DIMENSIONS OF EVIDENCE IN EUROPEAN CIVIL PROCEDURE

Robert Turner

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Dimensions of evidence in civil procedure
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CORRESPONDENCE ADDRESS: Professor Robert Turner, MA (Cantab), LLD, FICM. Senior Master of the Supreme Court and the Queen's Remembrancer 1996-2007. Visiting Professor to the Faculty of Law, the University of Cambridge. Bencher of the Honourable Society of Gray's Inn.

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1 Introduction

A brief account of the emergence of the Common Law jurisdiction in England and Wales[2] and the essential features of the acquisition and use of evidence in civil procedure and the trial of civil actions.

Julius Caesar wrote *Gallia est omnis divisa in partes tres*[3]. He might have said the same of the three jurisdictions which form the United Kingdom.

They consist of:

1. The traditional Common Law jurisdiction of Northern Ireland (pop. 1.7m).
2. The Scots law influenced by Roman Dutch law and UK Statute law (pop.5m).
3. The reformed Common Law jurisdiction of England and Wales[4] (pop.52m).

Northern Ireland was part of Ireland as a whole until the 1920s when Eire gained is independence and the Six Counties remained part of the United Kingdom. The provence retained the Common Law jurisdiction that it inherited but by having an independent jurisdiction, it choose in the 1990s not to adopt the reforms that were introduced by the Civil Procedure Rules 1998 in England and Wales.

The Scottish Court of Session - the equivalent to the High Court in England - was created during 15th and 16th centuries being derived from the judicial sessions of the Scottish Parliament of 14th century. Their lawyers studied in both Dutch and French universities and hence owe much to Roman and Canon legal traditions which were grafted on to traditional Scots feudal law. The jurisdiction of the Scottish courts is completely separate to that of the English Common Law.

Hence this paper will only deal with the English jurisdiction and the application of the Common law in the reception of evidence and the trial of civil cases[5].

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[2] Wales did not adopt the common law until 1533 and thereafter all aspects and statutory provisions applied equally to Wales as they did to England. Throughout this paper I have used England and English to include Wales and Welsh for convenience.

[3] *Commentarii De Bello Gallico I.i.I.*

[4] Following the Access to Justice Enquiry 1994-6 of which the author was a member, the Civil Procedure Rules 1998 were introduced making radical changes to the manner in which civil litigation and trials were conducted.

The Saxon (pre 1066) courts were in the main, the local district - hundred courts and the shire - county courts, controlled by the feudal landowners before which the tenants were summoned and where disputes were determined according to the customary law of the society within which they lived. These courts were common to virtually all the communities which evolved from the Germanic conquest of Northern Europe. Hence Charlemagne in Flanders would have recognized the courts of his royal "cousin" King Offa of Mercia in the English Midlands.

With the coming of the Normans in 1066 - the last successful invasion of our shores - the administration fell into the hands of the sheriffs (formerly known as the shire-reeve). The sheriffs were not generally liked. They were soon exclusively of Norman origin and tended to rule their shires in an autocratic manner.

Thus parties with disputes looked to the central government - the King's court - for redress and for more impartial determination of disputes. They sought the issue of Writs out of the King's Writing Office or Chancery, setting out the nature of the dispute and seeking a remedy for the same. These might state that the claimant had been ousted out of possession of his land and sought an order from the sheriff to reinstate him and if the sheriff was not prepared to grant him this relief, to transfer the Writ to the King's court either to be heard before the king in person or before one of the King's justices who travelled round the country.

Thus by the time of the reigns of Henry I (1100-1135) and especially during that of his grandson Henry II (1156-1189) the number of forms of Writs had expanded in their mode of subject matter and forms of relief. By the end of of the reign of Henry II (1189) the justices of the King had evolved a large numbers of forms of actions which governed a wide range of reliefs. Textbooks were written, the justices were becoming *"learned in the Law"* and a body of advocates known as "barristers at law" based on London, conducted cases on behalf of clients. They in turn took into their houses - known as "chambers" - students who sought to become barristers after a number of years following their "masters" around the six Circuits into which England had and is still divided. These Circuits defined the areas covered by the King's justices as they travelled around the country to hear the cases brought at the Assizes in each of the principal towns of the fifty or so counties of England.

The "masters" and their pupils ate together in four "inns" in London which quickly established themselves as the centres of the legal profession and are known today as the four Inns of Court. They were once described as the *Third University of England* at a time when there were otherwise just Oxford and Cambridge universities (the actual third university was that of Durham founded in 1820)[6].

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[5] The term "civil" embraces all commercial and private litigation but excludes family law matters.

[6] The Barristers profession is still governed nominally by the Benchers or senior members of the four Inns of Court. On passing their exams, pupil barristers are called by name to the step or "bar" in the Hall of their respective Inn by the senior Bencher and thus becomes entitled to plead at the Bar of the Court. In the Royal Courts of Justice in the Strand, London, there is still a physical wooden bar at which barristers must stand when addressing the court.

By the time of the Great Charter (Magna Carta) of 1215, there was a permanent court at Westminster before which lay clients with the aid of barristers could bring their *"Common Pleas".* These lawyers applied the "Common Law" as determined by the King's Justices who in turn had been appointed from the ranks of the senior barristers known as *"Serjeants at Law"*. The basis of the various forms of actions and their respective forms of relief were discerned from the judgments of the justices which were recorded on the records of the courts[7].

R.C. van Caenegem wrote:
"During the crucial 13th and 14th centuries the English common law was firmly embedded in national life. It had it own courts occupied by the best lawyers in the country. It had the text books written by Glanvill and Bracton, which were comprehensive expositions of the law and of the forms of redress available and which presented the common law as self-sufficient and a reasonable whole with its registers of writs some of which were official texts..."[8]

Central to this evolution of a juridical system was the use of juries of local men who informed the justices as to what they believed were the remedies available to redress the complaints made by members of their local society. The juries found the facts on which the complaints of the litigants were founded and as the law developed, the justices applied the Law which they perceived to be common to their English society.

All this had developed to a sophisticated degree before the Reception of the Justinian Institutes and the *Corpus Juris Civilis* with their concepts and "Principles" of Roman Law though the difference in the time scale was only a matter of decades.

But England had withdrawn from the Continent of Europe with the surrender of the main land Duchy of Normandy to the French in 1204 by King John and thereafter considered itself as an Island set in a silver sea[9]. Civil Law was of course adopted within the Papal courts and applied throughout these "church courts" in England and greatly influenced family law, succession to land and allied matters. Civil Law was taught in the universities of Oxford and Cambridge where most clerics were trained and

[7] These records were written on long strips of vellum, rolled up and keep by one of the court officials known as *The Master of the Rolls.* We still possess the complete records of all the Common Law courts from the middle of the 13th century. It was these records that the pupils studied and which the barristers read to discover the precedents set by the judges.
[8] *Judges,Legislators & Professors* Cambridge University Press 1987.
[9] An oversight by the scribes who wrote the treaty of Paris in 1204, which conceded Normandy to the French, forgot to include the Channel Islands as part of the Duchy and thus omitted to include them in the lands transferred to the King of France. Hence they remain in the possession of the current Duke of Normandy, Her Majesty the Queen. In the Channel Islands the Loyal Toast at formal dinners is still addressed to 'The Duke of Normandy" no doubt to the disgust of the French. Channel Island lawyers are in part trained in Roman civil law at the university of Caen. All transactions and sale of property are still recorded in Norman French.

was applied in the Court of Equity presided over by the Chancellor - always a senior bishop; otherwise all the other Courts enforced the Common Law.[10]

Hence the English Common Law is the creation of the royal justices and the role of professors of law and the theoretical study of law as a legal science has been marginal. There can be no greater contrast between the development of the Common Law by the English judges and the importance of *"professors' law"* on the Continent. This is perhaps illustrated best by the prominence given to the commentaries by the Continental professors whose names are well known and carry much weight whilst the names of the judiciary in civil law cases are seldom recorded contrasted with names and judgments of Common Law judges are publicly reported both of those who gave the majority judgments and those who dissented.

2 The Adversarial and the Inquisitorial approach to the trial of civil actions

The Common Law was an *Adversarial* jurisdiction in which the conduct of the case was with the parties. It was the party's task to seek a writ most appropriate to the complaint and redress which he sought to obtain from the court, from the King's Chancery and present it to the Sheriff - the administrator within the shire or county and seek to have his cause of action heard before the King's justices during their periodical visits to the shire or to have the case sent for trial to Westminster.

These judges did not form an *Inquisitorial* role in England - though as a result of the introduction of the Civil Procedure Rules 1998 (CPR) the judge has acquired extensive managerial powers and duties[11].

The approach of the judges in England has changed little in its form since the Middle Ages. During the Trial the duty of the judge is to *listen* to the witnesses and to make *findings of fact* to which he applies the relevant *principles of Law* and based on these findings of fact and law to give a *Judgment* on the issues before him/her.

Recent observations by modern English judges would have been in keeping with the manner in which these medieval justices conducted themselves. Indeed apart from the absence of a jury these days, a 17th century judge would find our present day civil proceedings very familiar.

Rose LJ explained the task of the English Common Law trial judge as follows:
"It is the judge's duty in summing up to the jury, to give directions about the relevant law, to refer to the salient pieces of evidence, to identify and focus attention upon the issues and in each of those respects to do so as succinctly as the case permits and to identify the defence."[12]

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[10] The Admiralty Court was an exception in that it applied the Law of Merchants based on the *jus gentium* and the universal laws of the sea derived from the Rhodian sea laws and the Customs of Oberon.
[11] See Part 1 and especially Rule 1.4 for these powers.
[12] *Curtin* [1996] Criminal Law Review at page 831.

Though the use of juries is no longer permitted in all but two civil causes of action - defamation and false imprisonment - the same observations can be applied to the duty of the civil judge today in the giving of the judgment that he/she is expected to deliver at the close of the hearing of a civil action. Most civil judgments are given *verbatum* immediately at the end of the hearing. They are recorded in the Law Courts electronically and later printed out. The judge may correct any grammatical errors but may not change his findings.

Although the Common Law jurisdictions are in a minor position within Europe - these being England and Wales, Northern Ireland, the Irish Republic and Gibraltar; the Common Law is the foundation of a large number of jurisdictions world-wide. These include most of the 53 members states of the Commonwealth, not all of whom were formerly part of the British Empire; Cameroon (1995), Mozambique (1995) and Rwanda (2009) having recently joined the Commonwealth. The Common Law is also the basis of the jurisdiction of the United States and it is heeded by the courts of the Hong Kong Special Administrative Region.

One feature of the English civil courts is the reliance on the precedents set by the judgments of earlier cases which may in many cases be binding on the trial judge. The Common Law judges were removed from the teachings of the two universities of Oxford and Cambridge and if they sought an opinion on the relevant law to be applied to any particular situation which they might be trying, they would seek the views of their fellow judges in the Inns of Court and not involve academics from the universities[13].

Whilst academic text book writers[14] may be cited by counsel in a civil trial to give guidance to a judge, the courts do not seek the opinions of academics on the issues that arise during the course of a trial. Indeed there is a very sharp distinction between the study of the Law in the Universities and the day to day practice of lawyers before the courts. It is rare for an academic to be appointed to a judicial post[15] and this would only occur if the academic had sat as a part time judge.[16]

Van Caenegem contrasted the origins of the common and civil law jurisdictions in this manner:
"Judge-made law is a common law tradition. It withstood the zeal of codifiers and modernizers of the nineteenth century. Professor-made law was clearly predominant in

[13] All High Court Judges are "Benchers" of the Inn of Court which originally called them to the Bar. To this day they lunch together on "top table" in their Inn and will frequently seek a view from their fellow Benchers.
[14] It was once the case that a text book author did not become an *authority* until he was dead!
[15] A distinguished exception is Baroness Hale who after a long term as an academic was appointed a High Court judge and is now the Deputy President of the Supreme Court but she had to serve a term as a Recorder (a part time judge).
[16] Until the middle of the 19th century, only Roman law was taught at the two universities of Oxford and Cambridge whereas the Common Law was taught by the Inns of Court where the training of barristers (advocates) took place.

northern Italy in the second Middle Ages, in modern Germany from the sixteenth to nineteenth century and in Holland from the days of Grotius to the introduction of the French codes."

The Common Law gives to the judges of the High Court the power to adjudicate in all matters as they act under the *inherent jurisdiction* of the Court as established from *"time immemorial".* If it can be shown that a right or practice existed before 3rd September 1189, proof of its existence is not necessary. *"Time immemorial"* is deemed to be the period *"before which the memory of man runneth not".*

The Justices (judges) of the High Court have this unquestioned range of jurisdiction as they were established before *"living memory"* and this power can not now be called in question save by an Act of Parliament[17].

There are three stages to the Common Law civil trial:
i. The service of pleadings setting out the case made by the claimant and the defence thereto of the defendant.
ii. The preparations for trial including the exchange of evidence relied upon by the parties and the disclosure of all relevant documents.
iii. And the production of evidence relied upon by the parties at trial.

There are limitations on the late production of evidence before the close of the case and the giving of judgment. The parties are bound to produce all the revenant evidence known to them and can not rely on matters of which they know prior to the giving of judgment at any appeal stage. Only evidence which was unknown to them at that stage may be adduced on appeal and then only with leave of the court.

The court's task is to evaluate the evidence placed before it and to make such findings as it finds proved on the balance of probabilities.

The use of juries for both criminal and civil trials was common until the 1920 when after experiencing the difficulty in finding sufficient men to sit on the jury due to so many being in the Armed Services during World War I (1914-1918), it became the practice to dispense with juries unless the parties sought to have the action heard before a jury. The use of judges sitting alone was found to be far more efficient and less time-consuming. Quite recently the entitlement to have a civil action tried by a jury was removed except for defamation cases and those alleging false imprisonment by the police.

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[17] Any power, right or practice that can be shown to have existed before *"the time of which the memory of man runneth not";* that is to say before the death of King Henry II on 2nd September 1189, need not be proved in court but must be accepted without further question and thus the powers of High Court judges are all embracing (save for any restraint placed on them by Parliament) as they sit to deliver justice on behalf of the Queen who is the Fount of All Justice. This is origin of the form of address used by lawyers appearing before High Court judges of "*May it please, my Lord",* as they are in theory addressing the Sovereign in whose place the judges are acting.

The form of trial has otherwise not changed much in the past 800 years. Three of the essential principles governing trial were laid down in the Great Charter / Magna Carta in 1215. It was itself based on the Coronation Charter of Henry I of 1100 and indeed today the first act of the Coronation of Queen Elizabeth II in 1953 was for Her to sign an oath to rule in accordance with the Right and Liberties of Her Subjects as enshrined in the Common Law.

The three principal clauses of the Charter for our purposes are:
Clause 17. *"Common pleas shall not follow our court but shall be held in some fixed place."*
Clause 39 *"No free man shall be ....disseised...or in any way ruined ..except by the lawful judgment of his peers or by the law of the land."*
Clause 40 *"To no one will we sell, to no one will we deny or delay right or justice*."

Thus the English courts (and from 1533 the Welsh courts and subsequently those in Ireland) evolved a very simple and straightforward form of trial. Indeed the English courts had little or no need to resort to the principles of law as revealed on the rediscovery of Justinian's laws at the Reception in the 13th and 14th centuries. England had by then establish its own jurisprudence and a very insular approach to the resolution of disputes[18].

Any freeman might seek the assistance of the King's court by the issue of a Writ stating the nature of his claim. This in turn had to be served on the defendant who was required either to admit the same or to state the nature of his defence and / or any counter claim.

The parties are responsible for collating the evidence in support of their respective cases and presenting it to the court. The judge plays[19] no part in deciding what evidence is required to be sought though he might rule on the admissibility of evidence sought to be relied upon by the parties.

It has always been a fundamental right for the opposing party to cross examine the other side's witnesses. The judge must not "descend into the area" and cross examine a witness but he may ask questions to clarify any aspects of the evidence though he will always ask the lawyers if he might do so - as a matter of courtesy.

Having heard the evidence in open court and having heard the submissions of law made by the parties' advocates, he had to find and determine what facts had been proved on

[18] This insularity can be best summed up in the speech of John of Gaunt in Shakespeare's play *Richard II* when he spoke of *"this royal throne of kings, this scepter'd isle; This earth of majesty, this seat of Mars; This other Eden, demi-paradise; This fortress built by Nature for herself; Against infection and the hand of war; This happy breed of men, this little world; This precious stone set in a silver sea; This blessed plot, this realm,this England".*
[19] However a recent amendment to the Rules has given the trial judge a far greater power than existed before to limit both the issues to be tried, the number of witnesses to be call and the amount of evidence to be given, Rule 32.2(3).

the balance of probabilities and apply the law as he found it to the proven facts and give judgment accordingly.

During the 19th century the English courts were in need of radical reform to rid them of centuries of unnecessary complicated forms of procedure, clashes of jurisdiction and general inefficiency in the dispatch of work. Hence seven "High Courts" were merged into one Supreme Court consisting of a Court of Appeal and three divisions of the High Court covering the business of the Queen's Bench (all criminal cases and all civil cases not otherwise covered by the other two divisions), the Chancery Division which dealt with property, estate, land, inheritance, and succession cases formerly covered by the Equity Court (where "civil law" rather than "common law" prevailed), and the Probate, Admiralty and Divorce Division.

These courts were housed in the new Royal Courts of Justice[20] in the Strand London which were opened in 1882 at which time a new set of Rules of the Supreme Court were published governing the procedures of the new jurisdiction.

These Rules were purely "mechanical" in setting out the sequence of procedures to be followed in the conduct of civil litigation. There was no attempt to frame them in a manner which reflected a philosophical basis for the determination of disputes in the courts.

Over the next century there were more than sixty reviews, commissions, committees and the like which made piece-meal alterations and improvements to the Rules but still by the 1990s civil litigation was long winded, rough shod, protracted and complex.

In the summer of 1994, Lord Mackie the Lord Chancellor, invited Lord Woolf, a member of the Judicial Committee of the House of Lords, myself as a judge from the High Court, a district judge from Gloucester and Rupert Jackson QC, a young but very intelligent Queen's Counsel, to undertake a two year investigation into the manner in which civil litigation was conducted under the cover of what was termed "The Access to Justice Enquiry". The Final Report was published in the summer of 1996 with the recommendation for a complete revision of the rules governing the conduct of civil litigation in both the High Court and in the 200 or so county courts throughout England and Wales.

For the first time a juridical and philosophical basis was given to the Rules of Court. It was a remarkable "revolution" for the Common Law. Much of its radical approach has had its effect on the use of Evidence before the civil courts of not only England and Wales but in other Common Law countries throughout the World.

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[20] Most conveniently the old courts at Westminster were burnt down on 26th October 1834 when my predecessor, the King's Remembrancer of the day was party to the fueling of the heating boilers of the House of Lords with medieval tally stick which had been used as a form of receipt in the Court of Exchequer. The boilers overheated and the entire medieval complex except Westminster Hall, was burnt to the ground.

3 The Civil Procedure Rules 1998

The Government did not immediately accept the Final Report. It commissioned a review of the same by one of its senior civil servants who reported favourably on the recommendations. The draft new Rules took about two years to be written but many gaps were left only to be filled in subsequent years. There was the expected unfavourable reaction from many of the older generation of lawyers and judges and some senior academics who criticized the rules in general but offered no alternative solution to the problems then facing litigants.

But the new Rules were predicated by two radical concepts. The first was the adoption of a juridical basis and philosophical approach for the courts to adopt when engaged in dealing with civil litigation and perhaps even more remarkable the introduction of the *"pro-active judge"* for the first time in the Common Law.

I recall seeing the first draft by Lord Woolf of the first Part of the Rules and which we subsequently worked on; it was an extraordinary statement not before seen in the Common Law. It was headed *"Overriding Objective".* It made a statement which encapsulated all that radical lawyers had sought to promote over the years. Initially it was a very bare outline of what Lord Woolf wanted to express and I had the privilege of helping to produce the final draft which is now the opening Part of the new Rules.

4 "The Overriding Objective"

1.1- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on an equal footing;
(b) Saving expense
(c) Dealing with the case in ways which are proportionate -to the amount of money involved - the importance of the case - the complexity of the issues - and the financial position of each party
(d) Ensuring that it is dealt with expeditiously and fairly
(e) Allotting to it an appropriate share of the courts resources while taking into account the need to allot resources to other cases.

A statement of principle such as this had not before been a part of the procedural code of any of our Rules of Court. It was said by some to be *"pie in the sky",* or in other words unobtainable. Yet several jurisdictions in the Common Law jurisdictions abroad have subsequently adopted this concept wholesale. Within a year or so of the introduction of the Rules in April 1999, the phrase *"overriding objective"* was to be found in judgment after judgment in both the superior and inferior courts across England and Wales.

The second remarkable statement was to be found in Rule 1.4.(1) which with one particular word which I have taken the liberty to highlight, turned the hitherto passive

judge into a proactive tribunal. The sentence could not have been simpler and indeed the introduction of the highlighted word was only made in the very last draft and it read as follows: *"The court must further the overriding objective by* ***actively*** *managing cases."*[21]

Emboldened by this new approach, the English civil judges soon took over the active management of the litigation before them and within the scope of powers given to them by the new Rules, came out of the shadows and though not *inquisitorial* in their approach, have nevertheless taken the management of litigation at every stage of its progress through the courts in their stride.

This radical adoption of the managerial judge was reinforced by the general managerial powers given to the court by Part 3 of the Rules which *inter alia* permitted the court to order the attendance of any party before the court, allowed the court to receive evidence by telephone (note the old fashioned description used) or by any other method of direct oral communication, could dismiss any issue from consideration and could take any other step or make any other order for the purpose of managing the case and to further the *"overriding objective"*.

Never before had the courts been given such comprehensive directions as to how to conduct and resolve litigation.

One of the worst aspects of all litigation is the "vexatious litigant" who can so often involve scores of innocent people in defending frivolous claims at great expense.

I had devised a scheme before CPR came into effect, for striking out these claims before defendants became involved. Being in charge of all the offices of the High Court by reason of my appointment as Senior Master in 1996 and having a very experienced support staff, they would identify such claims as they came to be issued and bring them to my attention. Using the inherent powers of the High Court, I would call before me the vexatious litigant and ask him or her to show good reason for me to allow the issue of what on the face of it appeared to be a thoroughly frivolous claim.

This practice is now incorporated in the Rules in Rule 3.3 which empowers the court of its own initiative to make any order without an initial notice to the party who must then on being given notice of the step taken by the court, apply to have the order rescinded. This is a power which is rarely used but very useful when needed as it avoids in particular the service of frivolous claims on a prospective defendant who from an abundance of caution, engages lawyers and files a defence and seeks to have the claim struck out - all of which will incur the defendant in huge and needless expense which in most cases he or she will not be able to recover from such a claimant who is usually *"a man of straw"*.

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[21] I wrote a paper on the effect of the introduction of this word under the title *"Actively - The Word that Changed the Civil Courts"* in the compilation of a number of papers given in the book *"The Civil Procedure Rules Ten Years on"* Oxford University Press 2009.

The court may use this power when it is satisfied that the claimant's case or that of a defendant *"discloses no reasonable grounds for bringing or defending the claim".*

I have written at some length on this Rule as it illustrates the intention of these new Rules to give the necessary powers to bring civil litigation under a new and enlightened regime.

5 An outline of a basic civil claim and its defence at Common Law under the new Rules

The claimant issues a claim out of the court in which he outlines his case and his grounds for bringing the same but does not plead the evidence by which he will seek to prove his claim at trial.

On receipt of the same the defendant must either admit the claim or plead a detailed defence.

The court will then call the parties before it to give directions for the further conduct of the same guided by the provisions of Rule 1.4 (2) which include the following:

i. *Encouraging the parties to co-operate.*
ii. *Identifying the issues*
iii. *Deciding which issues require a full trial and those which can be disposed of summarily.*
iv. *Deciding the order in which the issues are tried.*
v. *Encouraging the use of alternative dispute resolution such as mediation.*
vi. *Helping the parties to settle the case.*
vii. *Fixing timetables.*
viii. *Deciding on the economic benefit or otherwise of taking any particular step.*
ix. *Dealing with as many aspects of the case at one time as possible.*
x. *Dealing where possible with the case without requiring the parties to attend court - by using video conferencing or e-mails if possible.*
xi. *Making use of technology.*
xii. *Ensuring that the case proceeds to trial as quickly as possible.*

I have often described these as the **"Twelve Commandments of the Civil Procedure Rules"**.

These managerial powers may be exercised throughout the life of a case and are of a continuing requirement.

Once the court has given the necessary directions, it is for the parties to carry out the necessary preparations for trial which will generally include:

i. Disclosing relevant documents.
ii. Taking statements from all the witnesses upon whom they will rely.
iii. Disclosing the witness statements to the opposite party.

iv. Seeking the opinion of any appropriate experts and disclosing such material to the other side.
v. Making offers in settlement.
vi. Agreeing which parts of the evidence are agreed and deciding on which witnesses must attend trial.

The court will fix a date for trial depending on the estimates as to the duration of the hearing given by the parties and the availability of a judge to try the case.

Sadly as a result of the failure of the Government to invest in the appropriate technology, the courts do not have effective means to monitor the progress of cases nor to check on the compliance with its Orders. The court still has to rely on the other party to complain of non-compliance. Often this is not done as both parties may be at fault and do not wish incur penalties being imposed by the Court. One of my reforms when becoming Senior Master was to encourage my colleagues to stop writing timetables in the form of *"...within 56 days",* an expression which left doubt as to the minds of the parties and to write their Orders in the form of *"...unless by 4pm 23rd March 1996, the action will be..."This form of Order had the effect of concentrating the minds of the parties."*

6 Evidence at Trial at Common Law

The Trial is the occasion for the receipt of evidence and it is factual witness evidence which is the main element of any trial at Common Law together with the documents relied on by the parties following the disclosure process. Witnesses can attend the trial either voluntarily or be compelled to do so by means of a witness summons. The old form of summons describes the two facets best in Latin *"subpoena ad testicandum"* which require a person to attend to give oral evidence and *"subpoena duces tecum"* which required a person to bring documents or other items to court. The subpoena could incorporate both requirements.

7 Relevance

The statement that a piece of evidence must be relevant to the issues in a case may appear to be self-evident.

Lord Steyn in a practical manner explained the concept in *"Randall"*[22]*:*
"A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined for the most part by common sense and experience."

[22] Reported in [2004] 1 Weekly Law Reports at p.56

8 Best Evidence Rule

At one time a secondary piece of evidence could not be admitted if there existed another version which might be regarded as *"best evidence".* It was then said that the court would only permit the admissibility of evidence if it was the best that the nature of the case would permit[23].

The courts in recent times have resiled from this hard line position and the modern rule was stated by Lord Justice Ackner who said in *Kajala v. Noble*[24]*:*
"The old rule that a party must produce the best evidence that the nature of the case will allow and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance is that if the original document is available in ones hands, one must produce it."

9 Judicial Notice

The doctrine of judicial notice allows the court to dispense with the need to prove notorious facts. Hence the court will not need for it to be proved that Monday follows Sunday or that rains falls[25], that cats are kept for domestic purposes[26] or that Elvis Presley must be counted amongst the most well known popular musicians of the century[27].

Judges are sometimes prone to make comments which bring them into ridicule when enquiring as to some matter of which the public are well aware such as the judge in the Court of Appeal who asked *"Who are the Beatles?"*[28].

However what is notorious will vary over the years, as expressed in *"Omnia mutantur, nos et mutamur in illis".* The court is not bound to take judicial notice merely because the parties assert the fact. In a text book on evidence it was said that:
"... The judge upon being called upon to take judicial notice thereof may if he is unacquainted with such fact, refer to any person or any document or book of reference for his satisfaction... or may refuse to do so unless the party calling upon him to take such notice produces any such document or book of reference."[29].

But having made inquiry, the courts may then take judicial notice. The judge in a trade mark case where a manufacturer of "Penguin" biscuits sought to prevent a rival from

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[23] *Omychund v. Barker* (1745) I Ark 21, 49 *per* Lord Hardwicke.
[24] Reported in (1982) 75 Criminal Appeal Reports 149 at page 152.
[25] *Fay v. Prentice (1845) 14 LJCP at page 298.*
[26] *Nye v. Niblett (1918) 1 KB 23.*
[27] *Re Elvis Presley Trade marks* [1997] RPC 543.
[28] However the author did once display his own ignorance in a libel action by asking who was Kate Moss. This prompted one of his staff, tongue in cheek perhaps, to append to a case file the note which read *"Senior Master, the first claimant is Mr Beckham who is a footballer and the second claimant is Mrs Beckham who is Posh!"*
[29] Stephen's *Digest of the Law of Evidence.*

marketing "Puffin" biscuits made such enquiry and displayed remarkable and prodigious knowledge of the *sphenisidae* family and the unrelated *fratercula articia* family[30].

10 Formal admissions

The Rules permit a party to make an admission of the whole or part of another's case whither in the pleading or by a letter to the other side[31]. A retraction of such an admission can only be achieved by seeking the court's permission.

11 Estoppel

In civi actions there are two forms of estoppel. *"Cause of action"* estoppel which prevents a party litigating twice on the same cause of action and *"Issue"* estoppel which may arise in separate proceeding between the same parties.

A party must bring the whole of its case to court at one and the same time. A party can not litigate piecemeal. The leading case was that of *Conquer v. Boot*[32] where the purchaser of a house which the defendant had contracted to build, brought successfully a claim for failure to build the house in a good and workman like manner. He then later sought to bring a further claim for additional damages for the same breach of contract. It was held that the cause of action was the same in both actions and that the cause of action was *res judicata*.

Issue estoppel arises where a party makes an assertion which is a essential element of his case when the same assertion was pleaded in another action between the same parties and had been found by a similar and competent court to be incorrect.

12 The court's discretion to exclude evidence

Whilst it had previously been the case that the court in a civil action had no power to exclude evidence even on the ground that it had been obtained illegally, the Rules have recently been amended (rule 32.2(3)) to provide as follows;

(1) The court may control the evidence by giving directions as to;
(a) identifying or limiting the issues to which factual evidence may be directed;
(b) Identifying the witnesses who may be called or whose evidence may be read; or
(c) Limiting the length or format of witness statements.

This rule is remarkable in the context of the centuries long tradition of the non-interventionist judge in the Common Law. But in exercising this power the court is not to lose sight of the "overriding objective" to ensure that the case is dealt with justly. This rule was included following a major review of the cost of civil litigation by Lord

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[30] *United Biscuits Ltd v. Asda Store Ltd* [1997} RPC 513.
[31] Civil procedure Rules 1998 r.14.1(1).
[32] {1928} 2 KB 336.

Justice Jackson , who had been one of the original members with me of the Access to Justice Enquiry.

There are statutory provisions for excluding certain classes of evidence on the grounds of "public policy"[33]. There is always the issue of Limitation of Actions, namely a time limit for the bringing of a claim involving personal injury of three years, the ordinary time limit for contractual claims of six years and the special limit of twelve years for contracts under seal. There are special provisions for persons under a disability. The time for putting in a defence or for addicting evidence are limited by the Rules of Civil Procedure. Generally the latter are governed by the directions given by the pre trial judge but application can be made to adduce evidence at a latter stage with leave of the court but a good reason will have to be shown. The penalty for being allowed to do so is normally being made to pay a costs order but the veracity of the evidence is unlikely to be in issue.

13 The burden of proof

There was a time in the evolution of trial at Common Law when the burden was all one sided. In criminal matters the onus of proof lay at all times on the prosecutor indeed to the extent that until the mid -19th century the defendant was not permitted to give evidence in his own defence.

Today in a civil trial, the party asserting a fact must only establish the existence or non-existence of a particular fact as being more probable than not. Some have suggested that the more serious the issue, the higher standard of proof may be required. This is not so.

The present Deputy President of the Supreme Court [34] Baroness Hale said in *"re B"*[35]*: "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account where relevant in deciding where the truth lies."*

14 Competence to testify in a civil case

The issue for a judge being invited to hear evidence from a witness is to be satisfied:

i. That the witness is capable of speaking coherently
ii. Understands what is meant to speak the truth in a court of law

Some people and children may be incompetent to give evidence by reason of a defective intellect in the former or by reason of age in the latter.

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[33] Regulation of Investigatory Powers Act 2000.

[34] To meet the concerns of the European Court, the Judicial Committee of the House of Lords was re-cast into the Supreme Court of the United Kingdom, embracing all three jurisdictions and the Supreme Court of England and Wales re-named as the Senior Court.

[35] 3 W.L.R.1.

The test for children was stated by Lord Justice Bridge in these terms:
"..whether a chid has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the ruth, which is involved in taking the oath over and above the duty to tell the truth which is an ordinary duty of social contact."[36]

15 Compellability of a witness

All competent witnesses must attend court if required to do so. They may either come of their own free will or be summoned to attend. If they fail to attend when summoned or on attending court refuse to give evidence they will be held to be in contempt of court and may be imprisoned for up to six months. The courts are not slow to imprison those in contempt. A person imprisoned for contempt may offer to purge that contempt by agreeing to comply with the order of the court.

It is for a party seeking to have a witness attend at a trial for that party to take out a witness summons from the court. No leave of the court is generally necessary.

The duty before the English courts to bring a witness to the hearing is that of the party wishing to rely on the evidence of the witness in question. That party has the obligation to seek from the court a witness summons. A prudent lawyer will obtain such a summons at a very early stage to ensure that the witness is not required in another court, this is especially true of expert witnesses who must attend the trial of the case in which they first received a witness summons. In the case of a witness abroad, their attendance will depend on the provisions of any treaty that exists between the UK and the foreign state. Normally if a witness will not attend of his or her free will, it will be necessary to apply to the Senior Master for the evidence of that witness to be taken on Commission and such a request will be sent to our Foreign and Commonwealth Office who will send it to the appropriate Ministry in the foreign state. It is not for the English judge to actively take steps to obtain such evidence. This is the task of the parties who must seek the judge's orders and then follow the established procedure.

Some persons are not compellable such as the Sovereign and those with diplomatic immunity.

16 Sworn evidence

In criminal cases a child under the age of 14 may not be sworn but the judge hearing a civil action may take a more relaxed approach. The judge must be satisfied that the witness can give intelligible evidence in that they understand the question being put to them and can give answers that can be understood.

The Children Act 1989 by s.96 (2) provided that in civil proceedings a child's unsworn evidence may be heard by the court if, in the opinion of the court, (a) he understands

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[36] *R v. Hayes* [1977] 1 W.L.R.234at 237 C.A.

that it is his duty to speak the truth and (b) he has sufficient understanding to justify his evidence being heard.
The witness must generally take the oath in the manner laid down in the Oaths Act 1978 or make an affirmation as prescribed by that Act. The use of a "Holy Book" today requires the courts to possess a large number of "holy books" as so regarded by different religions. Some holy books must be handed to the witness wrapped in a silk cloth of an appropriate colour.

Witnesses who insist on giving unsworn evidence and who are found to being lying may be penalized in the same manner as those who have given untruthful sworn evidence.

A failure to observe the formalities of the Oaths Act does not render the evidence of a witness invalid. The vital issue is the intention to be bound by one's conscience.[37] Hence a Muslim wife who inadvertently took the oath on the New Testament rather than the Koran will still be validly sworn.

All witnesses must either take an oath in accordance with the Oaths Acts using the form appropriate to their religious faith or affirm that they will speak the truth. If the form of oath taking is inappropriate or can not be followed in the court in question for example a particular Holy Book is not available, then the witness will be invited to affirm. If he refuses to affirm, the judge may allow his to give evidence but may place such reliance on his evidence as the judge thinks fit.

If evidence is taken in a foreign court which will not permit the taking of an oath, the English judge will take this into account and would not necessarily discount the witness's evidence ans it is not the fault of the witness that his evidence could be taken on oath.

17 Hearsay

The traditional definition of "hearsay" was that given in in the textbook *Cross & Tapper on Evidence* namely:
An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.

The Civil Evidence Act 1995 by s.1(1) made it clear that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. But there is a safeguard in the Act that provided notice has been given and the leave of the court is sought and granted, an opposing party might have the maker of the original statement called and cross-examined.

[37] The author when trying a criminal case observed that a witness whilst taking the oath hold the bible in his right hand, had his left hand behind his back with his fingers crossed (a sign in England that he did not intend the consequences of his formal act). On requiring that the witness retook the oath with both hands in full view of the court, the witness then refused to give the evidence that had originally been in his witness statement!

Further the Act by s.4, provides that in estimating the weight if any to be given to hearsay evidence requires the court to have regard to any circumstances from which an inference can be drawn as to the reliability or otherwise of the statement.

The Act further safe guards a number of existing Common Law rules which permitted hearsay evidence in respect of:
i. Published works of a public nature (histories, dictionaries, maps scientific works) are to be admitted of the fact of a public nature stated therein.
ii. Entries in parish registers, marriage and death certificates and the like are to be treated as public records.
iii. The records of certain courts, treaties, grants by the Crown are admissible of the facts stated therein.

18 Documents

The classic statement as to what is a document was given by Mr Justice Lightman in *Victor Chandler International Ltd v. Customs and Excise Commissioners* in his judgment when he said:
"Mr Oliver QC for the claimant properly disavowed that he was a document: the repository of information must be inanimate: neither a person nor A.P.Herbert's 'Negotiable cow' (referred to in "Uncommon Law" at p.201[38]) can constitute a document. It matters not whether the information is in writing, or some other form capable of being assimilated by the eye or in the case of braille by the touch: nor whether apparatus such as a tape recorder of microdot reader is required for this purpose. Information of itself cannot constitute a document and the transmission of itself cannot constitute the transmission of a document".

Documents include anything that is written which furnishes information no matter what it is written on. Microfilm records, photographs, computer hard discs and the like would be included in this definition.

A distinction has to be drawn between public documents and private documents. The former includes Acts of Parliament, government orders, registers of births, deaths and marriages. Hence the Civil Evidence Act 1995, s.9 (1) states that any document forming part of the records of a public authority are admissible in civil proceedings without further proof.

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[38] A.P Herbert, the last MP for the University of Oxford, wrote a number of humorous sketches of a legal nature. In this particular article he wrote about a litigant who wrote a cheque on the side of a cow and drove the animal to the offices of the Tax authorities and tendered the cheque written on the side of the cow as payment of the taxes he owed. The judge, Lightman J. is not exactly correct in suggesting that the cow was found in this humorous article not to be a document, the issue was dismissed by the magistrate who found that the Collector of Taxes was wrong not to accept the cow in payment of the £56 owed. *Board of Inland Revenue v. Haddock.* More Misleading Cases 1930 p.119.

In the case of "private" documents the Common Law proceeds from the premises that a private document must be proved by primary evidence hence the original must be produced to the court. In this context there is a distinction, only written documents fall within this class: tapes and films do not. Equally if it is difficult or impractical to bring the object to court such as a gravestone or memorial plaque, the rule would not apply.

But the modern approach is to accept copies rather than to restrict the production even of written documents to the originals. This approach was adopted in *R v. Governor of Pentonville Prison*[39] *when Lord Justice Lloyd said:*
What is meant by a party having the document available in his hands? We would say that it means that a party who has the original of the document with him in court or could have it with him in court without any difficulty. In such a case if he refuses to produce the original and give no reasonable explanation, the court would infer the worst and the copy would be excluded.

19 Evidence in Court

The approach of the Common Law is best described by Rule 32. 2 (1) of the Civil Procedure Rules 1998 where it is stated:

The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved -
(a) at Trial by their oral evidence given in public and
(b) At any other hearing by their evidence in writing.

All witness statements must be signed by the individual who made the statement and verified by a "statement of truth". The form of the statement of truth is *"I believe that the facts stated in this document are true."* Generally at trial the witness on being called to give evidence will be shown his statement and asked if he confirms that it is true. This will then be taken as his evidence - in - chief. For my part as a judge I would follow this course but invite the lawyer who has called his client to ask him to give a brief account of his case - for so often the witness statement is the result of very careful drafting by his lawyers and I liked to hear how the party bringing the action or defending it, puts his case in his own words.

This practice also allows the witness to "play himself in". The witness is often appearing in the witness box for the first time in his life and is very nervous so by giving him an opportunity to speak to the court / Judge it allows him to gain confidence before he has to face cross-examination by the other's counsel.

[39] [1990] 1 Weekly Law Reports 277.

20 Evidence and the use of Technology

During the 1990's when I was a Master of the Queen's Bench at a time when our own Ministry of Justice were finding it hard to see the advantages of the use of modern technology, I received two offers of help.

British Telecom invited me to use a "Star Phone" conference telephone for a trial period of a year - they forgot to remove it at the end of the year. I used it on frequent occasions to hear applications from one or more parties through their lawyers being connected to my court by 'phone. Some times one party would be present in my room and the other on the 'phone. We encountered no difficulty in distinguishing the different parties when there were more than one party on the 'phone. When I became Senior Master I arranged for all the judges who reported to me to be supplied with similar 'phones. They are still in use.

Our reforms through the Access to Justice Enquire encouraged the use of such modern means for providing better access to the courts. Indeed we made it imperative that such technology should be used to support the reforms. Sadly the Ministry either failed to provide sufficient funding for the installation of such devices or spent millions on ill conceived projects which never achieved their purpose and wasted huge amounts of public funds. Even today some of the computer support systems in the High Court are unbelievably out of date[40]. The system upon which the Foreign Process section of the Central Office in the High Court still relies on a computer program that I commissioned in 1996 and is now unbelievably out of date.

Following a visit to Singapore, their High Court made a gift to me of a video conference machine which enabled me to have a weekly dialogue with their judges and on one occasion I "sat" with one of their judges and acted as the judge in the hearing of a summary trial conducted by video over six thousand miles. I heard the submissions of their lawyers, the evidence of the witnesses and gave a judgment which to comply with their internal jurisdiction was endorsed by the judge sitting in Singapore.

As a result of these experiments in the 1990's, the Civil Procedure Rules 1998 at Rule 23 and Practice Direction 23A make full provision for the use of modern technology to enable applications to be made and witnesses to give evidence without the necessity for them to attend court.

21 Evidence from Experts

Before our reforms to the management of civil proceedings in 1998, the use of experts had been a source of major concern. Too many experts were called to give opinions as

[40] On an occasion when I took the Lord Chancellor on a tour of the support staff of the High Court, he asked one young member of staff what he thought of the computer systems provided by the Ministry of Justice of which he was the head government minister. The young man replied with the frankness of youth "*Lord Chancellor, they are rubbish!"*. He actually used a word I would not repeat in print.

to matters in respect of which they had too little experience. Too many of the experts were grossly partisan to the extent that some judges before whom the parties' "tame" experts had appeared all too frequently, tended to ignore their opinions and there were no means by which to discipline the expert who expressed a manifestly wrong or negligent view.

The former Rules of both the Supreme Court and the county courts did possess the means for controlling the use and number of experts but these were very seldom resorted to by the judges.

Part 35 of CPR 1998 was therefore quite revolutionary in both its scope and approach to the use of experts before the civil courts[41].

At Common Law, experts do not decide cases. They are not called to express a view on matters of law. Their opinions are not binding on the courts. Their function is to assist the judge in his/ her task of deciding what the facts and issues in the action have been proved or not proved. For this reason we wrote a definition of their responsibilities in terms which shocked many of the "old school" of experts to the extent that they left the legal scene in their droves. The new approach also encouraged many experts who had previously regarded the role of appearing as experts in the courts as being somewhat tainted, to regard the new role allotted to them as adding to their professional status.

The role of the expert before the courts was expressed in the opening rules of Part 35:
35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.
35.3 It is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

As a result of these provisions the experts themselves formed two associations to regulate their work for the courts. These associations provided training for professional persons who sought to give expert evidence before the courts, in the conduct expected of them by the courts, in the experience they were expected to obtain before appearing in the courts, the form and manner of their reports with a requirement for all their members to undertake annual continuing education.

In the context of an adversarial jurisdiction, the introduction of the concept of the "joint single expert" was another radical break with the tradition of the parties being in complete control of the action. Rule 35.1 provides for the court to direct that a single expert be instructed to assist the court on any issue and if the parties cannot agree on the identity of the expert, the court may choose the expert.

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This element of the innovations introduced by the Rules has proved to be very successful.

One recent innovation adopted from a practice originating from Australia, is the giving of concurrent evidence by the experts in court and for the judge to enter into the discussions with the experts in court. It is known by the rather crude term of "hot tubbing". Personally I hope that this does not become the norm as it encourages the judge to *"enter into the area"* and will tend to cause him to be perceived as partisan.

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22 Assessors

There has always been a provision allowing assessors to sit with the judge and to advise him on technical matters. The assessor will generally prepare a report for the court based on a review of the evidence to be presented to the court and will sit with the judge during the trial and give such advice as may be necessary.

Assessor were common in the old Admiralty Courts and were generally drawn from the members of the City Livery Company of the Elder Brethren of Trinity House, a medieval trade guild of captains of merchant navy ships. They would advise the judge on matters of the Rules of the Sea and practices of navigation and the characteristics of ships at sea[43].

Nowadays the courts are likely to use assessors more frequently for assistance on technical matters and it is quite common for the Senior Taxing Master to assist the court on technical matters relating to the assessment of costs.

23 The taking of evidence for and by Foreign Courts

This a subject of considerable complexity and a minefield for the unwary lawyer as national sensibilities can be so easily upset as I know to my cost as the judge in the High Court responsible for all aspects of this discipline.

There are roughly nine classes of "conventions" or other arrangements governing this task namely:

i. Regulation states of the European Union with the exception of Denmark.
ii. Bi-lateral conventions, some of which are considerable age and sometimes forgotten about by foreign ministries in different jurisdictions[44].
iii. Hague Convention countries.
iv. Non-Convention countries.
v. Scotland and Northern Ireland. The English High Court can issue a witness summons for service throughout the United Kingdom but the evidence would be taken before a special examiner in the jurisdiction concerned.
vi. The Dominions of Her Majesty - there are still about 15 such Dominions. A request to any of Her Majesty's judges in one of the Dominions would be acted upon without any special formalities by an examiner appointed by the court.
vii. Members of the Commonwealth other than the Dominions. Commonwealth countries are not "foreign states" in the eyes of the English courts[45].
viii. Eire or the Irish Republic.[46]

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[43] The Company is known as "Trinity House" and is responsible for most of the lighthouses, bouys and light ships in England and Wales and Eire and for providing the pilot services in and out of most ports. The Duke of Edinburgh, a former navel officer who served throughout World War II with great distinction was the Master Elder Brother, a role now held by his daughter the Princess Royal. But neither would be invited to act as an assessor!

[44] I once used successfully two bi-lateral conventions, one signed by Adolf Hitler and the other by Herr Honecker for the western and eastern parts of Germany to enable service of certain documents which could not be achieved under more modern conventions and a further bi-lateral convention with France to overcome some technicalities of jurisdiction which arose due to an ill conceived decision of a judge in the High Court to attempt to hold his court in a hotel with Charles de Gaulle Airport.

[45] All Commonwealth states exchange High Commissioners with each other not ambassadors hence the title of the UK's Foreign and Commonwealth Office.

[46] Again this is one of the oddities of our relationship with the former members of the British Empire. In the case of Eire, a letter of request is sent by our High Court to their Minister of

ix. The remaining British Colonies now known as Overseas Dependent Territories.

All these different means of collating evidence for use in our courts or in the courts of other states, has its own price tag and time table. Hence it can be much easier to use a bi-lateral convention which allows the British Consul General to act as the examiner - and he would usually allow the examination to be undertaken in the "English style" by counsel for the parties - than to use a convention in a country with an inquisitorial style of examination by a local judge which would not allow for examination and cross examination in the manner practised in our courts[47].

The decision to grant a request for an order to take evidence abroad is at the discretion of our domestic courts usually exercised by the Senior Master or one of the Queen's Bench Masters.

The Lord Chancellor appoints lawyers in this country to act as court examiners (on the recommendation of the Senior Master) and it can prove to be a pleasant occupation for a lawyer who has retired from active practice.

24 Evidence requested under the Regulation for member states of the European Union

England has six designated courts[48] and the Senior Master at the High Court has the responsibility to oversee these arrangements and to seek solutions when difficulties arise. The request may be accepted in French in addition to English without a translation but all other languages must be accompanied by a translation.

The judges and representatives of the requesting court may attend. This includes any designated expert. Indeed a requesting court may seek to come to our jurisdiction and take the evidence itself but only if the witness agrees to give the evidence voluntarily. A request to use this method must be made to the Senior Master.

I am setting out in the next paragraph the mechanics for obtaining evidence from persons and agencies in England and Wales for use in the courts of both states in the E.U and elsewhere in the World. There are similar arrangements for Northern Ireland where the applications are made to the Master of the Queen's Bench of the Northern

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Justice who in turn sends it to the Master of their High Court who delegates the examination to one of their junior judges. There are no technicalities in this practice.

[47] I used a bi-lateral treaty with France to overcome a serious diplomatic incident when an English High Court judge "inadvertently" listed a hearing of a witness at Charles de Gaulle Airport in Paris. The French very rightly objected to the Queen of England's Court sitting in their jurisdiction! The use of the bi-lateral convention which by chance had never been revoked smoothed the ruffled feathers (rightly so) of the French. The English judge had a quiet talking to by me and promised never to do it again.

[48] The Royal Courts of Justice for the SE Circuit and London, Birmingham Civil justice Centre for the Midland Circuit, Bristol County Court for the Western Circuit, Cardiff Civil Justice Centre for Wales, Manchester County Court for the North West Circuit and Leeds County Court for the North Eastern Circuit.

Ireland High Court. I have as yet to discover the method of making an application to the Court of Session in Edinburgh.

25 The means for obtaining evidence for foreign jurisdictions from witnesses in England and Wales

Almost all applications under the regulations and treaties etc. listed in paragraph 23 above, are made to the Senior Master of the Senior Court for England and Wales at the Royal Courts of Justice, Strand, London WC2A 2LL. The applications are handled in the Foreign Process department of the Central Office. Following swinging cuts in the number of court staff, all such applications are handled by just one person (Miss Deborah Joy) who has a work load of over a thousand cases and applications at any one time.

On receipt of an application for evidence to be obtained from a witness in England and Wales under any of the Regulation states, the Hague Conventions or the Non-Convention States, the application with the draft questions is sent by Miss Joy to the Treasury Solicitors Department who handle all civil litigation matters for the Foreign and Commonwealth Office and for the Ministry of Justice. They draft an appropriate Order which is sent to the Senior Master to sign and perfect.

The Order is served on the witness or the authority concerned. The witness will then attend before the appropriate Court examiner and the Answers returned to the Foreign Process Section at the High Court.

In the case of Hague Convention and Non Convention countries, a Certificate is then signed by the Senior Master before the written answers are returned to the appropriate state. No certificate is required for applications that have originated from Regulation states.

Applications from Denmark are treated as having come from a Non Convention state.

Some states prefer a particular practice for obtaining evidence. Hence Portugal always seeks a Video examination of a witness direct to the court seized of the matter. Indeed it was this preference for the use of video examination of witnesses by Portugal that enabled us in the early days of the use of this medium to design the practice Direction which is now in use. The practice is for an Order to be made by the Senior Master who will select the nearest court with video facilities to the home address of the witness and then leave it to the Portuguese authorities to make all the necessary arrangements direct with the court.

The Swedish courts prefer to use telephone conferences for obtaining evidence and they too were of great assistance when we drafted the practice direction for this medium.

Both these methods must have the consent of the witness who must agree voluntarily to take part.

Where a DNA or Blood test is sought, the witness concerned must agree to under take the test and in the event of so agreeing, the necessary kit is sent direct to the witness. Because time is of the essence, the samples are returned direct to the laboratory nominated by the court from which the request has originated.

In the case of children welfare reports, the request are sent by the Senior Master to the CAFCASS authority who arrange for the visits sought to be undertaken by welfare officers.

As regards the inadmissible evidence, the approach of the English judge in such cases would be entirely pragmatic. He would attach such weight to the evidence as he think is appropriate having regard to all the circumstances of the case.

26 The cost of Litigation in England

Much criticism has been levelled at the cost of litigation in England. Court proceedings are regarded as the exclusive right of the very rich and till the 1990's of the very poor when legal aid was generally available.

Much of this criticism has been attributed to the CPR reforms - unjustly in my view but it suits the Ministry of Justice not to refute this criticism as the true author of the excessive lost of litigation of late has been the government.

Pre-1990 there were two main sources of "legal aid" for those seeking to bring modest claims before the courts. The public Legal Aid Scheme set up after World War II and that operated by the then powerful and wide-spread Trade Union membership.

The Trade Unions provided a simple legal assistance scheme to their members who sought redress for a work related accident. The claim was assessed initially by the branch committee and if accepted, it was passed to the central union management who if again accepted the application, passed it on their solicitors who in turn passed it to counsel for an advice on merits. If counsel considered that the claim had a reasonable prospect of success, the union would accept the opinion and support financially the whole of the action. Most claims succeeded and the trade union solicitors were always successful in recovering their costs from the employers' insurance company. Hence the scheme virtually paid for itself and the members received generous compensation as the unions were very supportive by instructing experienced counsel even if they did not brief the cheapest[49].

In contrast the government legal aid scheme though it mirrored that of the unions, differed in two serious respects. Too often the solicitors had to seek permission to proceed to the next stage of the litigation in a piece-meal fashion instead of being given the freedom that the unions gave to their lawyers and left it to them to take what ever

[49] I speak from some experience as I was instructed by about two thirds of the unions for 17 years and in my last month as a barrister before taking up my appointment as a Master, dealt with some 150 briefs for the unions in one form or another.

steps they considered necessary to resolve the complaint. But the most serious defect was that the government civil servants did not have the experience and initiative to recover their costs from the insurance companies when they won cases. In consequence the scheme did not appear to pay for itself.

The government therefore decided to change the legal landscape in three vey significant respects:

i. Counsel were allowed to accept cases on the basis of "no win, no fee" basis but in the event of succeeding in the case to claim success fees of up to 100% of the value of the damages recovered - whereas before counsel were only entitled, win or lose, to the fee marked in advance of the trial on their brief. Although this scheme was promoted on the claim that counsel undertook cases *"pro bono";* it proved to be a gravy train as the majority of the claims accepted were concluded successfully in favour of the claimant, which had in any event been the case before the changes were introduced.
ii. The claimant was encouraged to take out "after the event" insurance cover against the risk of loosing the case. These premiums were very substantial.
iii. Solicitors were allowed to pay equally substantial fees to firms of claims negotiators - commonly known as *"ambulance chasers",* who were paid for introducing work to the solicitors.

All these additional costs could be recovered from the defendants who lost the case and they in turn passed them on to insurance companies. The result was a massive increase in insurance premiums which was passed on to the public at large. The public regarded the fees recovered by lawyers as excessive.

The Government also allowed generous hourly rates to lawyers for their work thus encouraging them to work on the basis of "billable hours" for their work. This created a culture where the more hours a lawyer could show that he had worked on a case, the more he could charge - a recipe for enriching the inexperienced[50].

All these changes were buried as bad news to coincide with the introduction of the reforms so that the latter inevitably got the blame for the former. Master Leslie[51] who had made a study of the legal aid system and its viability, was convinced that properly organized, the old legal aid scheme was viable.

Such was the concern of many who sought to mitigate the "costs culture" and the adverse criticism it had attracted to the operation of CPR, that Lord Justice Jackson - who had been the Rupert Jackson QC on our Enquiry - was given a year free of judicial duties to prepare a report and recommendations to tackle the problem. His report was

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[50] One elderly solicitor who disapproved of this approach told me *"I charge for one hour's work and 35 years experience".*

[51] Master Leslie, one of the Queen's Bench Masters, was member of of the Rules Committee for the initial five years and responsible for the clear and intelligent drafting of those parts for which he was responsible. The rules on experts are an example of the clarity he brought to the task. Sadly he was not permitted to complete the task he was given nor given the credit he deserved.

accepted in the main by the Government and there are now new Rules in place governing the majority of litigation.

He recommended the abolition of the three vices that I have alluded to above and these have been accepted so that although success fees can still be charged by the lawyers handling a claim, they must not exceed 25% and may only be recovered from the award made to the successful party. After the event insurance premiums can not now be recovered from the losing party and there is a ban on ambulance chasers in as much that the fees paid to them can not be recovered from the losing party.

Only time will tell if these new Rules as to Costs will succeed.

27 Conclusion

Professor Neil Andrews writing in his recently published text book *"Andrews on Civil Process"* considered that to achieve the basic human right to a fair and proper trial of an issue brought before a civil court, four essential ingredients were required namely:

i. A fair hearing which must include the right to be present at an adversarial hearing; equality of arms; the fair presentation of evidence; the right to cross-examine witnesses and the delivery by the judge of a reasoned judgment.
ii. A public hearing which included the right to a public pronouncement of judgment.
iii. A hearing within a reasonable time
iv. A hearing before an independent and impartial tribunal established by law.

Central to all these preconditions for obtaining a just decision, is the need to present to the tribunal, the necessary evidence upon which the issue depends and which will enable the judge hearing the case to deliver a fair and just judgment.

The courts of differing jurisdictions have developed their own solutions for achieving this aim. It is not for me to suggest which form of trial or civil process is better for this purpose as compared with another. Each society must strive to produce the procedure and the solution best suited to its own society. Much will depend on the historical background of that society. The history of Continental Europe has been one of conflict and change over the past millennium. England in terms of the development of its own juridical process is perhaps most closely mirrored by that of the Confederation of the Swiss Cantons. The Common Law has been fortunate in having been immune in the main from the civil strife which has beset so many nation states in Europe during this time.

In this context, the best that I can achieve is to out line the approach of the English courts to the resolution of disputes by the reception and evaluation of evidence at the trial hearing. I do not seek to claim a preference for one means of achieving this end as compared with another; I can only explain the system with which I am familiar and have grown to admire - warts and all.

At Common Law and in particular in the English courts, all factual witnesses whom a party identifies as the source of relevant evidence and are both competent and compellable, should attend to testify at a civil trial. If competent then most witnesses are compellable unless they are the Sovereign, or have diplomatic immunity and additionally a judge can not be compelled to give evidence on matters relating to the discharge of his judicial functions.

A witness can not seek to agree not to give evidence as this would be contrary to public policy. The court will though out the civil process monitor the collation of the evidence and ensure that it directed only the relevant issues.

This very wide range of available potential witnesses reflects the importance that is attached to the receipt of evidence at the trial of civil actions to enable the judge to have access to the material he needs to make his findings of fact to which he may then apply the law and hence give his decision.

On appeal the appellate tribunal will only in exceptional circumstances overturn the finding of fact of a lower tribunal.

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