

Talk on Civil Procedure to Hong Kong Judiciary

12 May 1998

Over the past few years there has been a great deal of discussion in England about the reform of civil procedure. Everyone agrees that litigation is too complicated and too expensive and that something needs to be done about it. Four years ago Lord Woolf produced an Interim Report on Access to Justice and a year later he produced a Final Report. Both Reports were well received by the legal profession and the Government. Since then, committees have been labouring away to produce a new set of Rules of the Supreme Court which it is hoped will eventually replace the White Book. These Rules have not yet been unveiled. No doubt there has been similar discussion in Hong Kong. The idea of simplifying legal procedure, with a view to making it cheaper and more accessible, is not a new one. Lord Woolf noted that there had been about a 100 reports of one kind or another on the subject during the present century. Going further back, Oliver Cromwell is remembered for having made lawyers use English instead of law French and of course the nineteenth century saw a good deal of simplification of the judicial system as well as the procedures of the courts. I want to try to avoid going over all

this well trodden ground and offer some thoughts on the subject from a slightly different perspective.

The interesting feature about the English system of procedure, which you have inherited, is its essential continuity. Despite all the committees and radical reformers over the centuries, it still shows clear signs of its historical origins. If you walk into an English county court, or, for that matter, I suppose a court in Hong Kong, there are things happening which make no sense unless you realise that it all began with trial by jury in the middle ages. Although we no longer have juries for civil actions, except in defamation, their ghosts are still present in the court room, still demanding that proceedings be conducted in a way which they can understand. The central feature of English civil procedure is still the trial, which is a single climactic, largely oral theatrical event, taking place ideally in a single continuous session, even if the demands of nature sometimes require it to be adjourned from day to day, at which counsel for the parties explain what the case is about, call their witnesses to give oral evidence and have them cross-examined, sum up the evidence to the court and receive an oral verdict and judgment. The pleadings, the interlocutory procedures, are all seen as preparations for the trial, to enable the parties to be properly prepared to put their cases before the court and to enable the court to give an effective judgment.

We are so used to this system that it seems to us strange that litigation could be conducted in any other way. And yet there are entirely civilised countries which manage things differently. If you go to Continental Europe, or to Japan, which has taken over the continental tradition, you find that there is nothing which really corresponds to the English trial. The parties present their submissions and evidence, if any, in writing. There is very little discovery of documents, no American-style oral discovery at all. The lawyers go before the judge for a short discussion about how the case should proceed. Sometimes the judge will refer a matter to an expert for report, sometimes he will allow the parties to submit more evidence. There may be a session at which questions are put to witnesses, but no general right of cross-examination. After two or three hearings, the judge will decide that the case is ready for judgment and give his or her decision in writing. English lawyers, if they get into conversation with, say, a German lawyer about this system, find it hard to understand how anyone could be satisfied that it would deliver proper justice. What about discovery ? they will say. How can I be satisfied that the other party is not concealing some document vital to my case. And what about cross-examination ? The judge may accept the evidence of a witness whom I could prove, if I had him for an hour or two in the witness box, to be a complete liar. And those court appointed experts. How can my case be decided on the report of someone whose opinion no one has been able to challenge ?

The German reaction to this kind of thing is usually one of puzzlement. Yes, he may say, you can try to persuade a German judge to make an order for the production of documents, or to allow you to ask more questions of a witness. It is unusual, but in cases in which it appears necessary, it can be done. Likewise, you can ask to be allowed to adduce the evidence of your own expert. The fact is, people very seldom ask for it. They are content to operate the system as it is. The English lawyer cannot understand this. Why do the public not rise up in protest against such inadequate justice ? But public opinion polls show that Germans are on the whole quite satisfied with their system of justice. No doubt it could be quicker and cheaper, although it is in fact remarkably cheaper than justice in England, but there is no general dissatisfaction. So the conversation ends leaving both sides rather baffled about each other.

I want to try to explore why this should be so and what lessons we may learn from it. You could say that it is simply a matter of culture, historical tradition. The English are attached to their system because that is what they are used to, in the same way as they are used to lawyers wearing wigs and policemen in tall helmets. The Germans, on the other hand, have inherited a legal tradition based on Roman law an idea of how courts and judges should function which goes back to Napoleon. But I think that would be an oversimplification. The answer, I suspect, is rather

more complicated and has more to do with the culture and behaviour of the legal profession than the people in general. In particular, and this is the main proposition which I want to put before you this afternoon, it depends upon an interaction between the kind of system lawyers are used to and the way in which lawyers are paid.

Let me compare, in broad outline, the English system for paying lawyers with the German system. Under the English system, lawyers are entitled to charge what the taxing master considers a reasonable fee for the work which they do. And who decides what work the lawyers should do ? Obviously the system in some cases prescribes what needs to be done. A writ must be issued, a statement of claim served, someone must turn up on the summons for directions and so on. On the other hand, a great deal is left to the discretion of the lawyers. Whether to apply for further and better particulars, interlocutory injunctions, all that kind of thing depends upon whether the lawyer advises the client that it is necessary for his case. Usually the client will accept the advice: he hopes that he will win, in which case he expects that most of the cost will be paid by the other side. So generally speaking, the English system is that the lawyers are paid for what they do and the lawyers decide how much work they will do. There is no necessary relationship between the amount of work done and the amount in dispute in the case. The costs can easily, in the

case of a relatively small claim, exceed the amount at stake. It is rather like employing a builder on the basis that he will charge whatever the labour and materials costs him plus a percentage of profit. This is generally thought to be an unwise form of contract from the employer's point of view. In the case of litigation it is much worse, because it is as if one left it to the builder to decide whether he would put marble on the floors and gold taps in the bathroom.

The German system is rather different. First, the fees that can be charged are linked to the amount in dispute. For a small claim, there will be a correspondingly small fee. Secondly, the fees are broken up according to stages of the proceedings. For bringing the proceedings, one can charge one fee. If witnesses are called, there is another fee and so on.

If we look at the way in which these systems work in practice, we can see the way in which the payment structure conditions the behaviour of the lawyers. Under the English system, the tendency is to create more work. Take, for example, discovery. Lawyers seldom declare themselves satisfied with the other side's first effort at discovery. They go through the list and write letters asking for more documents. Often they go to court for orders for supplemental lists. They ask for leave to serve interrogatories. Or consider the different forms of interlocutory relief

which are available. When the Mareva injunction was originally invented in the London commercial court, it was an exceptional remedy, to deal with foreign defendants: the Liberian company controlled by a Greek shipowner with a bank account in Zurich. Then it was extended for use against defendants living within the jurisdiction and became relatively routine. Or applications for information from banks and other third parties, which were invented by the House of Lords in the *Norwich Pharmacal* case in 1973. Or *Anton Piller* orders, which were originally an exceptional remedy to deal with video pirates who, if you sued them, would hide their stock in the garage. This form of interlocutory process has spread into quite ordinary litigation. The system also has its effect on the use of new technology. The invention of the photocopier meant that one could make copies at a fraction of the unit cost of having a typist copy them out with carbon paper. But the system by which lawyers charge means that photocopiers have actually increased costs, because they prepare vast bundles of copies which were not previously thought necessary. Modern information technology has produced online access to legal materials all over the world. One can call up materials on Lexis or other such systems, including cases which have not been reported in any other system of law reporting. This material can be obtained for a fraction of what would be the cost of maintaining an equivalent library. But the effect has been that lawyers do legal research which they would never previously have done and of course they charge

for doing so.

I wonder sometimes whether people stand back and consider how cost effective this all is. Take, for example, the new interlocutory orders. When I was a judge of the Chancery Division, I used regularly to hear interlocutory applications of that kind in fraud cases. A company would find that a couple of directors had stolen large sums of money, salting it away in British Virgin Island companies controlled by directors in the Channel Islands operating on the instructions of trustees in Liechtenstein. An enormous hunt would then start to try to recover the money. A big City firm would put dozens of lawyers onto the job. There would be *Anton Piller* orders to recover documents from the homes of the directors, *Norwich Pharmacal* orders against banks and accountants, *Mareva* injunctions with orders to swear affidavits of assets. Each piece of information recovered by these applications would lead to further applications. But my experience was that the proceeds were usually miserably small: a bank account in Switzerland with a few hundred Swiss francs which someone had forgotten to close. There are certainly one or two cases in which it was possible to recover money which might not have been recovered without the aid of such orders. Over the run of cases, however, I do not think that their use has been cost effective. The same is true of the photocopying and the legal research. It is the experience of most judges that counsel refer to few of the

documents in the vast ring binders produced in court and that even less are of any importance in the case. Likewise, very little of the material thrown up by Lexis is of any value. Soon after the system was introduced, the House of Lords had to introduce a ban on the citation of unreported cases, which wasted far too much time. Even so, there are nowadays many new series of specialist law reports which report absolutely everything, presumably because there is enough demand from law firms which buy them.

I do not of course have the same detailed knowledge of the German system as I do about the English. But the impression I have from German lawyers that their behaviour is also driven by the economic incentives or lack of incentives. For example, a German lawyer will earn an additional fee if there is a hearing with witnesses. But he gets the same fee no matter how many witnesses are called or how ever long the hearing takes. The result, I am told, is that hearings with witnesses usually take place, but they are remarkably short. A few questions are asked and the lawyers are content to leave it at that. No one seem to think that this produces an inadequate system of justice.

I do not think it is necessary to be unduly cynical about these phenomena, or to suppose that lawyers generally are guided solely by their own self-interest in

deciding how to run a case. For example, many lawyers will say that the reason why they produce lots of photocopy documents is because it is cheaper to tell a low paid secretary to photocopy everything than to have an expensive lawyers sort out in advance which documents will really be needed. Counsel at the trial can then decide which documents they want to refer to. On the other hand, this presupposes the need for the single trial traditional in English procedure, whereas under the German system, one sorts out the documents for the hearing and then, if it should turn out that some other document is important, one can produce it later. Likewise, lawyers will say that they feel obliged to turn up all the authorities available on Lexis because they are afraid that if they miss something they may be sued for negligence. And they will say, perfectly honestly, that they want to do the best for their clients and not omit anything which might enable the client to win. This may be a rational gambling strategy in view of the rule that if they do win, they can recover a large part of the costs from the other side. The clients have also learned to play the system: sometimes they will deliberately increase the costs, offering huge quantities of documents on discovery so that it will be equally expensive for the other side to read them, or launching expensive interlocutory applications, in the hope that the other side's money will run out first.

Nevertheless, if one looks at how the system as a whole functions, it is

difficult to resist the conclusion that it has become as expensive as it is because the elaboration of procedure and the self-interest of lawyers go hand in hand. And this forms the legal culture, so that lawyers come to consider it the natural and indeed the only proper way to conduct litigation. And of course if you have an adversary system in which that is what the other side is doing, you have to do the same thing yourself. So procedures which have got into the system to fulfil a particular need, like Mareva injunctions, become naturalised and take on a life of their own.

What is sometimes interesting is to see how lawyers behave in accordance with their legal culture, even in situations when the economic incentives to do so are not the same. One can see this in international arbitrations, which sometimes involve lawyers from different traditions on opposite sides or even the same side. American and English lawyers treat arbitrations as if they were domestic litigation: they fight over discovery, cross-examine witnesses and so on. Continental lawyers likewise behave in the way in which they would in their own courts and sometimes the arbitrators have to invent compromise procedures which will satisfy both sides.

Let me now consider what lessons can be learned from this analysis. The problem is how to make litigation cheaper. What seems to me clear is that one will not get cheaper litigation merely by simplifying the rules of procedure. As long as

the system by which lawyers are paid remains the same, there will always be the incentive for them to do as much work as possible. One of the alarming features about Lord Woolf's proposals was the support which it received from the legal profession. They welcomed the proposed changes in procedure as a truly radical restructuring of English litigation. If I were trying to make litigation cheaper, I would be deeply suspicious of any proposals which were welcomed by the legal profession. It could only mean that they did not foresee any substantial reduction in what they earned. Interestingly, the only proposals which were vehemently opposed were the very modest changes in the way lawyers are paid. Lord Woolf suggested that there should be fixed fees for certain standard types of litigation, such as personal injuries, involving relatively small amounts, up to £10,000. The legal profession said that fixed fees were unrealistic and an interference with the rights of the parties to decide how to instruct their lawyers.

Fixed fees on the German model, related to the amount at stake, are one possible solution. Contingency fees are another. The advantage of a pure contingency fee, under which the lawyer gets a percentage of the recovery if he wins and nothing if he loses, is that it gives the lawyer an economic incentive to keep the costs down. It is his own money that he is spending on the costs of the case: if he loses, he will not recover that money and if he wins, he will not get any more than

his percentage. The system proposed in England is rather less pure. It does not allow the lawyer to take a percentage of the recovery. Instead, he can recover an enhanced fee for the work he has done, which remains an incentive to do as much work as possible if he is confident that he will win. Someone once told me that a lawyer's explanation of the English contingency fee system to the client should go as follows: If you lose, I get nothing. If you win, you get nothing.

For my part, I would favour a move to more fixed costs. But I do not think that it can be done all at once. Because the English system of charging is so closely linked with the way in which the English litigation culture has developed, one cannot simply adopt one feature from, say, the German system and try to graft it on. The economic incentives have to be changed by stages, so that the profession is weaned away from its reliance on being able to do as much work on any case as it thinks it will be able to charge for. It is only then that they will be able to take advantage of simplifications in the rules and procedures. Indeed, once they are in a position in which they do not earn a larger fee by doing more work, they may well have their own ideas for doing things more cheaply. This would make cases less complicated and produce savings in judicial time as well.

Does this mean that we will get inferior justice ? I suppose you could say that

the more elaborate the discovery, the more extensive the opportunities for cross-examination, the more freedom to call opposing expert witnesses, the more likely one is to get an accurate result. Everyone can think of the case in which the result turned upon the vital document produced under pressure at the last minute or the searching cross-examination. But my general experience is that these cases are very few. Sometimes, under the recent English trial procedure with witness statements instead of oral examination in chief, I have wondered whether my decision would have been different if I had simply been given the witness statements and there had been no cross-examination at all. I can think of hardly any. In any case, I think that one has to face up to the fact that under any system of justice, there will be cases in which things go wrong. The question is whether the number of cases in which things go wrong is within acceptable limits. And in deciding what level of error is acceptable, the questions of cost and delay are of vital importance. If you were to say to me: you can have your case tried with an 80% chance of reaching a correct result, or you can have a 90% chance but the cost will be three times as much and the decision will be a year later, I think I would settle for 80%. Unless we are willing to look at our civil procedure in this way, we run the risk of having a system which is so good that hardly anyone can afford to use it.