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THE ABUSER PAYS: THE CONTROL OF UNWARRANTED DISCOVERY

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THE ABUSER PAYS: THE CONTROL OF UNWARRANTED DISCOVERY

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This paper looks at the crisis in the English civil justice system, with particular regard to the problems associated with discovery. It supports an English lawyer's contribution to a debate held in Washington, D.C., in September 1996, entitled *Modern Discovery Practice: Search for Truth or Means of Abuse?*[1] Highlighting the key differences in discovery procedure between England and the United States and the contemporary problems in the discovery process in England, it looks at the proposals for reform made in July 1996 as a result of the Review of Civil Justice by Lord Woolf ("the Woolf Inquiry").[2] The authors argue that the question of discovery abuse is inextricably linked to the question of costs. By recognizing and using the potential which sophisticated costs orders have for influencing the conduct of litigants, courts in both England and the U.S. can make substantial in-roads to curbing discovery abuse.

I. INTRODUCTION

The current debate about civil justice taking place in many common law systems is founded on the principle that a system of civil justice is essential to the maintenance of a civilized society. In the words of an eminent English jurist, a civil justice system "manifests the political will

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1. *Panel Two: Modern Discovery Practice: Search for Truth or Means of Abuse?*, 41 N.Y.L. SCH. L. REV. 453, 467-74 (1997).

2. The Review of the Civil Justice System in England and Wales by The Right Honorable the Lord Woolf. Lord Woolf (now Master of the Rolls) was appointed by the Lord Chancellor on March 28, 1994, to review the current rules and procedures of the civil courts in England and Wales. The aims of the review were (1) to improve access to justice and reduce the costs of litigations; (2) to reduce the complexity of the rules and modernize technology; and (3) to remove unnecessary distinctions of practice and procedure. Two reports, both entitled *Access to Justice* were published along with *Draft Civil Proceedings Rules*. *See* LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995) [hereinafter INTERIM REPORT]; LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND & WALES (1996) [hereinafter FINAL REPORT]; LORD WOOLF, ACCESS TO JUSTICE: DRAFT CIVIL PROCEEDINGS RULES (1996) [hereinafter DRAFT RULES]. It is expected that the rules will be finalized in 1997, and it is likely that they will be implemented in 1998, although this depends on Parliamentary time being made available.

of the State that civil remedies be provided for civil rights and claims, and that civil wrongs, whether they consist of infringements of private rights in the enjoyment of life, liberty, property or otherwise, be made good, so far as practicable, by compensation and satisfaction, or restrained, if necessary, by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even reality."[3]

If an effective system of justice is essential to the maintenance of a civilized society, then English society is threatened. For the last two years, its civil justice system has been subject to scrutiny at the highest level. The Woolf Inquiry confirmed what many had suspected for some time: the civil justice system is creaking—it is in a critical state—and this is threatening the rights of individuals, businesses, and the British economy. "The key problems facing civil justice today are cost, delay and complexity. These three are interrelated and stem from the uncontrolled nature of the litigation process."[4] Indeed, the costs of litigation in England are now so high that

> [e]xcessive cost[s] deter people from making or defending claims. A number of businesses [say] that it is often cheaper to pay up, irrespective of the merits, than to defend an action. For individual litigants the unaffordable cost of litigation constitutes a denial of access to justice. . . .
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> . . . [T]he diversion of executives and other employees from their normal activities . . . can have serious implications for [large corporations'] profitability.[5]

One leading international bank has considered changing the venue for resolving its legal disputes from London to New York.[6] Another international firm of civil engineers told the Woolf Inquiry that

> [t]he risk of litigation and the costs of such litigation is higher in the UK (Scotland is an exception) than in any other country in which we operate in the world, except, *possibly*, the state of California. The cost of defending UK litigation, paid by our

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3. SIR JACK I.H. JACOB, THE REFORM OF CIVIL PROCEDURAL LAW AND OTHER ESSAYS IN CIVIL PROCEDURE 1 (1982) (citation omitted).

4. INTERIM REPORT, *supra* note 2, at 7.

5. *Id.* at 9.

6. *See id.* at 12.

> professional indemnity insurers, now exceeds our annual budget for training and development.[7]

United States lawyers may take some comfort in knowing that England also faces an acute litigation crisis. Some of the problems, and indeed solutions such as case management proposed by Lord Woolf, will sound familiar to U.S. lawyers. Others, such as the modification of the English rule on costs, may be surprising. In any event, as England draws in part on U.S. solutions such as case management, perhaps the U.S. will borrow something in return. In this way, civil justice and the societies it serves on either side of the Atlantic might benefit.

The Woolf Inquiry is wide-ranging. In its final form, excluding the draft Rules, it runs to 370 pages and contains 303 separate recommendations. Before examining those which most closely relate to the curbing of the substantial problems associated with discovery, it may be helpful to look at the existing system, in order to highlight the differences between the respective systems for the administration of justice in England and Wales, and the U.S. The exchange of ideas without the benefit of a basic understanding of these differences would be wasteful.

II. TWO COMMON LAW SYSTEMS DIVIDED BY . . .

The key differences between civil litigation in the U.S. and in England can be summarized by the following list:

- access to justice;
- costs;
- contingency fees;
- juries;
- punitive damages;
- class actions/mass torts; and
- discovery.

Each demands close examination.

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7. *Id.* at 11-12 (emphasis added).

A. *Access To Justice*

The number of civil cases filed each year in England and Wales is falling.[8] There may be a number of reasons for this, but as society becomes more complex, and its population increases, it seems specious to suppose that the number of disputes between its members actually declines. It is hard to believe that the disproportionate costs of litigation, increasingly out of reach of more citizens, does not have a prohibitive effect on the issue of proceedings.

B. *Costs*

Although the decision as to who will bear the costs of an action are entirely within the discretion of the trial judge, a general principle almost invariably followed by English judges is that costs follow the event—known as the English Rule.[9] This means that the losing party will be ordered to pay the costs of the successful party, as well as his own legal costs.[10] In fact, after costs have been taxed, the successful party will recover between one-half and two-thirds of the fees he actually pays to his lawyers. He may have won, but not without some cost to himself. Moreover, until the conclusion of the case and often not before the successful party's solicitor has had his costs "taxed" (approved by the court), the unfortunate party who has to bear all those costs will have no accurate idea of what the final bill may be.

This system of "costs transfer" according to the outcome of the case is not without fault. It raises the stakes in litigation: once on the litigation treadmill, a party will reach a point where he can ill-afford not to spend whatever it takes to avoid losing and thus picking up two sets of legal fees. Thus, the litigant will use his lawyers to apply a sledge hammer to the cracking of a nut. The English rule is more frequently an incitement to indulge in excessive and disproportionate behavior than it is a deterrent.

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8. In 1991, 3.7 million claims were entered in the county courts. *See* LORD CHANCELLOR'S DEP'T, JUDICIAL STATISTICS: ENGLAND AND WALES FOR THE YEAR 1992 39 tbl.4.1 [hereinafter 1992 JUDICIAL STATISTICS]. This fell to 2.4 million in 1995. *See* LORD CHANCELLOR'S DEP'T, JUDICIAL STATISTICS: ENGLAND AND WALES FOR THE YEAR 1995 37 tbl.4.1 [hereinafter 1995 JUDICIAL STATISTICS]. In the Queens Bench Division, the number of writs and originating summonses reached a high of a little over 360,000 in 1991, falling to just below 154,000 in 1995. *See* 1992 JUDICIAL STATISTICS, *supra*, at 29 tbl.3.1; 1995 JUDICIAL STATISTICS, *supra*, at 27 tbl.3.1 (1995).

9. *See* FINAL REPORT, *supra* note 2, at 79. *See generally* Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990).

10. *See* Snyder & Hughes, *supra* note 9, at 345.

Furthermore, the English loser-pays rule is relatively blunt and unwieldy. It takes no account of the conduct of the parties during the course of the litigation. It means that rarely, if ever, is the question of the costs involved in each individual step in the litigation process ever brought into focus. Courts, and therefore parties, lump all costs together and look at them globally only at the end of the litigation.[11]

In addition, the rule inhibits both the initiation and the defense of proceedings: a prospective litigant may do his calculations and conclude that he cannot afford, whether as plaintiff or defendant, to board the litigation ship in the first place, because of the added risk he assumes in having to meet two sets of legal fees in the event of losing.

Pressure is building in some quarters for the U.S. to adopt the "English Rule," but resistance is intense, and rightly so. The prospect of "loser pays all" calls into question the availability of justice. As one member of both the English and California bars has noted, Americans are concerned "that when the law ceases to be available for use by the public at large, this is the first sign of its decay."[12] On this test, English law is already in real jeopardy. As this paper attempts to argue, the use of costs orders could provide a cure to the decay and a prevention for excessive behavior, including abusive discovery demands. However, a significant improvement is likely only if the courts are prepared to be more flexible and imaginative when using costs orders than the current English Rule permits.

C. *Contingency Fees*

Although contingency fees are well established in the U.S. for personal injury cases and increasingly common in commercial cases, English lawyers were prohibited from charging on such a basis until very recently.[13] Change has now come, but only in a very limited range of

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11. *See* FINAL REPORT, *supra* note 2, at 78-79.

12. Keith Evans, COM. LAW., Feb. 1996, at 59.

13. Contingency fees, in relation to contentious business, are unlawful on the grounds of public policy:

> It was suggested . . . that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law as to champerty; and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England.

Trendtex Trading Corp. v. Credit Suisse, 3 All E.R. 721, 741-42 (Q.B. 1979). Not only were agreements as to contingency fees unenforceable, but a solicitor entering into such an agreement would breach Law Society Rules and thus run the risk of disciplinary proceedings. *See* Peter F. Schlosser, Speech, *Lectures on Civil-Law Litigation Systems*

litigation.[14] Most significantly, such fee arrangements can be used in relation to personal injury litigation.[15] Termed "conditional fee agreements" they are puny compared to their transatlantic elder brother, ordinarily providing merely for a "success uplift" payable in the event of winning on agreed fees which would be payable in any event.[16] It has been said that more than fifty percent of the British public have no real access to the civil courts.[17] Generally, the public is too affluent to qualify for Legal Aid, and not affluent enough to pay lawyers themselves, and therefore they are caught in a legal poverty trap. Perhaps this is why the number of actions commenced each year is falling. In America, the civil law is seen as accessible by all—a laudable principle, and one very much endorsed by the Woolf Report.[18] It is a principle which is given real meaning by the contingency fee principle. However, whether conditional fee agreements will contribute greatly to increasing access to the courts is doubtful: use of the "success uplift" means most clients are still required to find and to pay what may be a substantial sum, win or lose.

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and American Cooperation with Those Systems, 45 U. KAN. L. REV. 9, 18 (1996).

14. *See* Courts and Legal Services Act, 1990, ch. 41, § 58 (Eng.). The classes of litigation in which conditional fee agreements can be used are set out in the Conditional Fee Agreements Order, 1995, S.I. 1995, No. 1674 (Eng.). They are limited to personal injury, human rights cases, winding up, and administration orders and proceedings by a liquidator, administrator or trustee in bankruptcy. *See id.* There was considerable pressure on the Lord Chancellor's Department that was responsible for drafting the secondary legislation to include debt recovery work but this was resisted. Lobbying on behalf of the profession and clients continues in an effort to extend the scope of conditional fee agreements to cover debt recovery.

15. *See* Conditional Fee Agreements Order, 1995, S.I. 1995, No. 1674 (Eng.).

16. The maximum fee increase is 100% of agreed fees, which are payable in any event. *See id.*

17. *See* Cyril Glasser, *Solving the Litigation Crisis*, LITIGATOR, 1994, at 14, 14-15.

> Civil Litigation is in a state of crisis. . . . While criticism of the cost of legal services and delays in the court process are hardly new they have recently taken on a renewed urgency.
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> . . . .
>
> The combination of increases in the cost of legal services and the lack of effective access to the courts for the vast majority of its citizens has created a crisis for the government, the judiciary and the profession.

Id. at 14, 17.

18. *See* FINAL REPORT, *supra* note 2, at 3 ("[A] particular concern has been to improve access to justice for individuals and small businesses.").

D. *Juries*

In England, the role of juries has, for many years, been limited to the finding of fact in criminal trials. The only type of civil litigation in which they are cast as a player is in defamation cases, otherwise, the use of juries is almost unheard of in any form of civil litigation. Even in those cases, their use has been subject to substantial criticism,[19] because they have retained the power to award very substantial damages.[20] Those damages look remarkably like punitive damages, or, as they are generally referred to in England, "exemplary damages."

E. *Punitive Damages*

Except for in a very limited number of circumstances, exemplary or punitive damages are not available in England.[21]

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19. *See* Marcus A. Brown, Commentary, *Trial by Jury—An Obsolete Concept*, 49 CONSUMER FIN. L.Q. REP. 109, 112 (1995).

20. In spite of calls for reform of the use of juries in defamation trials, the Defamation Act of 1996 does not address the principal problem of juries making erratic and often very large awards of damages. *See* Defamation Act, 1996, ch. 31 (Eng.). The Act contains no specific provisions to limit awards of damages. *See id.* However, a provision is made for the defendant to "offer to make amends," by way of correction and/or compensation. *Id.* § 2. Whether or not such an offer is made, and the suitability and sufficiency of such, is a matter which the court can take into account and may reduce or increase the amount of compensation accordingly.

21. Exemplary damages are only exceptionally permitted, for example, in cases of express statutory authority, oppressive behavior by government servants, or objectionable conduct calculated to result in profit. "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity." Rookes v. Barnard, [1964] App. Cas. 1129, 1227 (1963). In *Rookes*, the House of Lords reviewed the opportunity to review the doctrine of exemplary damages. Such damages first made their appearance in England in the mid-eighteenth century. *See* Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763); Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763). They became a regular feature of tort actions, but never of contract actions. The House of Lords took the opportunity in *Rookes* to "remove an anomaly from the law of England" from most cases. *Rookes*, [1964] App. Cas. at 1221. The principal argument against punitive damages is that, confusing the civil and criminal functions of the law, they are anomalous in the civil sphere. It has been argued that to allow them "contravenes every protection which has been evolved for the protection of offenders." Cassell & Co. v. Broome, [1972] App. Cas. 1027, 1087 C-F.

F. *Class Actions/Mass Torts*

The English courts have no specific procedures for the conduct of complex class actions. However, the judges claim a broad power enabling the courts to be "as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically."[22] As a result of major disasters such as the Kings Cross station fire and product liability problems, the courts have had to deal with increasing numbers of class actions. The infancy of this type of action makes it a novelty, albeit less so with the passage of time.

G. *Discovery*

Unlike the Federal Rules of Civil Procedure governing discovery in federal cases, English procedural rules of discovery cannot be modified nor ignored by local courts. In England, two sets of court rules apply: County Court Rules to all smaller, less complicated matters proceeding in county courts; and the Rules of the Supreme Court for more complex issues pending in the High Court and higher appeal courts. There is substantial similarity in these rules, and there is no need to distinguish between the two for current purposes.

Although in England the term "discovery" means the disclosure of documents only, and in this sense has a much more restrictive meaning than it has in the U.S., English and American lawyers share several tools for discovering the facts relevant to a matter. For instance, disclosure and production of documents, interrogatories, and notices to admit/requests for admissions are all tools used in England to get at the facts of a case. Depositions are known to English civil litigation, but are of such limited application that they are hardly used at all.[23] In an effort to limit "trial by ambush," which is the evil to which all discovery weapons were originally directed, the use of witness statements was introduced in 1986.[24] These statements which are prepared by a party's own lawyers, and now exchanged with the other party before trial, stand as evidence-in-chief. For fear that courts will allow neither amendment nor supplementation after exchange, a great deal of "lawyering" goes into

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22. Davies v. Eli Lilly & Co., 1 W.L.R. 1136, 1139E (C.A. 1987).

23. *See* R.S.C., 1995, O.39, r.1 (Eng.). The court can order examination on oath when necessary for the purposes of justice. *See id.* The provision is used for witnesses who will be unable to attend trial or when evidence is sought abroad. *See id.*

24. *See* Rules of the Supreme Court (Amendment No. 2), S.I. 1986, No. 1187 ¶ 6 (Eng.). The Rules of the Supreme Court were amended by Rules of the Supreme Court (Amendment No. 2), S.I. 1986, No. 1187, and subsequently amended by S.I. 1988, No. 1340, and S.I. 1992, No. 1907 to provide for the exchange of statements.

their preparation. The end product rarely bears much resemblance to the witness's own words. What was an attempt to reduce trial costs has resulted in the front loading of costs to a ridiculous degree in cases which are often settled before trial.

Although the tools of discovery may be similar, the scope and application of those tools is considerably wider in the U.S. than in England. For litigants in England, the very existence and extent of a right of discovery currently depends against whom it is sought: a party, a prospective party or a stranger/third party.

1. The Right to Discovery of Documents and Facts

(i) Automatic discovery requires discovery of documents between the parties, without requests, once pleadings are closed.[25] It is worth noting that although amendments to pleadings are permitted, the consent of court is needed for all but the first amendment.[26] However, frequent and very late amendments are all too common.

(ii) Pre-action discovery of documents is available with the consent of the court, but only in cases of death and personal injury,[27] and even then, only when the documents to be produced are necessary and described with care and precision. The result is that the use of pre-action discovery as a means of undertaking a fishing expedition is limited. Lawyers rarely resort to pre-action discovery.

(iii) Discovery of facts by interrogatories is available only against parties with which there is a matter in question;[28] interrogatories can be administered without leave of the court. They must relate to "any matter in question between [the parties] in the cause or matter which are necessary either (a) for disposing fairly of the cause or matter, or (b) for saving costs."[29] Interrogatories are not allowed where their object is to obtain an admission of fact which can be proven at trial by the attendance of a witness who will in any case be called at trial. They are also not allowed if designed to prove a cause of action or defense not yet pleaded or to establish an action against a third party.

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25. *See* R.S.C., 1995, O.24, r.1.

26. *See id.* O.20, rr.1 & 3.

27. *See id.* O.24, r.7A; Supreme Court Act, 1981, ch. 54, § 33(2) (Eng.).

28. *See* R.S.C., 1995, O.26, r.1.

29. *Id.* O.26, r.1.

(iv) Discovery of documents or facts against a stranger is available in very limited circumstances, such as in personal injury actions against the treating hospital, as opposed to the defendant Health Authority, and in tort cases where the third party has provided facilities for the commission of the wrong but is not personally liable. If documents are required from a third party, it is necessary to issue a *subpoena duces tecum*[30] and require attendance at trial, or at a nominal trial date set in advance of the actual trial date.

(v) Oddly enough, inspection, preservation, testing and sale of property are available both before and after commencement of proceedings and against both parties and strangers.[31]

(vi) There is no duty to disclose the identity of individuals likely to have discoverable information relevant to disputed facts alleged in the pleadings.

2. The Obligation of Discovery of Documents

a. An On-Going Obligation

The obligation to give automatic discovery of documents[32] is ongoing throughout the litigation process. It requires the production of documents which are relevant, regardless of when they come into the possession, custody or power of the party under the obligation.[33] This can mean that in an action which includes a claim for prospective loss of earnings, the plaintiff is under an obligation to tell his opponent if and when he obtains a lucrative contract of employment at any time up to and including trial.

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30. *See id.* O.38, rr.14-19.

31. *See id.* O.29, rr.2-7A.

32. "The meaning of 'documents' is not restricted to paper writing, but extends to anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment. Thus tape recordings of evidence or information are documents." *Id.* O.24, r.1 (annotation 24/1/5).

33. This principle contained in R.S.C. O.24 is linked to the principle in R.S.C., 1995, O.18, rr.8 & 9, requiring a party to not seek to take his opponent by surprise or, in failing to disclose relevant documents, mislead the Court or his opponent into believing that full discovery has been given. *See id.* O.24, r.1 (annotation 4/1/2); *id.* O.18, rr.8, 9.

b. An Obligation On Whom?

The principle obligation to disclose relevant documents is on the party to the litigation. Failure to honor this obligation can result in the party's pleading being dismissed or struck out, and even in the party being committed for contempt.[34] However, his solicitor is under an onerous duty to ensure this occurs. Very early in the litigation process, clients must be advised of the duty and its breadth. They must be told of the importance of not destroying or tampering with material which might possibly be disclosable[35] and of the need to take positive steps to ensure that the material is preserved.[36] There is a duty to notify the court and in some circumstances to withdraw from acting in cases where a client fails to comply with proper advice as to discovery.[37] "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, *as far as possible*, that no relevant documents have been omitted from their clients' [discovery]."[38] Failure to comply with this duty can render the solicitor subject to disciplinary proceedings or to committal.[39]

c. An Obligation To Disclose What?

A party to an action must[40] disclose all documents which are in his possession, custody or power and which "relate to matters in question in the action."[41] This goes to the *questions* in the action and not to the

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34. *See id.* O.24, r.16.

35. *See* Rockwell Machine Tool Co. v. E.P. Barrus (Concessionaires) Ltd., 2 All E.R. 98 (Ch. 1968).

36. Infabrics Ltd. v. Jaytex Ltd., 12 F.S.R. 75, 79 (Ch. 1985) (stating "[i]t is not enough simply to give instructions").

37. *See* Myers v. Elman, [1940] App. Cas. 282, 293-94, 300-01 & 322-23 (1939).

38. Woods v. Martins Bank Ltd., 1 Q.B. 55, 60 (1959) (emphasis added).

39. *See Myers*, [1940] App. Cas. at 300; R.S.C., 1995, O.24, r.16.

40. This requirement applies automatically, unless the parties have agreed between themselves, or an application has been made to court and an order made, to limit or dispense with discovery. *See* R.S.C., 1995, O.24, r.1.

41. R.S.C., 1995, O.24, rr.1-3 & 7 use slightly different terminology when referring to what material must relate for it to be discoverable. Thus, rule 1 (mutual discovery of documents) says "relating to matters in question in the action"; rule 2 (automatic discovery without court order) says "relating to any matter in question between them in the action"; rule 3 (court order for discovery) says "relating to any matter in question in the cause or matter"; and rule 7 (specific discovery) says "relates to one or more of the matters in question in the cause or matter." *Id.*

subject matter of the action. However, the net is wider than might first be supposed. Currently, four categories of document must be disclosed:[42] (1) the parties' *own documents* upon which they rely; (2) *adverse* documents of which a *party is aware* and which materially affect his own case or support another party's case; (3) other *background* documents, which are relevant, yet are not necessary for the fair disposal of the case; and (4) *train of inquiry* documents, which may lead to a train of inquiry enabling a party to advance his own case or damage his opponent's, of the type referred to in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.*[43]

On this test, the range of potentially relevant and thus discoverable documents is almost unlimited. The disclosing party has to review and list all such documents, while the other party has to read them. In all probability, only a very small number of those documents will ever be used in court to affect the outcome of the case. However, the test facilitates oppressive behavior. Many of the real and perceived problems of excessive discovery in English actions stem from this broad definition of what is discoverable, and in particular, the inclusion of documents which are indirectly relevant.

III. ABUSES OF DISCOVERY IN ENGLAND

> By tradition the conduct of civil litigation in England and Wales, as in other common law jurisdictions, is adversarial. . . . [T]he main responsibility for the initiation and conduct of proceedings rests with the parties. . . . The role of the judge is to adjudicate on issues selected by the parties when they choose to present them to the court.
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> Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to

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42. *See* FINAL REPORT, *supra* note 2, at 124.

43. 11 Q.B.D. 55, 63 (1882). The current test for relevance was established in *Compagnie Financiere*. It requires discovery of

> every document . . . which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party [applying for discovery] either to advance his own case or to damage the case of his adversary. . . . [A] document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have [one] of . . . two consequences."

Id. at 63. Note that this test does not limit the discoverable material to that which is admissible into evidence. *See id.* at 62.

> degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply.
>
> . . . There is no effective control of [the parties'] worst excesses. Indeed, the complexity of the present rules facilitates the use of adversarial tactics . . . .
>
> . . . [T]he rules are flouted on a vast scale.
>
> . . . [T]he main procedural tools for conducting litigation efficiently have each become subverted from their proper purpose.[44]

The Interim Report lists, very succinctly, the major ills in England's civil procedure, for example:

> *[P]leadings* often fail to state the facts as the rules require. This leads to . . . the failure to establish the issues in the case at a reasonably early stage . . . .
>
> *Witness statements*, a sensible innovation aimed at a "cards on the table" approach, have in a very short time begun to follow the same route as pleadings, with the draftsman's skill often used to obscure the original words of the witness.
>
> The scale of *discovery*, at least in the larger cases, *is completely out of control*. The principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency in terms of the usefulness of the information which is likely to be obtained from the documents disclosed.
>
> . . . [I]nstead of the *expert [witness]* assisting the court to resolve technical problems, delay is caused by the unreasonable insistence on going to unduly eminent members of the profession and evidence is undermined by the partisan pressure to which party experts are subjected.
>
> In the majority of cases the reasons for *delay* arise from a failure to progress the case efficiently, wasting time on peripheral issues or procedural skirmishing to wear down an opponent. . . . Excessive discovery and the use of experts in heavy demand both contribute to [this] delay.[45]

The critical condition of the system is such that Lord Woolf believes

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44. INTERIM REPORT, *supra* note 2, at 7-8.

45. *Id.* at 8, 13 (emphasis added).

> there is now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts. . . .
>
> A change of this nature will involve not only a change in the way cases are progressed within the system. It will require a radical change of culture for all concerned.[46]

With increased responsibility for management of cases, there will have to be an increased readiness to apply costs orders much more flexibly. The "automatic exercise of discretion" in favour of the successful litigant, regardless of his conduct throughout the litigation process, will have to cease. Judges will have to be more discriminating when applying costs orders so as to encourage a responsible and proportionate approach to litigation and to punish excessive and oppressive conduct aimed at wearing down an opponent. Thus, if Lord Woolf's recommendations are implemented, a discussion of which follows, "the landscape of civil litigation will be fundamentally different."[47]

VI. THE WOOLF PROPOSALS FOR REFORM

The bedrock on which all the reforms are set is that the civil justice system should enable the courts to deal with cases *justly*, according to the principles of:

- *equality* between the parties;
- *economy* in the use of resources;
- *proportionality* with regard to the amount at stake, importance of the case, complexity of issues and the parties' financial position;
- *expedition*; and
- the need to allocate court *resources* to other cases.[48]

Rule 1 of the Draft Civil Proceedings Rules imposes an obligation on the courts and the parties to further the overriding objective of dealing with cases justly, according to these principles.[49]

With the use of the principles, certain features will dominate: litigation will be less adversarial and more cooperative, less complex and more responsive to the needs of litigants, and the use of principles will encourage parties to avoid litigation wherever possible. Parties will be

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46. *Id.* at 18.

47. FINAL REPORT, *supra* note 2, at 4.

48. *See* DRAFT RULES, supra note 2, at 2.

49. *See id.*

required to "put their cards on the table" early in disputes, often before litigation is started.[50] Pleadings will be simplified and made to cast the facts clearly and succinctly, so as to facilitate early definition of the issues.

Responsibility for the management of cases will shift from the parties to the courts.[51] Although the adversarial system will remain, it will have been denuded and eroded. Case management looms large in the new landscape: it is central to Lord Woolf's recommendations and central to controlling the expense of litigation.[52] As discovery is often the largest single cost factor in litigation, both in terms of legal expenses and the diversion of management resources, exercising control over the process will be central to successfully reducing both the apparent and hidden costs of litigation.

Also, crucial to managing the new landscape is the control of costs and the use of costs orders in a flexible and much more imaginative way than has previously been known in England. Costs will be used more directly and more often as a means not only of sanctioning parties, but of influencing them in advance of a particular course of action. The new regime will be supported by effective sanctions, including orders for costs in a fixed sum payable immediately.

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50. *See id.* at 186-97; FINAL REPORT, *supra* note 2, at 112-15. For some time, there has been a provision for defendants to make formal offers to settle before a matter comes to trial. *See* R.S.C., 1995, O.22, r.1 (regarding payments into court and "Calderbank" letters, aimed at encouraging settlement). The rules are such that if the offer is not accepted, and at judgment its terms are not bettered, then the plaintiff is invariably penalized as to costs. Woolf proposes to make the rules more flexible. The ability to make an offer to settle will be extended to the plaintiff. Offers need not await the issue of proceedings: the rules will encourage either party to a dispute to make an offer before proceedings have been issued. To encourage the acceptance of reasonable offers, a party who fails to accept an offer which is not equalled or bettered at trial may face an award of enhanced costs and interest being charged against him. Unreasonable behavior will invite jeopardy. *See* DRAFT RULES, *supra* note 2, at 186-97.

51. *See* INTERIM REPORT, *supra* note 2, at 207.

52. Woolf describes the introduction of judicial case management as a crucial element of the new system. *See* FINAL REPORT, *supra* note 2, at 14. He has been significantly influenced by developments in the U.S., New Zealand and Canada. *See id.* The Commercial Court in England has used case management in, for example, the Lloyd's litigation. *See id.* The regime which Woolf aims to introduce will be more extensive than this and will affect all courts. *See id.*

A. Pleadings: A New Breed

Currently, pleadings "are often misused and frequently fail to serve their intended purpose."[53] Their basic function—to state succinctly the facts relied upon[54]—all too often disappears from view as parties obscure issues and deliberately obfuscate their opponents. Original pleadings are often superseded by amendments and further and better particulars. Courts routinely fail to police pleadings so as to encourage brevity and clarification of issues at an early stage. Consequently, as issues remain ill-defined, the scope of discovery remains unbounded.

Woolf proposes to restore to primacy the basic function of pleadings.[55] Clear and concise statements of facts will enable both the parties and the court to define the true issues at the heart of the dispute early on, with little or no need for further exchanges in the form of requests for further and better particulars, notices to admit, or interrogatories.[56] To this end, both the "claimant" and the defendant will be required to set out in a single document all the material matters on which they rely, including facts, remedies sought and a list of documents necessary to the case.[57]

Parties will be encouraged to produce a provisional list of issues in the matter and case conferences will be used to clarify factual allegations. If possible, an agreed statement of issues in dispute will be produced at the case management conference, which will supersede the pleadings. Should further uncertainty about issues arise, perhaps out of discovery, parties should cooperate and failing this, seek assistance from the court. Equally, if a party is faced with a request which he considers vexatious, for

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53. INTERIM REPORT, *supra* note 2, at 153.

54. *See* R.S.C., 1995, O.18, r.7.

55. *See* FINAL REPORT, *supra* note 2, at 105, 118.

56. *See* INTERIM REPORT, *supra* note 2, at 155-56.

57. Thus, the statement of claim will succinctly set out the nature of the claim, the facts relied upon and the remedy sought. *See* DRAFT RULES, *supra* note 2, r.7.4, at 33. It will also identify any document necessary to the plaintiff's case, and include a certificate of belief in the truth of the contents of the statement, made by the claimant or his legal representative. *See id.* r.7.6, at 35. Other optional matters may also be included, such as a specification of any matter of law relied upon, the identity of any witness he intends to call and short summary of the evidence such a witness will give. *See id.* r.7.9, at 36. The defendant's statement must list the allegations admitted, denied or doubted, accompanied by explanations for such dispute, and the defendant's own version of events, if they are different from that of the claimant. *See id.* rr.8, 9.5, at 40, 44. The defendant must say why he disputes the claimant's alleged right to a remedy and the claimant's assessment of value and damages. *See id.* r.9.5, at 44-45. It too must contain a certificate of belief in the contents. *See id.* r.9.7, at 44.

example an array of questions whose quantity suggests they are intended merely to be burdensome, or a failure to respond to a reasonable request for information, he can seek an order from the court dispensing with his need to deal with it.[58] In this way, issues will be clarified early in the proceedings, which will enable the parties and the court to deal with the matters, including discovery, expeditiously and with economically.

B. Case management

> Case management include[s] identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence. These are all judicial functions. They are extensions backwards in time of the role of the trial judge.[59]

Cases will be allocated to one of the three tracks: small claims, fast-track or multi track, depending on their value and complexity.[60] "Procedural judges"[61] will take over responsibility for the management of cases. Case management conferences will be commonplace, where issues and evidential matters will be dealt with, and schedules drawn up for the efficient and proportionate management of cases.[62]

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58. *See* INTERIM REPORT, *supra* note 2, at 156-57.

59. FINAL REPORT, *supra* note 2, at 18.

60. Small claims procedures will cover claims below £3000; the fast track is intended for claims within the monetary band of £3000 to £10,000, as well as non-monetary claims such as injunctions or orders for specific performance; the multi-track will be used for all other matters. *See id.* at 22; *see also* DRAFT RULES, *supra* note 2, at 118-26. Cases can subsequently be transferred to a different track. *See* FINAL REPORT, *supra* note 2, at 34. One of the issues which the court will be bound to consider on either occasion is the wishes of the parties. *See id.* at 33.

61. Of which Lord Woolf says: "the procedural judge is not a new type of judge. It is a function, not a title." FINAL REPORT, *supra* note 2, at 94.

62. *See id.* at 59. There will not, however, be a single judge assigned to each case. There will be no "single docket" system, which at least ensures maximum continuity. Concerned that effecting this would be impossible without reducing flexibility in deployment of judges, Woolf recommends that judges work in teams, perhaps with a "procedural judge." *See id.* at 94.

C. *Discovery*

1. Disclosure of documents

The bounds of discovery in each case should be made more readily discernible by the early definition of issues. The general scope of documentary discovery, both in terms of what may be sought and what must be disclosed, will be curtailed by new rules.

Of the four categories of document that currently have to be disclosed, only documents relied upon or those of which a party is aware and are materially adverse will be automatically available under "standard disclosure" in the future. Material which falls into the "background story" and "train of inquiry" categories will have to be sought by court order—by way of "extra" or "specific" disclosure. When considering whether to make an order for specific disclosure, the court must decide whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.[63] It must have regard (a) to the likely benefit of specific disclosure; (b) to the likely cost of specific disclosure; and (c) to whether the financial resources of the party against whom the order would be made are likely to be sufficient to enable the party to comply with any such order.[64] It is important to note that the obligation to make standard disclosure will remain continuous during proceedings.[65]

2. Pre-Action Discovery

Woolf proposes to extend pre-action disclosure of documents by prospective parties to all cases whereas it is currently available only in personal injury and death actions.[66] However, it will not be automatic—application will have to be made to the court.[67] Even then, it will be limited to specified documents which can be shown to be in the hands of the respondent, who must likely be the defendant in prospective proceedings.[68] Furthermore, the applicant must show that the documents sought are relevant to a potential claim.[69] In determining this question, the court will apply the same rigorous cost-benefit tests as in normal post-

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63. *See* DRAFT RULES, *supra* note 2, r.27.14, at 143.

64. *See id.*

65. *See* DRAFT RULES, *supra* note 2, r.27.12, at 142.

66. *See* FINAL REPORT, *supra* note 2, at 127.

67. *See id.*

68. *See id.*

69. *See id.*

issue applications for specific disclosure.[70] As for pre-action discovery against a stranger or third party, this will be available only in personal injury and death-related claims.[71]

3. Witness Statements

To deal with the "overlawyering" of witness statements engendered by fear that witnesses will be permitted neither to depart from, nor supplement, the text, Woolf proposes to allow reasonable flexibility in amplifying witness statements.[72] If this fails to restrain lawyers from "gilding the lily" and "grossly overdone drafting," wasted costs orders are likely and the lawyer will pay. It will be required that statements are in the witness's own words, stated as such, and signed.[73]

4. Costs & Sanctions[74]

In his interim report, Lord Woolf referred to the problems faced by the opponents of litigants funded by Legal Aid.[75] In such cases, there is a virtual inability of the successful but unassisted party to recover costs from a legally aided party. The usual rules of "costs transfer," or costs following the event, do not apply.[76] However, he notes that greater liability to costs orders could result in the Legal Aid Board being more discriminating as to how its funds are used (for example, when there is an offer of settlement).[77] There is nothing to suppose that the principle of greater exposure to costs orders leading to a more discriminating approach in conducting litigation is applicable only to English legally aided persons. The authors would suggest that it is universally applicable. After all, it is merely a process to make litigants accept responsibility for their actions. But this basic social requirement seems to have been lost somewhere in

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70. *See id.*

71. *See id.* at 128.

72. *See id.* at 129.

73. *See id.* at 130. With the Civil Evidence Act of 1995 coming into effect on January 31, 1997, hearsay evidence has become admissible, and thus witness statements are able to refer to matters not within the direct knowledge or observation of a witness. However, the source of knowledge, information or belief upon which the witness relies should be identified.

74. *See id.* at 72-90; DRAFT RULES, *supra* note 2, r.5.2, at 19.

75. *See* INTERIM REPORT, *supra* note 2, at 205.

76. *See id.* There is a very limited power to make a costs order against a legally aided litigant. *See* Legal Aid Act, 1988, § 17 (Eng.).

77. *See* INTERIM REPORT, *supra* note 2, at 205.

the development of the English civil justice system. In administering civil justice, the English courts have largely chosen to ignore this simple principle. Wrapped up in obtaining the correct legal answer and providing a remedy for legal wrongs, the courts have ignored procedural irresponsibility encountered along the way, and injustice and unfairness has been allowed to take root.

It is time that this oversight was remedied, and it is hoped that the Woolf reforms will facilitate this. The recommendations are certainly intended to:

> Costs are also of great importance to my Inquiry because the ability of the court to make orders as to costs is the most significant and regularly used sanction available. The court's power to make appropriate orders as to costs can deter litigants from behaving improperly or unreasonably and encourages them to behave responsibly. Cost orders can also have a salutary effect on members of the legal profession.
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> . . . Costs are central to the changes I wish to bring about.[78]

Ironically, although Woolf sees costs as "the most serious problem besetting our litigation system,"[79] he also sees costs as central to solving its problems: they afford a means of controlling the excesses of parties battling in an adversarial system. To this end, Lord Woolf recommends a departure from the dual concepts to which English courts are wedded: that costs should be treated as a whole and should follow the event.[80] Instead, attention should be paid to the manner in which the successful party has conducted the proceedings and the outcome of individual issues. Attention should be given to identifying areas where costs have been incurred unnecessarily and to excess.[81] Judges must be prepared to scrutinize the parties' conduct, adopt greater flexibility and make more detailed orders than they are currently accustomed to do.[82] In short, they must abandon the clumsy, blunt instrument of the old rules, and take up a much finer, sharper and incisive tool—a tool which parties cannot ignore, which they will respect as having an immediate effect upon their pockets.

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78. FINAL REPORT, *supra* note 2, at 78.

79. INTERIM REPORT, *supra* note 2, at 199.

80. *See* FINAL REPORT, *supra* note 2, at 79 (this is otherwise commonly referred to as the English Rule).

81. *See id.*

82. *See id.* at 83-84.

As of yet, Draft Rules on costs have not been published. However, what is clear from the approach taken in the Final Report, is that judges will be afforded the widest possible discretion as to costs in order to encourage the conduct of litigation in a proportionate manner and to discourage excess. Where one of the parties is unable to afford a particular procedure, the court, if it decides that the procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome. "The court should be able to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case."[83] "The court may make a wasted costs order; it may assess costs or direct them to be taxed and may order them to be *paid immediately*; [or it might] order *interim costs* of an amount fixed by the court *to be paid within a specified time.*"[84]

V. CONCLUSION

In a speech delivered between the publication of the Interim Report and this Final Report, Lord Woolf said:

> In a situation where a streamline procedure is possible but that procedure is only acceptable to one side and the other side has good reason for recommending a more complex process, then the court should be able to direct the complex procedure *on condition that the more powerful litigant pays the additional costs of both sides in any event. In this way the litigant with limited means will not be exposed to excessive costs which he cannot afford and the other party will have every incentive to keep the costs as low as possible.*[85]

The reference to the "powerful litigant" and "the litigant of limited means" must be read in the light of one of the major problems in English civil courts: the powerful corporation using its greater resources to overwhelm the "small man," the individual litigant of much smaller means. It is the U.S. problem turned on its head, and it exists because most people in England do not have recourse to funding for litigation. The average English citizen does not have access to private capital or public subsidy to fund his fight. He has nothing approaching the credit

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83. *Id.* at 89.

84. DRAFT RULES, *supra* note 2, r.5.2, at 19 (emphasis added).

85. Lord Woolf, The Child & Co. Lecture: The Future of Civil Justice 8 (Feb. 19, 1996) (emphasis added) (on file with the *New York Law School Law Review*).

provided for litigation by lawyers working on a contingency fee basis. With no funds, he is weak in the face of the corporation whose resources are undoubtedly greater and legal expenses tax deductible. The English problem is the abuse of power—that is the exercise of power without corresponding responsibility—by the "big guns."

The exercise of power with responsibility can be encouraged, and irresponsibility sanctioned, by attaching a price to the exercise of power. If the litigant with more muscle wants to seek more extensive discovery than seems warranted, then he should be allowed to do so on condition that he pays for the privilege at the time he puts his opponent to the trouble. If it transpires that the exercise was justified, then the costs order can be reversed. In this way, the parties' autonomy remains intact while judges cannot be accused of unfairly limiting a party's investigations on a superficial understanding of the case. With the right to litigate comes a responsibility for the manner in which the litigation is conducted. The effective use of costs orders, applied judiciously and early enough, should act as a brake on the activities of the more powerful litigant. Having to pay will generate a pause for thought, for reflection and evaluation of whether the steps proposed are necessary and consistent with the just, expeditious, economical and proportionate disposal of the case. By doing so, the problems associated with automatic costs transfer—the encouragement of disproportionate and abusive behavior and the inhibition of participation in the legal process—might be avoided.

The distribution of power between respective types of litigants may be different in the U.S., but the same principles can be used to control abuse of that power: it does not matter in whose hands it rests. The systems of civil justice in the U.S. and in England have much in common. There are differences, from which lessons can be learned on either side of the Atlantic. As England learns from the U.S. and borrows case management, perhaps in return a recommendation might be ventured. The English Rule on costs transfer is not to be commended. Its very rigidity encourages abuse and discourages citizens and corporations from exercising and protecting their rights. A system of costs transfer which takes account of the outcome of individual issues in a case and the conduct of the parties during the litigation process has much more to be said for it as a tool for serving justice.