Three hundred years ago we gave you the common law.

Now we're back to see what you've done with it.

—LORD WOOLF OF BARNES
VISITING ARIZONA[1]

Arizona Supreme Court Justice Stanley Feldman in the House of Lords?

The Zlaket Rules debated in Parliament?

In a manner of speaking, yes. Arizona contributed to the most profound alteration of the civil justice landscape of England and Wales[2] in more than 100 years. On April 26, 1999, England's new Civil Procedure Rules (CPR) took effect. They replaced the patchwork of rules governing civil litigation in the English courts.

The new rules followed years of study, including visits to Arizona and other states by their author, a distinguished Law Lord. An English team consulted 11 judges in the United States. Five were U.S. Supreme Court justices. Of the remaining six, three were from Arizona. The English investigators were well aware of Arizona's recent changes in discovery and disclosure, known as the Zlaket Rules.[3]

Pre-Reform Pretrial Practices

In England's divided legal profession, familiar to devotees of barrister–character Horace Rumpole in the work of barrister–author John Mortimer,[4] gowned and bewigged barristers appear in court but leave the pretrial procedures, fact-gathering and witness preparation to solicitors, who select and brief trial counsel.[5]

Traditionally, neither barristers nor judges became involved in their cases until shortly before trial. Trial preparation was handled by solicitors, and court employees known as "masters" performed pretrial judicial intervention. The strictly observed distinction between trial and pretrial phases, although criticized as duplicating effort and multiplying fees, has been rationalized as assuring the independence of judges and trial counsel. It has been reinforced by the barristers' monopoly on in-court advocacy[6] and the fact that judges, still drawn overwhelmingly from the ranks of barristers, come to the bench with little experience in pretrial litigation.

Before the reforms, English civil litigation tended to proceed at a leisurely pace, largely at the parties' discretion, without judicial pressure to speed up. One critic of the reform effort, Prof. Michael Zander of the London School of Economics, argued strongly against importing American-style judicial scheduling and case management:

Old World, New Rules:

BY SUSAN WILLIS MCFADDEN

The Arizona Connection to England's Historic Civil Justice Reforms

> English courts have traditionally preferred the much more relaxed and to me more sensible approach that minor breaches of procedural rules should not generally be penalised and that practitioners should generally be permitted to conduct litigation at the speed and in the way that seems best to them—subject to control by the court of serious abuse. ... I take the view that the solutions proposed are likely to be unreasonable, counter-productive, and ineffective.[7]

The Woolf Investigation and Report

In 1994, the Right Honourable Lord Woolf of Barnes, Master of the Rolls,[8] was appointed by the Lord Chancellor[9] to review the civil court rules and procedures. The goals were improved access to justice, lower cost, reduced complexity, modernized terminology and the removal of unnecessary distinctions between practice and procedure.

Slightly more than a year later, the Woolf inquiry team produced its report, *Access to Justice* (see p. 16).[10] Measured against the ambitious standard of the report, the then-existing civil justice system was found to be too expensive, too slow and too complex. The major portion of the blame was assigned to "the unrestrained adversarial culture of the present system."[11]

> Without effective judicial control ... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. ... This situation arises precisely because the conduct, pace, and extent of litigation are left almost completely to the parties. There is no effective control of their worst excesses.[12]

Once introduced into Parliament, Lord Woolf's Final Report was quickly passed and received Royal Assent.[13] The Civil Procedure Act 1997 directed judicial case management, limited discovery, encouraged alternative dispute resolution and improved judicial administration, including deployment of information technology in the courts.

Judicial Case Management

The major change under the Woolf reforms increases the engagement of English judges with their cases. Rule 1.4 of the CPR obligates the court to manage cases actively, and Rule 1.1(2)(c) reminds judges of the need to deal with proceedings in a manner proportionate to the value of the claim.

Once the defendant has answered the plaintiff's claim,[14] the court sends an allocation questionnaire to all parties, seeking information on issues including the amount at stake, identities of fact and expert witnesses, likelihood of applications for summary judgment and anticipated length of trial.[15] Based on the responses, the court allocates the case to one of three tracks: small claims, most valued at £5,000 ($7,500) or less; the fast track for claims valued between £5,000 and £15,000 and some others in which the remedy sought is not appropriate for small claims; and multi-track for claims of more than £15,000.

Lord Woolf recognized that middle-income citizens could not economically prosecute medium-sized cases. He considered this to be one of the justice system's major failings.[16] Such cases now will be expected to go to trial approximately 30 weeks after the filing of an answer and to take only one five-hour trial day.[17] Case management is also at the heart of the multi-track. The rules

provide "individual hands-on management by judicial teams for the heaviest cases, and standard or tailor-made directions" where appropriate.[18]

Discovery Limitations

Before CPR, discovery was guided by the fittingly named Peruvian Guano case, which rendered discoverable not only all documents that would enable a party "either to advance his own case or to damage the case of his adversary" but also those "which may fairly lead him to a train of inquiry which may have either of those two consequences."[19] This made the range of discoverable material virtually unlimited, forcing parties to review, list and read an enormous number of documents, only a handful of which would affect the outcome of the case. The Interim Report found this process "monumentally inefficient. …The more conscientiously it is carried out, the more inefficient it is."[20]

Lord Woolf's remedy created four new categories for disclosable documents: (1) the parties' own documents, which they

U.K. Civil Justice Reforms

The Interim and Final Report of the U.K. review of civil court rules and procedures are available online from the Lord Chancellor's Department's Web site: http://www.open.gov.uk/lcd. A summary of both reports is contained in Woolf, *Civil Justice in the United Kingdom,* 45 Am. J. Comp. L. 709 (1997).

In the Report, the Right Honourable Lord Woolf of Barnes identified the goals of a civil justice system:

- It should be just in the results it delivers.
- It should be fair and seen to be fair by:
  - ➤ ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - ➤ providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
  - ➤ treating like cases alike.
- Procedures and costs should be proportionate to the nature of the issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.
- It should be responsible to the needs of those who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective: adequately resourced and organised so as to give effect to the previous principles. (Interim Report at Chapter 1, § 3, emphasis in original).

rely upon in support of their contentions; (2) adverse documents of which a party is aware and that to a material extent adversely affect his own case or support another party's case; (3) documents not in the first two categories that are part of the "story" or background of the case, including those that, though relevant, may not be necessary for the fair disposal of the case; and (4) train of inquiry documents—those that may lead to a train of inquiry enabling a party to advance his own cause or damage that of his opponent.[21]

The CPR disclosure rules parallel the three-track case management system. Provisions governing discovery do not apply to the small claims track, where the only requirement is for a party to disclose the documents on which it relies.[22] "Fast track" disclosure duty is limited to categories (1) and (2), now known as "standard disclosure."[23]

As soon as a case (other than small claims) is allocated to a track, the court issues a standard disclosure order. The parties must undertake a "reasonable search" for documents, then file a disclosure statement in a format familiar to any Arizona lawyer who has complied with Rule 26.1, ARIZ.R.CIV.PROC.[24] The duty of disclosure is a continuing one.[25]

The Arizona Connection

Lord Woolf and his team consulted hundreds of people in their 15-month investigation. Although most contributors were English, consultations also occurred in Australia, Canada, Hong Kong and the United States. Lord Woolf came to Arizona in October 1994 and met with then-Chief Justice Stanley Feldman, Judge Sarah Grant of the Court of Appeals and Judge Robert Myers of Maricopa County Superior Court.[26] Lord Woolf was already familiar with Arizona's progressive approach to civil justice reform, having previously inquired of Chief Justice Feldman about the Zlaket Rules, which were promulgated in December 1991.[27]

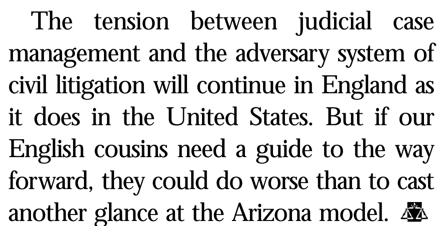
While in Arizona, Lord Woolf met with state bar leaders and sat in session with the Arizona Supreme Court and the Court of Appeals. He visited Maricopa County Superior Court and the federal district court in Phoenix, and he was sent a copy of the 1994 report of the Arizona Supreme Court Committee on More Effective Use of Juries.[28]

Lord Woolf returned Arizona's hospitality in May 1997. That is how Justice Feldman came to be in the House of Lords. He recalls that he and Mrs. Feldman, vacationing in London, lunched in the Lords Dining Room and observed from the "Strangers' Gallery" on the day of President Clinton's visit to Parliament.[29]

Conclusion

Nearly two years after their introduction, the Woolf reforms appear to have found acceptance in the legal community. According to a poll last year, 80 percent of solicitors are content with the new rules.[30] Government figures indicate that new claims are down 23 percent, suggesting to the optimistic that more cases are settling, and faster, with fewer preliminary court applications.[31] Lord Woolf has since been promoted to the position of Lord Chief Justice, making him the senior permanent judge in the

"Lord Woolf was already familiar with Arizona's progressive approach to civil justice reform."



country, next in rank to the Lord Chancellor.[32]

The tension between judicial case management and the adversary system of civil litigation will continue in England as it does in the United States. But if our English cousins need a guide to the way forward, they could do worse than to cast another glance at the Arizona model.

***Susan Willis McFadden,** a member of the State Bar of Arizona who formerly practiced in Phoenix and Tucson, is now with the firm of Gudeon & Hodkinson in London. She is admitted as a solicitor before the Supreme Court of England and Wales.*

ENDNOTES

1. After-dinner remarks, October 1994, reported to the author by an attendee.
2. The United Kingdom consists of England, Wales, Scotland and Northern Ireland. There are important differences between and among the legal systems of Scotland and Northern Ireland and the one that prevails in England and Wales. Here, we use "England" and "English" to refer to the jurisdiction and to the system that prevails in England and Wales. *See* R.C.A. WHITE, THE ENGLISH LEGAL SYSTEM IN ACTION 14 n. 19 (3d ed. 1999).
3. The Zlaket Rules were so named because Thomas Zlaket, then in private practice and a former president of the State Bar of Arizona, led the Bar committee that developed the reforms. Pamela Manson, *New Court Rules Taking Effect Today Are Hailed as Revolution,* ARIZ. REPUBLIC, July 1, 1992, at B2.
4. *E.g.,* J. MORTIMER, RUMPOLE OF THE BAILEY (1978).
5. Barristers' special status was further underlined by the profession's complete immunity, until very recently, against malpractice suits arising out of the conduct of litigation. *See Arthur J.S. Hall v. Simons,* House of Lords (July 20, 2000), which overturned immunity first granted in 1791. See also Eaglesham, *Lords Ruling on Negligence Makes Lawyers Legal Targets,* FINANCIAL TIMES, July 21, 2000, at 1.
6. Solicitors were given increased rights of audience to higher courts by the Courts and Legal Services Act 1990. However, of the more than 75,000 solicitors in England and Wales, fewer than 1,000 have chosen to become solicitor–advocates. *All Bar None,* L. SOC'Y GAZETTE, June 30, 1999, at 22.
7. Quoted in Flanders, *Transforming the Role of English Judges,* 81 JUDICATURE 244, 246 (May/June 1998).
8. "Master of the Rolls," a title dating from the reign of Henry VIII, refers to the Head Judge of the Civil Division of the Court of Appeal. G. RIVLIN, FIRST STEPS IN THE LAW 186 (1999); WHITE, *supra* note 2, at 372.
9. The position of Lord Chancellor is without U.S. equivalent. The incumbent is simultaneously a member of all three branches of government: (1) executive, as a Cabinet minister appointed by the Prime Minister; (2) judicial, as chief judge in the House of Lords when it sits in its judicial capacity; and (3) legislative, as the Speaker of the House of Lords in its lawmaking capacity. RIVLIN, *supra* note 8, at 183. A recent decision by the European Court of Human Rights raised concerns that this threefold involvement may be incompatible with the European Convention on Human Rights, which became effective in England and Wales on October 2, 2000. *McGonnell v. United Kingdom,* ECHR Application No. 28488/95 (February 8, 2000). *See generally* Woolf, *The Civil Justice Framework for Incorporation of the European Convention,* 32 TEX. INT'L L.J. 427 (Summer 1997).
10. The Right Honourable Lord Woolf, ACCESS TO JUSTICE (June 1995) (hereinafter INTERIM REPORT), Introduction.
11. *Id.* at Chapter 4, § 1.
12. *Id.* at Chapter 3, §§ 3-5.
13. D. GREENE, THE NEW CIVIL PROCEDURE RULES 5 (1999).
14. One of the CPR's most controversial reforms was its "modernisation" of legal terminology. A plaintiff is now known as a "claimant," and the equivalent of a complaint, formerly known as a "writ," is now a "claim form." In the spirit of Woolf, the Court of Appeal recently instructed lawyers to cease using Latin maxims such as *res ipsa loquitur,* which are "not readily comprehensible to those for whose benefit they are supposed to exist." *Fryer v. Pearson,* Court of Appeal (April 4, 2000).
15. Rule 26.3(1).
16. *See* Lord Woolf's speech to the Solicitors Annual Conference, October 1997, *quoted in* GREENE, *supra* note 13, at 187.
17. Rule 26.6 and Practice Direction to Part 26, § 9.1(3)(a).
18. FINAL REPORT, Section I(3)(c) (July 1996).
19. *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B. 55 (Brett L.J.), *quoted in* INTERIM REPORT.
20. INTERIM REPORT, Chapter 21, § 17.
21. FINAL REPORT, Chapter 12, § 38.
22. CPR, Rule 31.1(2) (disclosure requirements do not apply to claims on the small claims track); Rule 27.4(3)(a) (party to small claims cases must deliver to all other parties and the Court copies of all documents on which he intends to rely at the hearing).
23. CPR, Rule 28.3.
24. CPR, Rule 31.10 and Practice Direction, Part 31.
25. CPR, Rule 31.11. *Cf.* ARIZ.R.CIV.P. 26.1(b).
26. Letter to author from Judge Grant, June 22, 1999. The persons consulted by the Woolf team were listed in Annex I to the FINAL REPORT.
27. Letter to author from Justice Stanley Feldman, June 30, 1999.
28. Grant letter; Feldman letter. Judge Myers similarly recalls that the Arizona discovery–disclosure process was discussed with Lord Woolf. Letter to author from Judge Myers, June 16, 1999.
29. Telephone interview by *Arizona Attorney* with Justice Feldman (Dec. 7, 2000).
30. Fleming, *Trying Woolf,* L. SOC'Y GAZETTE, April 28, 2000, at 18.
31. Horrocks, *A Practitioner's Point of View,* THE TIMES, May 2, 2000, at § 2, p. 8.
32. Lord Woolf is the first person to have served as Lord Chief Justice, Master of the Rolls and a law lord. *Why Lord Woolf Knows Prison Better Than Most,* THE TIMES, June 6, 2000, at § 2, p. 23.