

# Proposed Procedural Change in England and Wales

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The Honourable Mr. Justice David LATHAM\*

In the United Kingdom cynics argue that court structures and procedures have reflected the lawyers perception of justice, and not that of the public. There is force in their argument. But it is fair to say that there was a general consensus that justice was so precious a concept that there could be no question of compromising its quality for the sake of saving money. The consequence, however, has been an escalation of expense which has itself produced real injustice. Access to the courts is effectively denied to a large proportion of the population; and there is a serious imbalance in the way in which the courts can fairly hold the ring between large corporations and small enterprises. The consensus view is now that substantial change must take place. Some change has already been put in operation, largely by the efforts of the judges and the legal profession itself; and at the end of March 1994, the Lord Chancellor asked Lord Woolf to review the current rules and procedures of the civil courts in England and Wales. His interim report was published in June this year. I will give a summary of its recommendations later in this paper. The same cynics may suggest that the sudden interest of the Government in achieving change has been motivated by Treasury-led concern over the cost to the taxpayer to the Legal Aid budget. Be that as it may, the choice of Lord Woolf has ensured a radical and sensible package of recommendations.

The present picture is of piecemeal change which has produced significant improvements in the delivery of justice in certain areas. For example, in the county courts, the use of a small claims arbitration type procedure, has made a significant impact on the cases where the claim is less than £1,000. The procedure is intended to operate without lawyers or formal pleadings; although not wholly successful in the former respect, it seems to operate satisfactorily as far as the latter is concerned. The commercial court has now for a significant period of time been judge managed, with restrictions on speeches, and an emphasis on the submission of written material. Another specialist area, that of construction and engineering contracts, is dealt with by a group of judges known as Official Referees. They also manage their own cases and have developed effective procedures to control heavy disputes with substantial technical content. By a process of osmosis, some of the better procedures have become common place in ordinary actions. In most actions now witness statements have to be exchanged significantly before the trial date; judges have been, on a case to case basis, insisting on much of the material provided being in written form so that the process in court can be speeded up.

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\* Royal Courts of Justice, London, England.

It was with the intention of formalising and extending these developments across the board that the Lord Chief Justice and the Vice Chancellor issued the Practice Direction in January 1995. A copy is annexed to this paper. It can be seen that the intention is to use the existing rules of court more effectively. In general, without wishing to belittle its importance, it is an attempt to persuade judges to apply best practice so as to reduce delay and cost and to be more robust in order to achieve those objects. There are, however, two areas which are unwelcome for the English barrister, namely the restriction on the length of oral submissions, and in particular the time allowed for the examination and cross examination of witnesses. This is familiar in some jurisdictions, but not in ours. And there have already been mutterings from the profession to the effect that the result would be that their clients may be denied justice. I personally consider that that is the attitude which has produced the problem in the first place, and is the subject of the cynics' criticism that I referred to in the opening sentence of this paper. It nonetheless shows that the direction in which the Practice Direction seeks to move attitudes is one which will require a fundamental rethink in our approach to the management and disposal of actions if it is to have any significant effect.

Lord Woolf, in his interim report, recognizes this. The aims of his review are :

- i. To improve access to justice and reduce the cost of litigation;
- ii. To reduce the complexity of the rules and modernize terminology;
- iii. To remove unnecessary distinctions of practice and procedure.

His approach has been governed by eight basic principles which he identified as follows :

- i. It (the legal system) should be just in the result it delivers.
- ii. It should be fair and seen to be so by :

Ensuring that litigants have an equal opportunity regardless of their resources to assert or defend their legal right;

Providing every litigant with an adequate opportunity to state his own case and answer his opponents;

Treating like-cases alike.

- iii. Procedures and costs should be proportionate to the nature of the issues involved.
- iv. It should deal with cases with reasonable speed.
- v. It should be understandable to those who use it.
- iv. It should be responsive to the needs of those who use it.
- vii. It should provide as much certainty as the nature of particular cases allows.

- viii. It should be effective : adequately resourced and organised so as to give effect to the previous principles.

The fundamental change that he proposes is that the responsibility for the management of civil litigation should be transferred from the litigants and their legal advisers to the courts.

Lord Woolf proposes that when claims are received they will, if an intention to defend is received, be allocated to one of three procedural systems depending on their value.

For claims up to £3,000, a "small claims" arbitration hearing will be ordered, and no legal costs will be awarded.

For claims up to £10,000, and for cases which are identified as simple cases not requiring any special procedures, what Lord Woolf calls the "fast track" will be allocated, which will have a set timetable of 20 to 30 weeks, with limited discovery, a trial confined to not more than three hours, with no oral evidence from experts. Only fixed costs will be allowed.

For other cases, a tailor made procedure will be developed using at least two interlocutory management hearings. The first will be a case management conference shortly after the defence is received, and the second will be a pre-trial review, normally conducted by the trial judge. At each such hearing, an estimate of the amount of costs already incurred, and of the costs which will be incurred if the case proceeds, must be provided by the parties to the court and to each other. The aim is to encourage early settlement, to identify the ways in which the case can proceed with efficiency and despatch, and to identify the best means of disposing of the dispute, if necessary utilizing alternative dispute resolution procedures.

In order to give effect to these proposals, Lord Woolf accepts the need for a significant change in the functions performed by the judiciary. Judges will have to become case managers, taking responsibility for initiating and devising the procedural route for each case. The main burden will fall on the lowest level of judiciary in the civil courts, that is District Judges, who will make all the preliminary decisions. Some cases will remain with them throughout, in particular all the cases to be dealt with under the informal arbitration system.

The District Judge will, if the case required input from a more senior judge, allocate a Circuit Judge, or, if it is clear that the case is sufficiently serious for a High Court Judge, the High Court Judge. In any substantial cases, procedural matters will have to be dealt by a team of judges. For English judges, who are used to reacting to applications made by litigants, this will be a profound change, requiring the exercise of a number of different skills from those for which the present judiciary is appointed.

Lord Woolf proposes that practice should be simplified, particularly in relation to pleadings and discovery. Both are areas which have become bedeviled by prolixity and abuse aimed simply at creating difficulties and expense for the opposing party and

obfuscating and not illuminating the issues in the case. As for pleadings, each side is to serve simply a statement of case and no further pleadings are to be allowed unless the court considers it necessary, and the contents of the statement will have to be verified. As to disclosure of documents, he proposes that documents should be placed in two categories, those for which there will be automatic discovery, and those for which discovery will have to be the subject of an order of the court. In the first category are those documents which the party relies upon in support of its claims, and those documents of which a party is aware and which to a material extent adversely affect his own case or support the other party's case. The other category is to include documents which can be described as relevant, in the sense that they are part of the story or background, and those documents which are useful for one party because they open up a chain of enquiry which would otherwise be unexplored. It is proposed that in any category of case, on proper cause being shown, discovery of either category of documents can be obtained before the commencement of proceedings.

At the hearing he proposes to retain and extend the practice of exchanging witness statements, although in fast track cases, this is to be done by exchange of summaries, not full statements. Cross examination is to be allowed only at the discretion of the judge. Equally controversially, it is proposed that the litigants should not have the right to call their own expert witnesses. This will be permitted in appropriate cases, otherwise expert issues are to be dealt with by a court appointed expert.

As far as costs are concerned, it is not proposed that there should be any change to the basic rule which is that costs follow the event. But the present payment into court system is considered too rigid, and is to be replaced by a system of offers to settle, which can be made by either party and relate to the whole claim, or to any part of a claim. The court would then have complete discretion as to any award of costs.

It is suggested that litigants in person should be given far greater help, and it should be the responsibility of a judge to be interventionist in all such cases, but it is recognised that this carries risks which should be the subject of judicial training. Litigants in person should have access to library facilities and to all means of obtaining and collating information necessary to run a case. Suggestions are also made as to the possibility of mobile courts for rural areas, and evening and weekend courts everywhere.

There are two particular areas addressed by both the Practice Direction and Lord Woolf's proposals, which appear to me to raise considerable difficulty. Pleadings have in many actions as I have already said become prolix and argumentative. Hence the exhortation in paragraph 4 of the Practice Direction to confine pleadings to fact and not evidence. In its present form the relevant Rule, Order 18 Rule 7, reads as follows :

*Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits.*

Order 18 Rules 8 and 12 set out matters which must be specifically pleaded and the extent to which they should be particularised. By Order 18 Rule 13, any allegation of

fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is, in effect, denied. The combination of these rules, designed to ensure that each party has a fair opportunity to know the other side's case, has resulted in incremental refinements which are the result of case law which make it difficult to cut back pleading practice to an acceptable shape. How easy it will be for judges to operate the existing Rules more robustly is therefore a matter of debate.

Lord Woolf, as I have already indicated, proposes that each party should simply serve a statement of its case. It will be interesting to see how this is translated into practice. The proposed Rules of Procedure have not yet been drafted. The extent to which he proposes to provide any detailed guidance as to what the case should contain is not yet clear. The outline proposals are as follows :

As to claims, he proposes that they should contain the following :

- a. A succinct statement of the facts entitling the claimant to remedy;
- b. The remedy or remedies claimed;
- c. The matters of law arising out of the stated facts which entitle the plaintiff to a remedy;
- d. The legal nature of the claim where it would otherwise not be clear.

As to defences, he proposes that they should state the following :

- a. The parts of the claim admitted and not admitted;
- b. The defendant's version of the facts so far as different from those stated in the claim;
- c. Specific defences and any ground for denying the claim arising out the facts stated by the defendant, or for disputing its value or denying entitlement to a particular remedy;
- d. Where no specific facts or legal grounds are relied upon, a statement that the defendant does not know whether the facts stated in the claim are true and requires a plaintiff to prove them and, if appropriate, why this is required.

He envisages that the procedure for dealing with problems arising out of any difficulties posed by the pleadings will be the case management conference. He suggests that the distinction between facts on the one hand and evidence on the other is often a nice one, which is not readily understood by litigants in person. He is therefore proposing that an evidential summary, including if appropriate the names of witnesses, should be attached to the pleadings. He acknowledges that this approach will require careful monitoring.

The second area particularly addressed by both the Practice Direction and Lord Woolf's proposals is discovery. The opportunity for wide ranging discovery in English courts is given by the application of the principle laid down more than a hundred years ago in *Compagnie Financière du Pacifique v. Peruvian Guano Co.*<sup>1</sup> It was there held that the documents subject to disclosure are not merely those which would be admissible in evidence nor those which would prove or disprove any matter in question, but extends to any documents, which, it is reasonable to suppose, contain information which may enable the party applying for discovery either to advance his own case or damage that of his adversary, if it is a document which may fairly lead him to a train of enquiry which may help either of these two consequences. The breadth of this principle is obvious, and is one of the major factors responsible for long delay and significant expense. It is therefore difficult to see how the present Rules can be used satisfactorily to control discovery, although the court does have power on any specific application for discovery to refuse an application if it is of the opinion that discovery is not necessary either for disposing fairly of the action or for saving costs. This power has not proved easy to apply as a solution to the problem.

Lord Woolf has proposed the two categories of documents to which I have already referred. The first category he describes as being subject to "standard discovery" and the second, to what he describes as "extra discovery". Essentially, he intends that in fast track cases, there should only be standard discovery and extra discovery should only be available in cases falling outside the fast track, and should be subject to close control by the court. Again it will be interesting to see the details of his proposed Rules. Bearing in mind the tactical advantages to litigants with large purses, it may be difficult to prevent a return to the present position.

The concept of case management is the recurrent theme. The Practice Direction is headed "Case Management" and Lord Woolf sees case management by the court as the key to the improvements that he proposes. But the phrase is used in a subtly different way. The Practice Direction has to operate from the premise that the litigants will have themselves determined to a significant extent the shape of the action and its timetable, so the scope for case management is perhaps more one of control than it is of direction. The point at which judicial control becomes critical is when the preliminary procedures are completed so that the case is in effect ready for trial. This is what is envisaged in paragraph 6.

Lord Woolf, on the other hand, proposes that the court should take control from the outset, and thereafter direct the course of the action. This is the fundamental change to which I have already referred. For example, whereas at present the court in general reacts to specific applications in relation to discovery by either party and deals with those applications on their merits, Lord Woolf suggests that the case management hearing should impose a structure appropriate for the case, save where the action is proceeding either as a small claims, or on the fast track, which will be dealt with on the basis of a common procedure and timetable.

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1. *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55.

Another fundamental change inherent in Lord Woolf's proposals is that there will be a single point of entry to the courts. This means that all claims, of whatever sort, including administrative law challenges by way of judicial review, will be subject to the same procedures, commencing in the same place. It will be for the court then to direct the case onto its appropriate track. The object is to ensure amongst other benefits that there is ready access for the litigant in person who will not be faced by any technical problems relating to the forum in which to commence his proceedings, or the form in which those proceedings have to be commenced. This may well cause a number of very real problems, for example in claims which contain elements of public law and elements of private law. There are other categories of cases such as medical negligence cases, where the expertise required to determine the complex technical issues is such that the cost/benefit equation makes it difficult to justify anything other than a fast track procedure, whereas that would, or might, unjustly deprive a claimant of a proper investigation of his claim. These are just two of the areas in which it remains unclear as to precisely what shape the final proposals will take.

The changes in the rules of procedure proposed by Lord Woolf in one sense build incrementally on the changes which have already taken place over the last few years, and in particular on the Practice Direction. The fundamental changes as I have said are in the way actions are to be received and thereafter dealt with by the court. I have some concerns about practical problems which may arise as a result. Judges in the United Kingdom have minimal logistical support. District Judges and Circuit Judges simply have the court staff, none of whom are designated as support staff for the particular judge, and none of them are legally trained. High Court judges are at present assisted by clerks who are laymen, who essentially deal with the day to day organisation of the judge's life. Judges who are responsible for portfolios of cases will require individual administrative assistance, and, in relation to many of the interlocutory decisions as to the appropriateness of further pleadings, or further discovery, there could well develop the need for legally trained assistants. Whether or not financial resources will be made available to provide assistance must be a matter of some doubt.

At the end of the day I suspect that the success of the changes will depend upon the way in which judges are prepared to develop the new skills that they will require, and the new habits of mind which will be necessary. At one conference I attended recently, it was pointed out that the necessary powers to achieve the desired results are all there in the existing Rules of the Supreme Court, and the County Court Rules. The problem it was said, was the attitude of the judiciary to the way in which those powers can and should be used. As I have already stated, the Practice Direction is in a sense simply an exhortation to the judiciary to do what is required under the present rules. I am sure that the judiciary will respond. I am not so sure that practitioners will be so compliant. There are, as I indicated, case law encrustations on the Rules which may make it difficult to achieve significant change. For that reason, I am certain that Lord Woolf is right to propose the fundamental changes in structure which I have described as a means of shocking the system into using what are, in effect, similar powers to those it possesses at present for the benefit of litigants and therefore, ultimately, of the public generally.





## **ANCILLARY DOCUMENTS — FOR INFORMATION ONLY**

### **PRACTICE DIRECTION : CASE MANAGEMENT**

The paramount importance of reducing the cost and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders.

The court will, accordingly, exercise its discretion to limit :

- (a) discovery;
- (b) the length of oral submissions;
- (c) the time allowed for the examination and cross-examination of witnesses;
- (d) the issues on which it wishes to be addressed;
- (e) reading aloud from documents and authorities.

Unless otherwise ordered, every witness statement shall stand as the evidence in chief of the witness concerned.

R.S.C. Order 18, rule 7 (facts, not evidence, to be pleaded) will be strictly enforced. In advance of trial parties should use their best endeavours to agree which are the issues or the main issues, and it is their duty so far as possible to reduce or eliminate the expert issues.

R.S.C. Order 34, rule 10(2) (a) - (c) (the Court Bundle) will also be strictly enforced. Documents for use in court should be in A4 format where possible, contained in suitably secured bundles, and lodged with the court at least two clear days before the hearing of an application or a trial. Each bundle should be paginated, indexed, wholly legible, and arranged chronologically and contained in a ring binder or a lever-arch file. Where documents are copied unnecessarily or bundled incompetently the cost will be disallowed.

In cases estimated to last for more than ten days a pre-trial review should be applied for or in default may be appointed by the court. It should, when practicable, be conducted by the trial judge between eight and four weeks before the date of trial and should be attended by the advocates who are to represent the parties at trial.

Unless the court otherwise orders, there must be lodged with the listing officer (or equivalent) on behalf of each party, no later than two months before the date of trial, a completed pre-trial check-list in the form annexed to this Practice Direction.

Not less than three clear days before the hearing of an action or application, each party should lodge with the court (with copies to other parties) a skeleton argument concisely summarizing that party's submissions in relation to each of the issues, and citing the main authorities relied upon which may be attached. Skeleton arguments should be as

brief as the nature of the issues allows, and should not without leave of the court exceed twenty pages of double-spaced A4 paper.

The opening speech should be succinct. At its conclusion other parties may be invited briefly to amplify their skeleton arguments. In a heavy case the court may, in conjunction with final speeches, require written submissions, including the findings of fact for which each party contends.

This Direction applies to all lists in the Queen's Bench and Chancery Divisions, except where other directions specifically apply.

### **PRE-TRIAL CHECK-LIST**

SHORT TITLE OF ACTION — FOLIO NUMBER

TRIAL DATE

PARTY LODGING CHECK-LIST

NAME OF SOLICITOR

NAME(S) OF COUNSEL FOR TRIAL (if known)

### **SETTING DOWN**

1. Has the action been set down?

### **PLEADINGS**

2. (a) Do you intend to make any amendment to your pleading?  
(b) if so, when?

### **INTERROGATORIES**

3. (a) Are any interrogatories outstanding?  
(b) If so, when served and upon whom?

### **EVIDENCE**

4. (a) Have all orders in relation to expert, factual and hearsay evidence been complied with? if not, specify what remains outstanding.

- (b) Do you intend to serve/seek leave to serve/ any further report or statement? If so, when and what report or statement?
  - (c) Have all other orders in relation to oral evidence been complied with?
  - (d) Do you require any further leave or orders in relation to evidence? If so, please specify and say when you will apply.
5. (a) What witnesses of fact do you intend to call? (Names)
- (b) What expert witnesses do you intend to call? (Names)
- (c) Will any witness require an interpreter? If so, which?

### **DOCUMENTS**

6. (a) Have all orders in relation to discovery been complied with?
- (b) If not, what orders are outstanding?
- (c) Do you intend to apply for any further orders relating to discovery?
- (d) If so, what and when?
7. Will you, not later than seven days before trial, have prepared agreed paginated bundles of fully legible documents for the use of counsel and the court?

### **PRE-TRIAL REVIEW**

8. (a) Has a pre-trial review been ordered?
- (b) If so, when is it to take place?
- (c) If not, would it be useful to have one?

### **LENGTH OF TRIAL**

9. What are counsels' estimates of the minimum and maximum lengths of the trial?  
[The answer to question 9 should ordinarily be supported by an estimate of length signed by the counsel to be instructed.]

### **ALTERNATIVE DISPUTE RESOLUTIONS**

10. Have you or Counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by Alternative Dispute Resolution?

11. Might some form of ADR procedure assist to resolve or narrow the issues in this case?
12. Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by ADR?

**[SIGNATURE OF THE SOLICITOR — DATE]**

NOTE : THIS CHECK-LIST MUST BE LODGED NOT LATER THAN TWO MONTHS BEFORE THE DATE OF HEARING WITH COPIES TO THE OTHER PARTIES.

