules; (iii) modernising terminology; and (iv) removing unnecessary distinctions of practice and procedure. Woolf's interim and final reports appeared in 1995 and 1996, and they stimulated a substantial literature. The CPR were enacted in 1998 and took effect on 26 April 1999.

The new CPR system recognised and sought to promote nine procedural features: (1) proportionality; (2) procedural equality; (3) active judicial involvement in a case's progress; (4) accelerated access to justice by improved summary procedures; (5) curbing excessive documentary disclosure; (6) greater resort to the disciplinary use of costs orders; (7) curbing appeals; (8) stimulating settlement by use of costs incentives to induce acceptance of reasonable settlement offers; and (9) judicial encouragement of resort to ADR, notably mediation.

The procedural code is a large and intricate body of rules. The rules, rather like law professors from some Member States, have retinues of assistants. These ancillary rules are called Practice Directions. Some branches of the civil judiciary are subject also to specialist procedural Guides, notably, *The Admiralty and Commercial Courts Guide*.

The Civil Procedure Rules (1998) were intended to introduce a simplified new procedural code. But some topics have become heavily criss-crossed with complex regulations. This is a feature of costs law (see section VI of this paper), where the Jackson changes of April 2013 have introduced a new system of damages-based agreements (England's terminology for the contingency fee) and costs-budgeting. The topic of freezing injunctions (see further Section III C of this paper) is another procedural aspect where there is effectively a mini-code. Here the rules are impressively detailed, as they need to be, in order to offer extensive protection of the unrepresented respondent, whose assets are about to become subject to a highly coercive order. And the tentacles of the procedural code extend to the ante-chamber of pre-action contact between the prospective parties: pre-action protocols.

In addition to the rules, there is much procedural case law to be noted by legal advisors. These precedent decisions are collected because they provide authoritative guidance in the application of these Rules, notably the exercise of the numerous discretions and powers conferred on the courts.

But poor judicial guidance, or guidance which at least causes a major stir within the legal profession, can lead to a flurry of litigation. This occurred when the Court of Appeal in the *Mitchell* case (2013) (November 2013) issued a robust interpretation of the judicial power (under CPR 3.9) to consider granting relief from the automatic application of sanctions, where a party has failed to comply with a procedural order, such as a time-tabling requirement. It became necessary in July 2014 for the Court of Appeal in the *Denton* case (2014) to revise this guidance, softening it slightly, and clarifying the central message (see below for further detail).

II. THE HUMAN ELEMENT: LAWYERS, JUDGES, PARTIES
A. WHO ARE THE PARTIES' LAWYERS?

A remarkable feature of English practice is the division between solicitors and barristers. Most barristers appear regularly in court as advocates. Some barristers have only a small court-based practice and instead give advice on pure matters of law. But that is rare. Solicitors do not enjoy a right of audience in the High Court, or higher appellate courts, unless they have qualified as a "solicitor-advocate". In practice, solicitors (often members of medium-sized or large law firms) prefer to take a supportive role in the conduct of litigation. This is not to ignore their strategic function. And, of course, their power is considerable, because they select the relevant advocates. Solicitors will decide whether to use a barrister again. Careers can be made by such decisions, for a barrister's career can turn on a single appointment to a complex case which is likely to run for many years.

Cuts to legal aid have rendered some areas of advocacy highly unattractive.

Competition among lawyers for lucrative litigation remains intense. In particular, London firms of solicitors now include foreign firms which have merged with existing English firms, or which have simply acquired the English forum as another of their global ports-of-call.

B. WHO ARE THE JUDGES?

A neglected topic in comparative studies concerns the nature of the civil judiciary. It is curious that this has become so overlooked. Is it a comparative 'taboo' topic, so embedded in the national "psyche" that commentators dare not permit it to be examined? English judges are not trained in the way in which some civil law systems train prospective judges. In England, training is associated with dogs, race-horses, and perhaps brick-layers. There is no career judiciary in England and Wales. For centuries the elite High Court judiciary was appointed upon invitation by the Lord Chancellor. But in recent years this came to be regarded as an opaque and suspicious arrangement, a relic of an age of self-perpetuating oligarchy. Now all prospective judges must make a special application. Appointment bodies exist to ensure that there is 'diversity' in selection of judges, both in terms of gender and ethnicity.

Remuneration and pension provision must be adequate, indeed attractive. More generally, the conditions and prestige of judges must be perceived by prospective applicants as a congenial and stimulating last phase in a legal career (penultimate in the case of judges wishing to practise as arbitrators once they have retired from the Bench). But for various reasons some of the shine seems to have been taken off the once highly coveted High Court position.

The Supreme Court, at the apex of the system, enjoys a privileged existence. Its case-load is carefully controlled to ensure that only very important final appeals are received. Legal argument is received orally (supplementing extensive documentation). The pace is much more leisurely.

C. RELATIONS BETWEEN THE PARTIES, LAWYERS, AND THE COURT

English law has not abandoned the principle that the parties must choose how to support their rival contentions, by adducing witness and documentary evidence, and by framing and researching legal submissions (this contrasts with the more active involvement of some civil law courts). Under the English system, witness statements and expert reports are prepared in consultation with the parties' lawyers but without judicial supervision.

III. JUDICIAL MULTI-TASKING: TWO NEW FUNCTIONS, CASE-MANAGEMENT AND PROTECTIVE RELIEF

A. CASE MANAGEMENT 10
During the early stages, and throughout the case's development and preparation for trial, the court must now ensure that matters are properly focused, procedural indiscretion checked, expense reduced, and progress maintained or even accelerated. There is a need for a common goal: that the courts, in exercise of their case management responsibility, should constantly seek to ensure that the action remains focused on essential issues and that the case does not lose direction or become bogged down in minutiae or side-issues.

Case management enjoys international support. The (non-binding) American Law Institute/UNIDROIT's "Principles of Transnational Civil Procedure" recommend that the court should "actively manage the proceedings, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed".\(^1\)

Lord Neuberger, in a lecture (2012),\(^1\) suggested that a sea-change has occurred since 1998:

"The judiciary, and lawyers, have adapted pretty well to active case management over the last decade(...) It is something now with which we are all familiar; and more importantly we now have a generation of solicitors and barristers who know nothing other than a system where there is active case management. There are also many judges who have been appointed since 1999, who know no different approach to carrying out their judicial role (...) What was once novel is for many not just the norm but the only one they have known. It is unsurprising therefore that we have all got better at it (...)".

*Regulating Expenditure*. The court must decide whether a proposed step in the action is cost-effective,\(^1\) taking into account the size of the claim ('proportionality').\(^1\)

*Costs Budgets*.\(^1\) On the Multi-Track (but not Admiralty Court or Commercial Court cases, nor claims over £2 million in the Technology and Construction Court, Chancery Division, and Mercantile Courts),\(^1\) parties must file a costs budget.\(^1\) This will constrain assessment of standard basis costs, unless the court finds that there is a good reason to depart from the budget.\(^1\) Costs management conferences can be conducted by telephone or 'in writing'.\(^1\)

**B. RELIEF FROM SANCTIONS**

CPR 3.9 was re-drafted in April 2013 and now reads:

"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate costs; and (b) to enforce compliance with rules, practice directions and orders".

In the wake of the Jackson rule changes (implemented April 2013), the Court of Appeal delivered its judgment in the *Mitchell* case (November 2013).\(^1\) That court robustly declared that judges should be very slow to grant relief from procedural sanctions (including the possible dismissal of a defaulting party's case) where a party fails to comply with procedural requirements. But on 4 July, 2014, in the *Denton* case, the Court of Appeal softened the robust "message" of its earlier decision.\(^1\) This later decision makes clear that a party will not receive relief from sanctions if the default was serious or significant, and there was no good reason shown for it, and the general criteria of sound administration of justice require the sanction to remain in force.

**C. PROTECTIVE RELIEF**\(^23\)

*Freezing injunctions*.\(^24\) Invented by the English courts in the 1970s, these orders are granted *ex parte* against a respondent who is considered likely to spirit away or dissipate his assets before the case can proceed to judgment and enforcement. The respondent is protected, in his absence, in numerous ways. A freezing injunction is an *in personam* order (an order addressed personally to the respondent) requiring
the respondent to refrain from dealing with his assets. Freezing injunctions, formerly called *Mareva* injunctions, can normally be granted only by puisne judges in the High Court, rather than by Masters in the High Court or by judges in the county courts. This is because they are draconian.

*Civil search orders.* A prospective respondent might be subject to this *ex parte* order. The court authorises the applicant, under the supervision of an independent solicitor, to require the respondent to allow his premises to be searched for evidence to substantiate the civil claim. A typical context will involve allegations of intellectual property infringement.

**IV. MECHANISMS TO UNCOVER THE REAL FACTS: DISCLOSURE, EXPERTS, TRIAL**

**A. Disclosure**

Documents possessed or within the control of each party, if relevant, must be made available to the opponent for inspection (generally, CPR Part 31). The disclosing party must list the relevant documents. The opponent can then proceed to inspect them. The recipient is obliged to use the relevant documentary information only for the purpose of the present civil proceedings. It will be a serious breach for the recipient to use it in some other way, including by revealing it to the press. But once the information is received in open court, protection ceases to apply.

Under the CPR, "document" refers to "anything in which information of any description is recorded": whether paper or electronic; literary, pictorial, visual or "audio". It thus encompasses "e-mail", "e-commerce", information held on answer-phones, and details recorded in mobile phones.

Lord Woolf's new "standard disclosure" test (effective since 1999) was an attempt to render the process proportionate to the nature of the claim. April 2013 changes expand the "menu" of possible forms of disclosure. Standard disclosure remains the default regime. But there are five other possibilities.

**B. PRIVILEGED COMMUNICATIONS**

The main exception to disclosure concerns privileged communications between the client and her lawyer. This privilege operates as an absolute form of protection because: (i) it cannot be overridden by exercise of judicial discretion; and (ii) unless this privilege is waived by a privilege holder (or his authorised agent), protection endures beyond the immediate occasion or context of the privileged communications.

In *Three Rivers DC vs. Governor and Company of the Bank of England (No 6)* (2004), Baroness Hale quoted Lord Taylor (Taylor LJ, as he then was) in *Balabel vs. Air India* (1988) who had said: "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context". In *R (Prudential plc) v. Special Commissioner of Income Tax* (2013) the Supreme Court held that accountants are not lawyers for the purpose of legal advice privilege, even if the accountant in question is a tax specialist.

**C. EXPERTS**

English law allows matters of expert evidence to be admitted by use of a "single, joint expert", or by party-appointed experts, or by court assessors.

The court can restrict use of experts. It can require the parties to agree upon the nomination of a "single, joint expert". However, in more complex cases, the traditional system of "party-appointed" witnesses continues to apply. This permits the parties to select their own "rival" experts. The party-appointed expert system injects often salutary scepticism, debate, and 'intellectual honesty', into the process of taking a 'view' on debatable matters of opinion.
Compared with the system of party-appointed experts, a "single, joint expert" is more likely to enjoy neutrality and objectivity. But the major problem with the "single, joint expert" system is the danger of inaccuracy, for experts are fallible.

The (non-binding) American Law Institute/UNIDROIT’s "Principles of Transnational Civil Procedure", in this respect reflecting the civilian majority membership of its working group, recommend that the court may appoint an expert to give evidence(...). But this is qualified by the rider: 'A party has a right to present expert testimony through an expert selected by that party(...)' In this way, the traditions of all legal communities were deftly acknowledged and a benign agnosticism prevailed.

D. TRIAL

Trial is the culmination of first instance proceedings: a hearing on the merits, with the legal arguments and factual and expert evidence being presented by the parties, conducted before a trial judge. But trial is rare. Many actions end without trial. The general rule is that a hearing, including a trial, must be in public. Under the English system of trial, factual witnesses and experts are examined and cross-examined by the parties (normally by their advocates) in the presence of a judge whose task is to listen. Indeed the trial judge must only ask occasional questions, for the purpose of clarification. Thus the Court of Appeal in the Southwark London Borough Council case (2006) affirmed that if the judge were to intervene excessively during presentation of oral evidence, he would "arrogate to himself a quasi-inquisitorial role", something which is "entirely at odds with the adversarial system".

V. CLOSE OF PLAY: APPEALS AND ENFORCEMENT

A. APPEALS

Trial is a luxury: a fortiori an appeal should be regarded as exceptional; a fortissimo a second appeal is quite exceptional. Appeals cannot be brought unless the court (at first instance or on appeal) grants permission. This filter exists to prevent unnecessary or hopeless attempts to challenge first instance decisions.

The prospective appellant must successfully seek permission. The first opportunity is to ask the first instance decision-maker to grant permission. If that is unsuccessful, a paper application can be made to the relevant appeal court. If the verdict at that stage is that the application is "totally without merit", this is the end of the road. Where a paper application for permission is refused by an appellate judge because it is "totally without merit", that judge can dispense with a further “hearing” on this issue. Otherwise, there is a third, and final, chance to gain permission, by receiving an oral hearing. If the verdict at that third stage is still negative, the appeal will not occur. There can be no appeal from refusal to grant appeal.

B. ENFORCEMENT OF JUDGMENTS

*Enforcement of Money Judgments*. The court’s judgments or orders are open to enforcement. For example, money judgments can be enforced, at the creditor’s initiative, according to various official processes: seizure of the debtor’s goods, attachment of earnings orders, garnishee proceedings (‘third party debt orders’), or by charging orders against real property. There are special procedures relating to the recovery of movable and immovable property.

*Directly Coercive Non-Money Judgments: Contempt of Court*. The English judge, therefore, has an intensely coercive set of powers to support enforcement of interim or final injunctions. An injunction or order for specific performance granted by a judge must be obeyed. Disobedience can be punished by contempt of court proceedings (‘committal proceedings’). The consequences can be serious. A person in contempt of court is liable to be punished.
VI. THE FINANCIAL ELEMENT: COSTS AND EXPENSE

A. THE PERSISTENT PROBLEM OF HIGH COSTS

Lord Justice Jackson's *Civil Litigation Costs Review (2009-10)* (supplemented by a stream of lectures) placed the whole topic of costs and funding under scrutiny. The "Woolf reforms" were expected to alleviate the problem of the high cost of civil litigation. But the situation had not improved. In *Coventry vs. Lawrence (2014)* Lord Neuberger in the Supreme Court commented:

"(...). I am as aware as anyone how hard it is to ensure that a case, particularly one that does not involve a very large sum of money but is potentially complex in terms of fact, law and expertise, such as the present case, is both properly and proportionately litigated (...) None the less, (...) it would be wrong for this court not to express its grave concern about the base costs in this case, and express the hope that those responsible for civil justice in England and Wales are considering what further steps can be taken to ensure better access to justice".

B. Qualified One Way Costs Shifting in Personal Injury Litigation

In personal injury claims, the claimant will not normally be at risk of liability for the defendant's costs, if the claim fails, although the defendant will be liable for costs if the claim succeeds. And so a major exception is introduced to the reciprocal principle of the "loser pays". For this privileged cohort of claimants, one barrier to access to justice is removed: the prospect of liability for the opponent's costs if the case is lost.

As for standard basis costs, the *leitmotiv* of proceedings "at proportionate cost" has now been given prominence in the Overriding Objective, Part One of the CPR. And the same concept is the major determinant when assessing standard basis costs. In fact "standard basis" costs awards only partially indemnify the expense of fighting the case.

CPR 44.3(2) makes clear that proportionality is the dominant criterion, trumping the receiving party's plea that individual items were 'reasonably or necessarily incurred'.

C. Conditional Fee Agreements

The so-called "CFA" system was the first English "no win, no fee" system. CFAs entered on or after 1 April 2013 are subject to these restrictions: the success fee cannot exceed 100 *per cent* of the recoverable fees, and in the case of personal injury claims at first instance the success fee cannot exceed 25 *per cent* of damages. From 1 April 2013, neither the success fee nor the ATE legal expenses premium can be recovered from the defeated party, although there are exceptions.

It follows that the success fee and any ATE insurance premium will have to be paid by the client.

D. Damages-Based Agreements

"Damages-based agreements" are now permitted in all fields of civil proceedings. This was intended to be the new engine of economic access to justice.

In essence, the new system is as follows: A legal representative can agree with the client that professional remuneration will be waived unless the case is won. In the event of victory, the representative's payment will be expressed by reference to the money recovered by the client from the opponent.

The amount of this contingent payment is, however, capped as a percentage of the 'sums ultimately recovered' by the client from the opponent.
That percentage cap is 35 per cent in the case of employment disputes,\textsuperscript{67} 25 per cent in the case of personal injury disputes,\textsuperscript{68} and 50 per cent in all other cases.\textsuperscript{69}

\section*{VII. SUMMARY OF THE DISCUSSION}

These six topics excited lively discussion amongst the symposium participants on the third day (16 September, 2015) of the Gent meeting. Everyone expressed gratitude to Marcel Storme for his visionary intellectual creativity in establishing this important critical framework for discussion.

Here is a summary of the main comments made in respect of these six topics concerning the gap between expectation and experience:

(1) \textit{Information Overload: Drowning in a Sea of Complicated Rules}. The question posed here is whether it is inevitable that the procedural code becomes densely technical. In particular, do we need multi-layer procedural systems: that is, rules operating at different levels of generality and specificity?

\textit{Summary of discussion}. Although one participant defended the extreme richness of his national code, other participants were emphatic that the procedural codes (notably the profusion of satellite specialist codes crafted by individual branches of the judiciary) need to be shorter: `less is more'.

(2) \textit{The Human Element: Lawyers, Judges, Parties}. Here the following issues arise: Who are the judges? What is the significance of the manner of appointing them? Who are the lawyers? Are there specialist advocates? If so, does this help? What are the expectations and realities concerning the relations between courts, lawyers, and the parties?

\textit{Summary of discussion}. There is a modern expectation that judges and parties should co-operate more. It is also expected that opposing parties’ lawyers should not fight tooth-and-nail. But as the profession becomes more diffuse there is greater need for ethical guidance in the field of professional conduct and standards. The courts have assumed greater managerial powers which brings them into greater danger of conflict with litigants and their lawyers. But in all matters it remains fundamental that the court should behave with strict neutrality. Courts are at difficulty in coping with the rise of litigants-in-person.

(3) \textit{Judicial Multi-tasking: New Functions}. It is clear that judges no longer simply sit at trial or similar plenary sessions. Their functions have become more diverse. Are they over-stretched or competent in all these areas?

\textit{Summary of discussion}. Judges in the various national systems represented at the Gent conference have different levels of experience. But there was an optimistic sense that, with appropriate training and support, judges are capable of mastering these new challenges and that, already, some national judiciaries have developed impressive new skills (for example, in the field of case-management, costs budgeting, and the award of protective relief)

(4) \textit{Mechanisms to Uncover the Real Facts: Disclosure, Experts, Hearings}. Different techniques and responsibilities have arisen within the various national traditions. What are the options for uncovering the facts? What is the optimal system of: (a) disclosure, (b) of expertise, and (c) of the testing of evidence?

\textit{Summary of discussion}. A comparative `sticking-point' emerged: whether access to information, notably in modern times, to documents and electronically accessible information must be controlled by the court or whether the procedural system can be left to provide the framework for party exchange of such information. A distinction was drawn, and substantially accepted, between access to information (without the judge intervening: \textit{inter partes}) and the technical reception of evidence (before the court: \textit{coram iudice}).

(5) \textit{Close of Play: Appeal and Enforcement}. Here the following points require attention. What are the
appropriate restrictions upon appeals? What is the general perception concerning the quality of first-instance decision-making? What are the powers of enforcement? Are these adequate? Does the system work effectively?

Summary of discussion. It was agreed that appeals might be restricted more effectively in many national systems. Some participants also reported that the system of enforcing judgments has become highly problematic.

(6) The Financial Element: Costs and Expense. What are the main sources of expense? Can these be controlled? Are there any special solutions to the great challenge of promoting economic access to justice? Or is the financial barrier to access a good thing, given the human propensity to be disputatious?

Summary of discussion. The German system of fixed costs was discussed. But it was also noted that it does not prescribe in practice the total fees paid to lawyers. This is because parties are free to supplement the sums received by lawyers (even if these will not be fully recovered from the opponent if the latter loses the case). The problems of billing-by-the-hour costs systems, notably in England, were contrasted.

VIII. RECOMMENDATIONS AND TOPICS REQUIRING FURTHER DISCUSSION

(1) Information Overload.

Procedural codes need to be shorter. The concrete recommendation is that each legal system should reduce the number of words within these prolix documents by at least fifty per cent.

(2) Lawyers, Judges, Parties.

(a) There is a modern expectation that judges and parties, including parties’ lawyers, should co-operate more.

(b) As the profession becomes more diffuse there is greater need for ethical guidance in the field of professional conduct and standards.

(c) The facts that courts have assumed greater managerial powers has subjected to even greater pressure the relationship between judges and parties and lawyers. But it remains fundamental that the court should behave with strict neutrality in all its activities.

(d) Courts are at difficulty in coping with the rise of litigants-in-person. This is a trend which requires further discussion.

(3) Judicial Multi-tasking: New Functions.

There must be training and support to enable judges to master their new functions and to acquire necessary new skills (for example, in the field of case-management, involvement in costs decisions, the award of protective relief)


A distinction was drawn, and substantially accepted, between access to information (without the judge intervening) and the technical reception of evidence (before the court). There is a need to develop controlled systems so that parties are required to share information.

(5) Close of Play: Appeal and Enforcement.

Appeals should be restricted more effectively in many national systems.

The system of enforcing judgments has become highly problematic and requires greater State support.
The German system of fixed costs was discussed. But it was also noted that German parties are free to supplement the sums received by lawyers (even if these will not be fully recovered from the opponent if the latter loses the case). The problems of run-away costs systems, notably in England, were contrasted. The new systems of no-win-no-fee arrangements were considered. This is likely to remain an intractable topic within most procedural systems.

*It is a major challenge for legal systems to fund means-tested legal aid and, in its absence, to promote access to civil justice for all ranks of society and for businesses of different sizes. Litigation is often very expensive: prohibitively and unfairly so; and inequality is intensified. Lawyers and experts need to keep this problem at the top of the civil justice policy agenda.*

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**Pesquisas do Editorial**

- OS PRESSUPOSTOS PROCESSUAIS; de Amarildo Samuel Junior - RTSP 4/2014/35
- O PRINCÍPIO DA COOPERAÇÃO E A CONSTRUÇÃO DE UM SISTEMA COMUNICATIVO DAS NULIDADES SOB A ÓTICA DA TEORIA DO FATO JURÍDICO PROCESSUAL, de Ravi Peixoto - RDPriv 60/2014/99
- CONTEÚDO DO PROCESSO FORMULAR ROMANO, COM SUAS CONDIÇÕES DA AÇÃO E PRESSUPOSTOS, de Francisco da Silva Caseiro Neto - RePro 245/2015/551

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**FOOTNOTES**


2 Idem; this and its successor are available on-line at: http://www.dca.gov.uk/civil/reportfr.htm.


5 (9th edn, 2011), at section D2.


11. Idem, Principle 14.1; the case management of cases should be conducted “in consultation with the parties” (Principle 14.2; and there is acknowledgment of the need for time-tables, Principle 14.3).


14. CPR 1.4(2)(h) and 1.1(2)(c).


16. See the judicial declaration concerning the TCC, Chancery Division, and Mercantile Courts: [www.judiciary.gov.uk/JCO%2FDocuments%2FPpractice%2FDirect%2Fcosts-budgeting-announcement-draft-direction-cpr-rule-3-12.pdf].
Annexed to PD (3F).

CPR 3.18.

CPR 3.16.


CPR 25.1(1)(f) renames the injunction (which had been earlier ratified by section 37(3), Senior Courts Act 1981).

PD (25A), para 1.2: Masters or District judges can make such orders only in special cases.


CPR 31.22(1).

CPR 31.22(1)(a).

CPR 31.4.

Especially, CPR 31.3(2), 31.7(2), 31.9(1).

Apart from standard disclosure (option (e) below), there are five other possibilities: CPR 31.5(7): "(a) an order dispensing with disclosure; (b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis; (d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences; (e) an order that a party give standard disclosure; (f) any other order in relation to disclosure that the court considers appropriate".


[2013] UKSC 1; [2013] 2 WLR 325.

The court assessor system is of minor significance, being confined to maritime collisions, patent disputes, and costs issues.

Principle 22.2.4; *American Law Institute/UNIDROIT'S Principles of Transnational Civil Procedure* (Cambridge University Press, 2006), 43.

CPR 39.2(1); CPR 39.2(3) and PD (39A) 1.5 set out exceptions; the primary source is section 67, Senior Courts Act 1981; J Jaconelli, *Open Justice* (Oxford University Press, 2002); North Shore Ventures Ltd vs. Anstead Holdings Inc (No 2) [2011] EWHC 910 (Ch); [2011] 1 WLR 2265, per Floyd J.


Whether a member of the Court of Appeal, or of the High Court, or a Designated Civil Judge, or a 'Specialist Circuit Judge' (this last phrase is defined, at CPR 52.3(4A)(b), as "a patents court judge and any circuit judge in any county court nominated to hear cases in the Mercantile, Chancery or Technology and Construction Court lists").

CPR 52.3(4A).

Accessible collectively at: http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/lectures


CPR 44.13(1).

CPR 44.13 to 44.16; PD (44) (General Rules About Costs) 12.4 to 12.7.


Art. 3, Conditional Fee Agreements Order 2013/689.

Art’s 4 and 5, idem; Art 5(2), ibid, refers to: “(a) general damages for pain, suffering, and loss of amenity; and (b) damages for pecuniary loss, other than future pecuniary loss”.


(a) There is an exception to the non-recoverability of the ATE premium in the case of expert reports in clinical negligence litigation; section 46(1), Legal Aid, Sentencing, and Punishment of Offenders Act 2012; for comment, Sir Rupert Jackson, Legal Aid and the Costs Review Reforms, idem.  
(b) There is an exception to the non-recoverability of success fees and ATE premia in respect of these three classes of proceeding (Arts 1, 6(2), Conditional Fee Agreements Order 2013/689), as explained at V Ramsey, Implementation of the Costs Reforms (2013) 32 CJQ 112, 115.

Section 58AA(3)(a), Courts and Legal Services Act 1990 (amended by section 45, Legal Aid, Sentencing, and Punishment of Offenders Act 2012); Damages-Based Agreements Regulations 2013/609; CPR 44.18.
The new system is an expansion of the DBA arrangements formerly confined to employment matters: The Damages-Based Agreements Regulations 2010 regulates use of DBAs in employment tribunals until 1 April 2013, when they were superseded by the Damages-Based Agreements Regulations 2013.

Regulation 1(2), Damages-Based Agreements Regulations 2013/609.


Regulation 7, Damages-Based Agreements Regulations 2013/609.

Regulation 4(2), idem.

Regulation 4(3), idem.


