

**A NEW APPROACH TO CIVIL LITIGATION?
THE IMPLEMENTATION OF THE
“WOOLF REFORMS”
AND JUDICIAL CASE MANAGEMENT**

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There is now widespread support from judges, lawyers and academics, as well as from those who use the courts, for a new approach to civil litigation.

(Lord Woolf, “Access to Justice: Interim Report”)

I. INTRODUCTION

The civil litigation process in Ireland and Britain has attracted much criticism in recent years. It was against this background of criticism that the Working Group on a Courts Commission was appointed to make recommendations on how the Irish courts could be better managed and Lord Woolf was appointed to review the rules and procedures of the civil court system in England and Wales. The aim of this paper is to assess the impact of the Civil Procedure Reforms which were introduced in England and Wales in April 1999, (following Lord Woolf’s inquiry), and to consider what lessons can be learned by the Irish Courts Service and judiciary.

II. BACKGROUND TO THE ACCESS TO JUSTICE REPORT

In 1994, Lord Woolf was asked to review the rules and procedures of the civil courts in England and Wales. The aims of the review were:

- to improve access to justice and reduce the costs of litigation;

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- to reduce the complexity of the rules and modernise terminology; and
- to remove unnecessary distinctions of practice and procedure.¹

Lord Woolf approached his inquiry in two stages. Firstly, he produced an Interim Report in 1995 which set out a broad agenda for change together with his recommendations on how this could be achieved. The second stage of the inquiry concentrated on particular areas of litigation where Lord Woolf considered that the civil justice system was not meeting the needs of litigants.² A Final Report was published in July 1996,³ accompanied by the Draft Civil Proceeding Rules which were eventually implemented in April 1999.

III. ACCESS TO JUSTICE REPORT FINDINGS

In the Interim Report, Lord Woolf identified the key problems facing civil justice today as “cost, delay and complexity”,⁴ and he expressed grave concern at the extent to which rules were being flouted and timetables were being ignored.⁵ Furthermore, he identified a number of “principles” which, in his opinion, the civil justice system should meet in order to ensure access to justice.

- The system should be just in the results it delivers.
- It should be fair and be seen to be so by:
 - ensuring that litigants are afforded an equal opportunity, regardless of their resources, to assert or defend their legal rights;

¹ Lord Woolf, “Access to Justice: Interim Report”, Introduction, Lord Chancellor’s Department, June 1995.

² These were medical negligence, housing, multi-party litigation, judicial review and the specialist jurisdictions. A consideration of these areas is beyond the scope of this paper.

³ Lord Woolf, “Access to Justice Part II: Final Report”, Lord Chancellor’s Department, July 1996.

⁴ Chapter 3, para. 1.

⁵ Chapter 3, para 6. The same criticisms could equally be applied to the current system in Ireland.

- providing every litigant with an adequate opportunity to state his or her case and to answer that of his or her opponent;
- treating like cases alike.
- Procedures and costs should be proportionate to the nature of the issues involved.
- The civil process should deal with cases with reasonable speed
- It should be understandable to those who use it
- It should be responsive to their needs.
- It should provide as much certainty as the nature of a particular case allows.
- It should be effective with adequate resources and proper organisation.

His subsequent findings were based around these principles. In the Final Report he concluded that the system did not support these principles and he identified the problems within the system as primarily:

- litigation was too expensive;
- litigation was too slow in bringing a case to a conclusion;
- there was a lack of equality between litigants;
- litigation was too uncertain in terms of time and cost;
- the system was incomprehensible to many users;
- the system was too fragmented since there was no clear overall responsibility for the administration of civil justice; and
- litigation was too adversarial with cases being run by the parties, not by the courts, and the rules often ignored by the parties and not enforced by the courts.⁶

IV. RECOMMENDATIONS

The Access to Justice Report recommended radical, arguably revolutionary, procedural change putting greater

⁶ Final Report, op. cit.

emphasis on settlement and giving greater control of litigation to the judiciary.

Key new features of the system were to be:

- Pre-action protocols – clear frameworks provided for litigants to encourage settlement.
- Part 36 offers – a new process to allow claimants to make offers to settle, as well as defendants.
- Single joint experts – intended to reduce costs and promote co-operation between parties.
- Case Management – cases to be allocated to one of three tracks:
 - Small Claims Track – with a raised upper limit of £5,000
 - Fast Track – with an upper limit of £15,000 and fixed timetables
 - Multi Track – for cases over £15,000 and with pro-active case management
- Costs – to increase certainty and proportionality the development of benchmark and fixed costs
- Rules – to reduce complexity a single set of rules to apply for the High Court and county courts
- ADR – the use of Alternative Dispute Resolution to be encouraged

V. THE REFORMS EVALUATED

The Civil Justice Reforms introduced in April 1999 implement these recommendations. The first assessment was published in March 2001,⁷ a Lord Chancellor's Department Report presenting the "emerging findings" from the first phase of the procedural reforms.

According to Lord Woolf in his Final Report:

If my recommendations are implemented the landscape of civil litigation will be fundamentally different from what it is now. It will be underpinned by Rule 1 of the new

⁷ Lord Chancellor's Department, "Emerging Findings: An early evaluation of the Civil Justice Reforms", March 2001.

procedural code, which imposes an obligation on the courts and the parties to further the overriding objective of the rules so as to deal with cases justly. The rule provides a definition of ‘dealing with a case justly’, embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice. These requirements of procedural justice, operating in the traditional adversarial context, will give effect to a system which is substantively just in the results it delivers as well as in the way in which it does so.⁸

He went on to describe the “new landscape” of civil litigation as having certain features:

- litigation will be avoided wherever possible;
- litigation will be less adversarial and more co-operative;
- litigation will be less complex;
- the timescale of litigation will be shorter and more certain;
- the cost of litigation will be more affordable, more predictable, and more proportionate to the value and complexity of individual cases;
- parties of limited financial means will be able to conduct litigation on a more equal footing;
- there will be clear lines of judicial and administrative responsibility;
- the structure of the courts and the deployment of judges will be designed to meet the needs of litigants;
- judges will be deployed effectively; and
- the civil justice system will be responsive to the needs of litigants.⁹

⁸ Final Report, para. 8.

⁹ For more detail on these points, see Final Report, para. 10.

The first six of these features are used in the LCD Report as the criteria for measuring the success of the reforms. Have these aspirations been achieved?

The report's key findings include:

- There has been a drop in the overall number of claims issued, and evidence suggests that pre-action protocols are working well to promote settlement before issue.
- There is evidence that settlements “at the door of the court” are now fewer and that settlements before the hearing day have increased. “Part 36” has been welcomed by all interested groups as a means of resolving claims more quickly. The use of single joint experts “appears to have worked well”. There has been a rise in the number of cases in which ADR is used.
- A single set of rules applying to the High Court and county courts is being introduced in phases. The number of ways of commencing a claim has been substantially reduced. Case Management Conferences are a key factor in making litigation less complex, and “appear to have been a success”.
- The time between issue and hearing for those cases that go to trial has fallen, although the time between issue and hearing for small claims has risen since the introduction of the Civil Procedure Rules.
- It is too early to provide a definitive view on costs, with “statistics difficult to obtain and conflicting anecdotal evidence.”
- The views of litigants in person are difficult to obtain “as they tend to use the system only once”, but research is currently being undertaken to assess their views.¹⁰

VI. CONCLUSIONS

The findings discussed above appear to indicate that, overall, the Civil Justice Reforms are moving litigation in the

¹⁰ “Emerging Findings”.

desired direction. Sources external to the Lord Chancellor's Department also show that, with one or two exceptions, the reforms have been very well received. Particular praise has been given for the change from an adversarial culture to a more co-operative one. For example, a survey of fifty solicitors' firms conducted by the U.K. Law Society shows widespread support for the reforms, with some 80% of respondents welcoming the reforms as a whole. The reasons for the support are identified as being "to do with the change of culture, a new spirit of co-operation between solicitors, and a process perceived to be quicker and less adversarial".¹¹

The main criticisms have been in the areas of costs and judicial inconsistency. A perceived increase in costs for the early stages of claims is causing concern. Judicial inconsistency in relation to costs, and in relation to the management of timetables and protocols has also been identified as a problem.¹² This may be a question of increasing judicial awareness of what is required under the new regime and it may also be related to the question of resources. Although 66% of respondents in the Law Society survey said that case management conferences worked well, there was evidence that with greater court involvement in managing cases "the strain of under-resourcing was starting to show in some courts".¹³ Fraser Whitehead, chairman of the Law Society's Civil Litigation Committee identifies this as a problem which may undermine the reforms if not addressed:

Case Management under Woolf has greatly increased the burden on courts in driving the pace of litigation. The simple fact is that the under-resourcing of courts appears to be reaching crisis point... Complaints about delays and inefficiency are becoming increasingly frequent. If the civil justice reforms are to succeed they must have the

¹¹ Whitehead, "The Cost of Inconsistency", *Gazette*, (98) 13, 29 March 2001, 14.

¹² Allen, "Inconsistent Judges Plague Woolf Reforms", *Gazette* (98) 13, 29 March 2001, 1.

¹³ Allen, *Gazette* (98) 13, 29 March 2001, 1.

support of an adequately resourced court infrastructure.¹⁴

It must be remembered that the reform process is ongoing and that these findings are very much emerging findings. It is too soon to say whether the reforms have solved any of the problems identified by Woolf (especially those of cost and delay), although there is no doubt that the change in culture is receiving support. Further research is being carried out to assess the impact of the reforms more fully and to consider the need for further change.¹⁵

VII. LESSONS FOR IRELAND

In Ireland, our courts system is also undergoing radical change. Ideas similar to those outlined in the Woolf Reports were considered by the Working Group on a Courts Commission.¹⁶ The Working Group was appointed to carry out a wide-ranging review of the operation of the courts system, and, in particular, to consider the matter of the establishment of a commission on the management of the courts as an independent and permanent body. This took place against a background of dissatisfaction concerning the inability of the court system to cope with the demands being placed on it as well as criticisms of the physical condition of courthouses.

The Working Group submitted its first report in April 1996. The litany of problems noted by the group included no clear management or reporting structures, fragmentation of administrative systems, lack of financial and statistical information, no strategic plan, and inadequate courthouses. The primary recommendation of the first report was that there should be established by statute, as a matter of urgency, an independent and permanent body to manage a unified court system.

¹⁴ Whitehead, *Gazette*, (98) 13, 29 March 2001, 14.

¹⁵ Major studies are ongoing at Nottingham Law School, the Institute of Advanced Legal Studies, and University of Westminster.

¹⁶ *Second Report of the Working Group on a Courts Commission: Case Management and Court Management*, 1996.

The reports of the Working Group on a Courts Commission and the speedy implementation of their recommendations in the form of the Courts Service Act, 1998 has resulted in a major revolution in the manner in which our courts are administered. The Act was described as bringing about “the most comprehensive and radical reform of court administration since the foundation of the State.”¹⁷

We now have an independent state agency managing a unified court system – a system which aims to “provide more accessible, community-friendly services and alleviate delays in cases being heard”.¹⁸ Current initiatives include a massive court repair and rebuilding programme and the introduction of a major information technology programme across the courts system.¹⁹ So far the Irish court reforms have concentrated on improving the fragmented structure and modernising the system, but if problems like cost, delay and complexity are to be properly tackled then we also need to look at reforming rules and procedures, and at the concept of case management.

VIII. JUDICIAL CASE MANAGEMENT

The Working Group held a conference in 1997 on the use of judicial case management in other jurisdictions, including the proposals for reform then being considered by Woolf.²⁰ It recommended that consideration be given to the introduction of judicial case management in Ireland. However, it also recognised that, with the establishment of the Courts Service, this was more appropriately a matter for the Service itself to consider. So far the Irish Courts Service has concentrated on administrative case management, unlike

¹⁷ The Minister for Justice, Mr. John O’Donoghue T.D., 153 *Seanad Debates* 115 (first stage).

¹⁸ Denham J. in the *Irish Times*, 3 November 1997.

¹⁹ “Courts Service Finalises £50 million programme for e-Courts”, *Courts Service News*, March 2001.

²⁰ *Working Group on a Courts Commission: Conference on Case Management*, May 1997.

the Woolf reforms which emphasise judicial case management.²¹

The concerns which led Lord Woolf to recommend case management could equally be identified in this jurisdiction. He was concerned that the courts were taking a minimalist approach to the progress of a civil action. He concluded that the courts were not really in control of the process at all but were dependant on whether the parties themselves chose to process a claim with reasonable speed. He expressed particular concern that rules were being flouted by those with experience of the system and noted that “all too often, such tactics are used to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay.”²² Accordingly, it was recommended that a system of case management be introduced “which will provide a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisors to the court.”²³ Woolf defined case management as:

... the court taking the ultimate responsibility for progressing litigation along a chosen track for a pre-determined period during which it is subjected to selected procedures which culminate in an appropriate form of resolution before a suitably qualified judge. Its overall purpose is to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final

²¹ The Strategic Plan of the Service for 2000-2003 does, however, contain a commitment to “support the judiciary in any initiatives undertaken by them in relation to *judicial* case management” (page 24) (emphasis added), and the issue of case management is being actively considered by the Irish judiciary at present.

²² Interim Report, Chapter 5, para. 5.

²³ Interim Report, Chapter 5, para. 5.

hearing which is itself of strictly limited duration.²⁴

Any decision to introduce such a concept in Ireland cannot be taken lightly. If we introduce rules and procedures designed to encourage settlement, speed cases through the system and reduce complexity, then Irish judges will have to be prepared to adopt a role which is more interventionist than at present. The experience of the Woolf Reforms shows that the proactive role of the judge is necessary to ensure that such a system is workable. Furthermore, the experience shows that a consistency between judges is absolutely essential if new rules are to be applied justly. Therefore, such moves will have to have the support of all members of the judiciary, and, it is submitted, all judges will have to receive some kind of training for their new role. But will judges accept the need for this new education? It may be that the historical background and culture of non-intervention in the Irish judiciary will be difficult to overcome.²⁵ Indeed, might such a level of judicial intervention be viewed by some as inappropriate? Do we want judges exercising a stronger supervisory role? Might judicial allocation of cases to pre-determined “tracks” or settlement procedures be viewed by some as inconsistent with a citizen’s rights relating to their action? There may also be resource implications – the experience with the Woolf Reforms indicates that the introduction of case management without adequate resources would be ill-advised.

There is also an argument that case management requires a commitment of resources which is out of proportion to any benefit achieved. The conclusions of a recent Working Party set up to consider the matter in Scotland is instructive on this point. In 1997 a Working Party was appointed on Court of Session procedure. The remit of the Working Party was to try to devise a means of simplifying and accelerating procedure in ordinary actions. The Working Party decided against recommending a high

²⁴ Interim Report, Chap. 5, para. 16.

²⁵ For a discussion of similar concerns with regard to the British judiciary see Gross Kurth, “Plaudits with Provisos” (1995) 145 *New Law Journal* 935.

degree of judicial case management. The essential reason for this view was that it was considered that the time and effort which would be required for genuine and effective case-management would be disproportionate to any benefit likely to be achieved, and that the result of a case management system might well be to increase the burdens on the court and the parties rather than to reduce them. Secondly, they recommended that there should not be any requirement for a routine pre-proof or pre-trial hearing before a judge. The Working Party concluded that the benefits which case-management or pre-trial hearings might produce could equally well be achieved if their other recommendations were accepted.²⁶

These are some points for discussion as to reforms for the future. We have already undertaken substantial reforms, but there is widespread agreement that further reform is necessary to deal with delays and inefficiencies which remain.²⁷ We have reached a point of acceptance of ‘management’ of our courts. It is submitted that what is now required is further consideration of how we can better manage the civil litigation process.

²⁶ See further *The Coulsfield Report on Court of Session Procedure*, <http://www.scotcourts.gov.uk/session/report/report.htm>, accessed 7 June 2002.

²⁷ See, e.g., Keane, “The Irish Courts System in the 21st Century: Planning for the Future” (2001) 1(1) *Judicial Studies Institute Journal* 1.