ENGLISH CIVIL JUSTICE AND REMEDIES: PROGRESS AND CHALLENGES

NAGOYA LECTURES

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To the Memory of Professor Kurt Lipstein, QC, LL D, Bencher of Middle Temple

And for Elizabeth, Hannah, Ruby, and Sam

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PART I: ASPECTS OF COURT LITIGATION

CHAPTER 2

MODERN ENGLISH CIVIL PROCEEDINGS: PROGRESS AND CHALLENGES[1]

Contents

1. *Introduction*

2-01 This chapter provides an overview of litigation under the Civil Procedure Rules (the 'CPR').[2] We begin, in Section 2 of this chapter, with a brief description of the English system of courts, lawyers, and its general legal methods. Sections 3 to 6 of the chapter explain

[1] Civil Procedure Rules (1998): accessible at: http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm (the rules are collected in the *Civil Procedure Handbook* (Oxford UP, 2006) (complied by V Williams). Other literature: Lord Woolf *Access to Justice: Interim Report* (Stationery Office, London, 1995) and *Access to Justice: Final Report* (Stationery Office, London, 1996); *Blackstone's Civil Practice* (2006, Oxford UP); *Civil Procedure* ('the White Book') (regular new editions); *Civil Court Practice* ('the Green Book') (regular new editions); Neil Andrews, *English Civil Procedure* (Oxford UP, 2003); R Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford UP, 2006), esp ch 5, *Halsbury's Laws of England* (4th edn, 2001 re-issue), *Practice and Procedure*, vol 37, (by Master John Leslie, QBD); Sir Jack Jacob, *The Fabric of English Civil Justice* (1987) (a classic distillation of the pre-CPR (1998) system, its traditions and values, presented as the Hamlyn Lectures for 1986); JA Jolowicz, *On Civil Procedure* (Cambridge UP, 2000) (including comparative themes); S Burn and J Peysner (eds), *Law Society's Civil Litigation Handbook* (2nd edn, Law Society, London, 2007); J O'Hare and D Browne *Civil Litigation* (12th edn, 2005); S Sime *A Practical Approach to Civil Procedure* (9th edn, Oxford UP, 2006); AAS Zuckerman and Ross Cranston (eds), *The Reform of Civil Procedure* (Oxford UP, 1995); *Zuckerman on Civil Procedure* (2006); AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford UP, 1999); *Zuckerman on Civil Procedure* (2nd edn, 2006).

[2] *Note on Abbreviations*: 'CPR' (Civil Procedure Rules, effective from 26 April, 1999, enacted SI 1998/3132, but with many later amendments); 'PD' eg PD (3) 4.1 (Practice Directions appended to the Civil Procedure Rules; the relevant 'Part' of those rules is given in round brackets and the relevant paragraph is then indicated).

fundamental aspects of the system of civil procedure and evidence. Section 7 notes various challenges facing English civil procedure.

2. *General Features of English Law, the Court System and Lawyers*

2-02 This short statement is intended to delineate the essential features of this system. There is a very useful description of the court system in each year's issue of *Judicial Statistics*[3] and in specialist works.[4]

2-03 *Civil Courts*

The two courts of first instance in civil matters are the county courts and High Court.[5] The Court of Appeal hears appeals from judgments made by High Court judges. Final appeal to the House of Lords occurs in relatively few actions each year. Small claims and actions for moderate amounts must be commenced in the county courts. These are located in many cities and towns.[6] Actions for larger sums proceed to the High Court which sits in the main provincial cities and in London.

There is no longer a right to appeal from a first instance decision. Instead, permission to appeal must be obtained from the first instance court or from the relevant appellate court.[7] In this way, appeals are controlled.

2-04 *Civil Judges*

The Department for Constitutional Affairs has overall responsibility for the administration of justice in civil and criminal matters.[8] Judges sitting in the county court are known as 'district judges' or 'circuit judges'. The High Court is composed of three 'divisions': the Chancery Division, Family Division, and the Queen's Bench Division. High Court judges are decorated as 'knights' or 'Dames', for example, Sir Gavin Lightman and Dame Mary Arden (now a Lady Justice of Appeal). There are separate parts of the Chancery and Queen's Bench Division. For example, the Commercial Court (on which see chapter

[3] The latest issue is referred to in this note: http://www.direct.gov.uk/en/Gtgl1/GuideToGovernment/Judiciary/DG_4003285.

[4] Full accounts: C Elliott and F Quinn, *English Legal System* (7th edn, 2006); G Slapper and D Kelly, *The English Legal System* (8th edn, 2006).

[5] http://www.hmcourts-service.gov.uk/ and http://www.direct.gov.uk/en/Gtgl1/GuideToGovernment/Judiciary/DG_4003285.

[6] http://www.hmcourts-service.gov.uk/HMCSCourtFinder/

[7] CPR 52.3(1): except decisions affecting a person's liberty, namely appeals against committal orders, refusals to grant *habeas corpus* and secure accommodation orders made under s 25, Children Act 1989.

[8] http://www.dca.gov.uk/

3) is part of the Queen's Bench Division and the Patents Court is part of the Chancery Division.

Judges are appointed from the ranks of practising solicitors or barristers.[9] Traditionally, High Court judges have been former barristers.[10] A lawyer can be appointed to become an English judge only after gaining extensive experience of practice as a solicitor or barrister.

2-05 *English Lawyers: Solicitors and Barristers*

Practising lawyers in England and Wales are either solicitors or barristers. At the time of writing, there are important proposals before Parliament concerning the re-organisation of legal practices.[11]

Solicitors are enrolled as members of the Law Society for England and Wales.[12] Barristers are members of one of the four Inns of Court. These are ancient societies located near the courts in central London. The fours Inns are: Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn. The Bar Council administers the Bar.[13] It is the regulatory and representative body for barristers in England and Wales. Thus it deals with complaints against barristers.

English lawyers must hold a university degree, not necessarily in law. If a person wishes to qualify as a solicitor, it is necessary to obtain a degree and to pass examinations in the following 'Foundation Subjects': Constitutional and Administrative Law, Contract Law, Criminal Law, Land Law, Tort Law, Trusts and Equity, and European

[9] http://www.judiciary.gov.uk/about_judiciary/index.htm.
An important comparative study of various systems of judges is J Bell, *Judiciaries within Europe: a Comparative Review* (Cambridge UP, 2006) (examining England, France, Germany, Spain, Sweden); see also European Judicial Systems (2006 edition) by the European Commission for the Efficiency of Justice (CEPEJ):
www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf

[10] The highest promotion, thus far, of a former solicitor is Sir Lawrence Collins, a celebrated legal author, and now a member of the Court of Appeal.

[11] For comment on the 'Legal Services Bill', (for reference to this Bill, see end of this note), K Underwood 'The Legal Services Bill-Death by Regulation?' (2007) 26 CJQ 124: he comments 'we are under one year away from the effective abolition of the legal profession in England and Wales'; Underwood adds, 'thus supermarket law becomes not just a reality, but a certainty. A business with hundreds of outlets and tens of thousands of staff will be a law firm and, if they so choose, can employ just one lawyer to be known as "Head of Legal Practice".' The text of the Bill, which is being debated in Parliament in early 2007, is available at: http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm.

[12] http://www.lawsociety.org.uk/home.law.

[13] http://www.barcouncil.org.uk/.

Union Law. These subjects form part of a recognised law degree. In the case of a non-law graduate, these seven subjects can be taken as a post-graduate course at certain recognised institutions. Qualification as a solicitor requires two more years under a 'training contract' (formerly known as 'articles'). Qualification as a barrister is subject to the same requirements just mentioned except, in lieu of a two year 'training contract', a pupil barrister must serve a year of 'pupillage' in Chambers (or under the Government lawyers' scheme). This year involves supervision by one or more barristers.

Most advocates appearing before the High Court, the Court of Appeal, or House of Lords, are barristers. But it is possible for a solicitor to gain a special right of audience in these superior courts. He can then call himself a 'solicitor-advocate'.

2-06 Barristers are normally not consulted directly by a client. Instead the general arrangement is that a barrister will be brought into a case following a request to his or her Chambers by a solicitor (known as the 'instructing solicitor'). For example, in important litigation before the Commercial Court (on which see chapter 3), the client will have a direct contractual relationship with a firm of solicitors. The solicitor agrees a fee for the barrister's services. This will be paid from monies supplied by the client. The barrister owes a duty of care and other professional responsibilities to the client. Conduct of hearings, including trial and appeal, will be by a barrister, or sometimes one or more junior barristers led by Queen's Counsel ('QC'). A QC is a senior barrister of proven distinction. The Department of Constitutional Affairs administers the system of promoting barristers to become a QC (a process known as 'taking silk').[14] Barristers also assist in the case's preparation for trial, and provide advice on points of evidence, law, and general tactics.

2-07 *Statutory Rules*

English law is now heavily influenced by statutes. These include secondary legislation (especially, 'statutory instruments'). European 'Regulations' have the force of primary legislation.[15]

[14] 'Silk' being the superior material of a QC's court-room gown.

[15] eg, the (revised) 'Brussels Convention': Council Regulation 44/2001 of 22 December 2001 on 'jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'.

2-08 *Precedent Decisions*[16]

'The common law' is an expression often used to denote the body of case law precedents. Some parts of English law rest largely on precedent decisions. For example, many contractual doctrines are wholly the product of the precedent system (see further chapters 9 to 11 on aspects of contract law). Judicial interpretation of statutory rules (by the High Court or superior appellate courts) can also furnish binding law.

Only the High Court and higher appellate courts (the Court of Appeal, House of Lords, and the Privy Council) have power to establish such precedents.[17] There is a hierarchy of precedents within that pyramid of courts. Thus decisions of the House of Lords are binding on all lower courts, including the Court of Appeal. Decisions of the Court of Appeal bind the High Court and lower courts. A Court of Appeal decision is also binding on the Court of Appeal itself. Certain exceptions exist to this last proposition. A decision of the High Court is neither binding on the Court of Appeal nor on the House of Lords, but it is binding on the county courts.

However, long-standing precedents at any level within this hierarchy can acquire considerable force if they express fundamental principle. For these reasons, the system of precedent remains a corner-stone of English law.

3. *Sources of English Civil Procedure*[18]

2-09 The main sources of civil procedure are: statutory instruments (notably the Civil Procedure Rules[19]); practice directions; judicial decisions; official 'Guides' to practice; and juristic writing.[20] These will now be explained.

Secondary Legislation and Civil Procedure Rules

[16] The leading English study is R Cross and J Harris, *Precedent in English Law* (4th edn, 1991, Clarendon Press: Oxford).
[17] For details of these courts, C Elliott and F Quinn, *English Legal System* (7th edn, 2006); G Slapper and D Kelly, *The English Legal System* (8th edn, 2006), and *Judicial Statistics*: http://www.direct.gov.uk/en/Gtgl1/GuideToGovernment/Judiciary/DG_4003285.
[18] Detailed account: Neil Andrews, *English Civil Procedure* (Oxford UP, 2003), paras 1.01 to 1.38.
[19] SI 1998/3132, with subsequent amendments (enacted under the parent statute, Civil Procedure Act 1997).
[20] Jacob, *The Fabric of English Civil Justice* (1987) 50 ff.

2-10 The CPR is by far the largest source of procedural rules. Until April 1999 there were two sets of rules, the RSC dealing with matters in the High Court and Court of Appeal and the CCR for county court litigation.[21] But since 26 April 1999 there is a unified set of rules applicable to both the High Court and county courts, as well as the Court of Appeal.[22] These rules have been drafted by the Rule Committee, which replaced the former separate rules committees responsible for the RSC and CCR.[23]

Practice Directions

2-11 The Heads of Divisions of the High Court have an inherent power to issue practice directions governing matters of procedure. This power is now recognised and, to an extent, regulated by legislation.[24]

Judicial Decisions: English and European Case Law

2-12 This source of procedural law concerns the case law of the High Court and higher appellate courts.[25] Judges in these courts apply the procedural rules authoritatively and develop new principles or doctrines. Many decisions have provided guidance or commentary upon the CPR (1998).[26] The creativity of these courts must be admired.[27]

European case law is also important especially concerning Article 6(1) of the European Convention on Human Rights.[28] Article 6(1) creates five (sets of) guarantees:

[21] On the history of the RSC, M Dockray (1997) 113 LQR 120, 123-124, notably nn 32-33.
[22] CPR 2.1 defines the scope of the new rules.
[23] ss 2-4 Civil Procedure Act 1997, the full title of the committee is the Civil Procedure Rule Committee.
[24] s 5 Civil Procedure Act 1997; the Practice Directions are also accessible at http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm.
[25] Jacob, *The Fabric of English Justice* (1987), 57 ff.
[26] Case law illuminating the new process includes: *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 1 WLR 2571, 2576-7, CA, (court taking preliminary); *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926, CA (range of court's disciplinary powers); *Securum Finance Ltd v Ashton* [2001] Ch 291, CA (delay; court's power to terminate litigation); *Daniels v Walker* [2000] 1 WLR 1382 CA (discussion of single, joint experts).
[27] For an appreciation of eight fundamental judicial innovations in civil procedure, N Andrews 'Development in English Civil Procedure' (1997) ZZPInt 2, at pp 7 ff.
[28] There are two European courts: the European Court of Justice (Luxembourg), especially concerning the Brussels Jurisdiction Regulation; and the European Court of Human Rights (Strasbourg), especially concerning Article 6(1) of the European Convention on Human Rights (1953) (Cmd 8969) and Sch 1 to the Human Rights Act 1998); for textbook analysis of Article 6(1), L Mulcahy, *Human Rights and Civil Practice* (2001), chaps 10-12; R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford UP, 2000), 2 vols; and 2001 supplement), ch 11; S Grocz, J Beatson and P Duffy, *Human Rights: The 1998 Act and the European Convention* (2000), paras C 6-01 ff; A Lester and D Pannick, *Human Rights Law and Practice* (1999) at section 4.6; A Le Sueur, 'Access to Justice in the United Kingdom' [2000] EHRLR 457; on the Convention's historical background, Brian Simpson,

(i) access to justice (a right which although not explicitly stated in the text of Article 6(1) has been implied by the European Court of Human Rights);[29]

(ii) 'a fair hearing'; this includes:[30]

the right to be present at an adversarial hearing;
the right to equality of arms;
the right to fair presentation of the evidence;
the right to cross examine;
the right to a reasoned judgment;

(iii) 'a public hearing'; this includes public pronouncement of judgment;

(iv) 'a hearing within a reasonable time'; and

(v) 'a hearing before an independent and impartial tribunal established by law'.

Official Guides to Practice

2-13 The reader is referred to: the Chancery Guide, Admiralty and Commercial Court Guide (substantially discussed in chapter 3 of this book), and the Queen's Bench Division Guide.[31]

Learned Treatises and Comment

2-14 Specialist learned works enjoy 'persuasive' authority.[32]

Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford UP, 2001); for a review of Art 6(1), *Brown v Stott* [2003] 1 AC 681, PC, especially Lords Bingham and Steyn.

[29] *Golder v UK* (1975) 1 EHRR 524, ECtHR, para 35.

[30] R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford UP, 2000), para 11.201.

[31] These are accessible at http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm.

[32] eg *Cross and Tapper on Evidence* (10th edn, 2004); the various writings of Sir Lawrence Collins, QC, LL D, now a Lord Justice of Appeal, (*per* Bingham LJ *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, 103, CA, a 'very considerable authority'), notably *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006); C Hollander *Documentary Evidence* (9th edn, 2006); Spencer Bower, Turner and Handley, *Res Judicata*, (3rd edn, 1996); *Arlidge, Eady and Smith on Contempt* (3rd edn, 2005).

4. *Pillars of the Civil Procedure Rules 1998 ('CPR (1998)')*[33]

2-15 *Innovation under the CPR*

The CPR (1998) is a new procedural code.[34] It took effect on 26 April 1999. In Lord Woolf's two reports in 1995 and 1996, he identified five aims: (1) to speed up civil justice, (2) to render civil procedure more accessible to ordinary people, (3) to simplify the language of civil procedure, (4) to promote swift settlement, (5) to make litigation more efficient and less costly by avoiding excessive and disproportionate resort to procedural devices.[35]

The main change introduced by the 1998 code was to confer extensive managerial powers upon the courts.[36] Other recent changes are:[37]

(i) tripartite re-structuring of first instance jurisdiction into small claims, fast-track and multi-track litigation;

(ii) consolidation of the conditional fee agreement system (see **2-46** below);

(iii) the rise of pre-action protocols (see **2-19** below);

(iv) permitting settlement ('Part 36') offers to be made not just by defendants but also by claimants and potential claimants (see **6-24** ff);

[33] Detailed account: N Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 2.

[34] So described in CPR 1.1(1).

[35] Lord Woolf, *Access to Justice, Interim Report* (Stationery Office, London, 1995) and *Access to Justice, Final Report* (Stationery Office, London); both available on-line: http://www.dca.gov.uk/civil/reportfr.htm. Responses to these reports: S Flanders 'Case Management: Failure in America? Success in England and Wales?' (1998) 17 CJQ 308; M Zander, 'The Government's Plans on Civil Justice' (1998) 61 MLR 383-389 and 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor?' (1997) 16 CJQ 208; AAS Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford UP, 1995) (essays by various authors); AAS Zuckerman, 'The Woolf Report on Access to Justice', ZZPInt 2 (1997), 31 ff.

[36] CPR 1.4(2), 3.1, and see text below; and see for greater detail the chapter on Case Management and the Commercial Court.

[37] N Andrews, *English Civil Procedure* (Oxford UP, 2003), generally, on these developments; see also *Zuckerman on Civil Procedure* (2006).

(v) introduction of 'single joint experts' (on which see chapter 4 of this book);

(vi) the capacity of a defendant to seek summary judgment against the claimant;[38]

(vii) introduction of a general power to seek pre-action disclosure of documents;

(viii) introduction of a general power during proceedings to seek disclosure of documents from non-parties.

2-16 *Case Management under the CPR*[39]

Case management in the Commercial Court is examined in detail in chapter 3.

Until the enactment of the CPR, English procedure was premised on the so-called 'adversarial principle', or the 'principle of party control'. According to this principle, the parties and their lawyers controlled pre-trial progress of the litigation. Since the CPR, however, the parties have much less scope to control the case's development because the courts have been granted extensive 'case management' powers and duties. Lord Woolf commented on these powers as follows:

> '...judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances...When judges seek to do that, it is important that the [Court of Appeal] should not interfere unless judges can be shown to have exercised their powers in some way which contravenes the relevant principles.'[40]

The CPR contains two lists of managerial responsibilities which mostly overlap and reinforce each other, and which are not intended to be exhaustive statements of the court's new active role.[41] Judges have the

[38] CPR Part 24.
[39] On the new system from the perspective of the traditional adversarial principle, N Andrews 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone"' (2000) 19 Civil Justice Quarterly 19-38; Neil Andrews *English Civil Procedure* (Oxford UP, 2003), 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.72.
[40] *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, 1934 F, CA, *per* Lord Woolf MR.
[41] CPR 1.4(2) setting out a dozen forms of 'active case management'; CPR 3.1(2) presenting 13 forms of 'general management' see also the general provisions relating to case management: CPR Parts 26 (general), 28 (fast-track), 29 (multi-track) and parallel PD (26), (28), (29).

following managerial responsibilities (which the author has bundled under separate headings):

(i) *co-operation and settlement* (on this theme, see chapter 6 on settlement and mediation):

encouraging co-operation between the parties;[42]
helping parties to settle all or part of the case;[43]
encouraging ADR (alternative dispute resolution);[44]
if necessary, staying the action (ie, placing it 'on pause') to enable such extra-curial negotiations or discussions to be pursued;[45]

(ii) *determining relevance and priorities*

helping to identify the issues in the case;[46]
deciding the order in which the issues are to be resolved;[47]
deciding which issues need a full trial and which can be dealt with summarily;[48]

(iii) *making summary decisions*

deciding whether to initiate a summary hearing (under CPR Part 24);[49] or
whether the claim or defence can be struck out as having no prospect of success;[50] or
whether to dispose of a case on a preliminary issue;[51]
excluding issues from consideration;[52]

[42] CPR 1.4(2)(a).
[43] CPR 1.4(2)(f); this settlement responsibility is a controversial but salutary power. Its absence was regretted in the past, eg on the facts in *Jones v Padavatton* [1969] 2 All ER 616, 624 B, CA (mother and daughter in dispute over length of daughter's stay in mother's second home).
[44] CPR 1.4(2)(e).
[45] CPR 3.1(2)(f).
[46] CPR 1.4(2)(a).
[47] CPR 1.4(2)(d); 3.1(2)(j).
[48] CPR 1.4(2)(c).
[49] This facet of case management is highlighted at PD (26) paras 5.1, 5.2.
[50] CPR 3.4(2).
[51] CPR 3.1(2)(l).
[52] CPR 3.1(2)(k).

(iv) *maintaining impetus*

> fixing time-tables and controlling in other ways the progress of the case;[53]
> giving directions which will bring the case to trial as quickly and efficiently as possible;[54]

(v) *regulating expenditure*

> deciding whether a proposed step in the action is cost-effective, taking into account the size of the claim and other considerations ('proportionality').[55]

The three main sanctions for breach of a procedural requirement are: costs orders;[56] stay of the proceedings;[57] striking out part or all of the claim or defence.[58] Breach of a judicial order or injunction can involve contempt of court, for example a freezing injunction.[59]

2-17 *Wresting Control of the Case's Progress from Parties and Lawyers*

A fundamental change is that the parties can no longer relax mandatory procedural time rules or orders, notably the rules or directions governing the progress and timetabling of the action.[60]

5. *Stages in a Case's Development*

2-18 *Evidence Gathering*

The parties remain in charge of selecting relevant information to be submitted as witness testimony or documentary evidence. The parties also select the particular expert(s) for the case (on the system of experts, see chapters 4 and 5). The common law system of civil litigation is based on the assumption that the parties will present rival

[53] CPR 1.4(2)(g).
[54] CPR 1.4(2)(l).
[55] CPR 1.4(2)(h) and 1.1(2)(c).
[56] CPR 3.8(2).
[57] CPR 3.1(2)(f).
[58] CPR 3.4(2)(c).
[59] Generally on protective and provisional relief, see N Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 17; the leading discussion is S Gee, *Commercial Injunctions* (2004); see also *Zuckerman on Civil Procedure* (2006) ch 14; IS Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (International Edition, 2005).
[60] CPR 3.8(3); cf non-mandatory time provisions, CPR 2.11.

versions of relevant interest; that this material will be considered by an impartial court; and that the court will then determine which party should win.

Under the CPR system, the court retains this 'responsive' and 'reactive' role. But the modern civil judge is required to control the proceedings in the interests of efficiency and fairness. This means that the court must guard against three dangers: that the case should not become unduly prolonged; nor unreasonably complicated; nor unfairly tilted in favour of a stronger party (this last aim is known as the 'equality of arms' principle or 'procedural equality').

Both the systems of pre-*action* disclosure and pre-*trial* disclosure are intended to enable each side of the contest to gain access to relevant information which might otherwise be known only to one side. Reciprocal disclosure achieves equality of access to information. It also facilitates better settlement of disputes (on which see chapter 6). Pre-trial disclosure also avoids so-called 'trial by ambush', that is, the situation when a party is unable to respond properly to a surprise revelation at the final hearing.

2-19 *Pre-Action Protocols*

The CPR (1998) system introduced an important set of 'pre-action protocols'. The protocols create a framework of responsibilities which the prospective parties and their legal representatives must satisfy before commencing formal proceedings. One of the aims of this system is that each side should know the strengths and weaknesses of his opponent's case. It is also hoped that settlement will be promoted by efficient exchange of information (generally on settlement, see chapter 6).[61] For example, a person who alleges that he was the victim

[61] In *Carlson v Townsend* [2001] 3 All ER 663, CA, at [24], [28], [31], Brooke LJ praised this innovation:

> '...introduction of pre-action protocols...represents a major step forward in the administration of justice...Under the [pre-CPR system], in many disputed cases of any substance nothing very effective seemed to happen until a [case began]...[These protocols] are guides to good litigation and pre-litigation practice, drafted and agreed by those who know all about the difference between good and bad practice.'

Judge LJ said in *Ford v GKR Construction Ltd* [2000] 1 WLR 802, 807, CA:

> 'Civil litigation is now developing a system designed to enable the parties involved to know where they stand in reality at the earliest possible stage, and at the lowest practicable cost, so that they may make informed decisions about their prospects and the sensible conduct of their cases.'

of medical negligence can gain access to hospital or medical records under this system of pre-action protocols.
In 2007 these protocols applied to the following topics:

(i) 'Construction and Engineering Disputes';
(ii) 'Defamation';
(iii) 'Personal Injury Claims';
(iv) 'Resolution of Clinical Disputes';
(v) 'Professional Negligence';
(vi) 'Judicial Review';
(vii) 'Disease and Illness Claims';
(viii) 'Housing Disrepair Cases'; and
(ix) 'Possession Claims based on Rent Arrears'.[62]

The 'Practice Direction on Protocols' states:[63]

> 'In all cases not covered by any approved protocol, the court will expect the parties...to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.'

If the dispute does proceed to a formal action, the court has power to sanction a person's failure to comply by making an appropriate costs order.

2-20 *Pre-Action Judicial Orders*

There is now power to order this type of disclosure against any type of prospective defendant.[64] However, in *Black v Sumitomo Corporation*

[62] A new version of the 'Construction and Building Disputes' protocol was issued in April 2007: see http://www.dca.gov.uk/civil/procrules_fin/index.htm.
[63] 'Practice Direction on Protocols' at para 4.1.
[64] CPR 31.16 (3) states:

(3) The court may make an order under this rule only where-

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to--
(i) dispose fairly of the anticipated proceedings;

(2002) the Court of Appeal refused to open the door to roving and 'deep-sea fishing' expeditions in commercial contexts.[65]

Specific rules provide that property, for example factory equipment, can be preserved for inspection.[66]

2-21 *Pre-Action 'Surprise' Orders for Preserving Potential Evidence*

A civil search order is available to prevent a prospective defendant from destroying vital evidence. This is the former *Anton Piller* order (so-named after the original decision).[67] It was re-named as a 'civil search order' in the CPR (1998).[68] This type of order has now been placed on a statutory basis.[69] The most common context concerns a prospective defendant suspected of having infringed the applicant's intellectual property rights.

2-22 *Pre-Action Disclosure and Non-parties*

(ii) assist the dispute to be resolved without proceedings; or
(iii) save costs.

[65] [2002] 1 WLR 1562, CA; see N Andrews, *English Civil Procedure* (Oxford UP, 2003), 26.70 for details of this important decision.
[66] s 33, Supreme Court Act 1981 provides:

On the application of any person..., the ...Court shall...have power to make an order providing for any one or more of the following matters...(a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject-matter of subsequent proceedings in the...Court, or as to which any question may arise in such proceedings and (b) the taking of samples of any such property as is mentioned in paragraph (a), and the carrying out of any experiment on or with any such property.

For this purpose, 'property' is defined by s 35(5), ibid, to include *'any land, chattel or other corporeal property of any description'*.

CPR 25.1(1)(i) acknowledges that either a county court or the High Court can make such an order.

[67] [1976] Ch 55, CA.
[68] Re-named as such, CPR 25.1(1)(h); the standard order is prescribed by PD (25); the leading discussion is S Gee, *Commercial Injunctions* (2004); see also N Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 17; *Zuckerman on Civil Procedure* (2006) 14.175 ff; IS Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (International Edition, 2005) ch 3; the CPR, their accompanying PDs, and various 'Guides' to parts of the High Court's practice, are accessible at www.dca.gov.uk/civil/procrules_fin/menus/rules.htm.
[69] s 7, Civil Procedure Act 1997, following recommendation of a Committee of Judges appointed by the Judges' Council, 'Anton Piller Orders: A Consultation Paper' ('the Staughton Committee'), Lord Chancellor's Department, November 1992; for comment, M Dockray & K Reece Thomas (1998) 17 CJQ 272.

A long-standing aspect of 'Equitable' relief is the judicial power known as *Norwich Pharmacal* relief.[70] This is an order compelling a stranger, and possibly an eventual witness to proceedings between A and B, to disclose documents or non-documentary information if he was 'involved', whether culpably or innocently, in an alleged civil wrong. This information can be obtained by court order when it becomes necessary to identify any of the following matters: the identity of the main wrongdoer; or the location, nature and value of the prospective defendant's assets; to determine whether there was a civil wrong, such as defamation, committed behind the applicant's back; to identify and discipline a dishonest or defaulting employee within the applicant's organization.[71]

2-23 *Pleadings*

Each party must produce a sworn 'statement of case' (formerly known as 'pleadings'). This must set out the main aspects of the claim or defence. There is no need to include in a 'statement of case' any detailed evidence or details of legal argument. The claimant should also specify the relief he is seeking. The main remedies are a claim in debt, damages, injunction, or a declaration (for various remedies applicable to claims for breach of contract, see chapter 11).

2-24 *Party Selection of Factual Witnesses*

The decision to call particular factual witnesses and to use particular documents lies with each party. The court does not compel a party to produce particular witnesses or documents. However, the court can restrict the number of witnesses at trial (a power which should be used delicately and not heavy-handedly). The court can also place limits on the time devoted at trial to examining witnesses. However, these restrictive powers must be exercised responsibly and fairly (on these matters see **2-33** below).

Each party must normally produce a witness statement in respect of each factual witness, including the party's own intended factual evidence. No witness can be heard unless such a statement has been made and exchanged before trial. The judge will be expected to have

[70] In *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, HL, Lord Woolf CJ re-stated the principles governing this jurisdiction, which was resuscitated in *Norwich Pharmacal v Customs & Excise Commrs* [1974] AC 133, HL; and see next note.
[71] On this jurisdiction generally, see N Andrews, *English Civil Procedure* (Oxford UP, 2003), 26-102 ff.

read the witness statements before trial (on these matters see 2-39 below).

2-25 *Party's Competence to Give Evidence*

Each party is competent to give evidence as a 'factual witness', that is evidence of what he or she saw or heard. This must take the form of a witness statement. At trial this evidence can be supplemented by oral examination (see below).

2-26 *Expert Evidence*

This topic is the subject of chapter 4 of this book. The court has power to restrict use of experts. It can require the parties to agree upon the nomination of a 'single, joint expert'. However, in more complex cases, the traditional system of 'party-appointed' witnesses continues to apply. This permits the parties to select their own 'rival' experts.

2-27 *Disclosure of Documents: Main Framework*[72]

After proceedings have begun, each party must prepare a list of documents on which he will rely, or which might assist the other party.[73] A party is obliged both to provide a list of documents ('disclosure') and to allow inspection of these by the other side.[74] Such information is not yet evidence: it only becomes evidence if it is 'adduced' by one party for the purpose of a trial or other 'hearing'.

The CPR defines a 'document' as 'anything in which information of any description is recorded'.[75] That definition does not catch information held in the other party's brain (nor the brains of company employees). Nor does Part 31 of the CPR apply to non-documentary 'things', such as the claimant's body, physical chattels, or immovable property.[76]

'Standard disclosure' concerns documents which satisfy one of the following criteria:[77] documents on which party A will rely; or which adversely affect A's own case; or adversely affect party B's case; or

[72] Detailed account: Neil Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 26.
[73] CPR Part 31.
[74] CPR 31.10(2) and 31.15, subject to certain qualifications added at CPR 31.3(2).
[75] CPR 31.4.
[76] cf, eg, s 14, Civil Evidence Act 1968.
[77] CPR 31.6.

support B's case; or any other documents which A is required to disclose by a relevant practice direction.[78]

The obligation to make disclosure applies to 'documents' (defined above), whether they are currently available or have ceased to be available, and whether they arise before or during the relevant litigation.[79] These documents must either fall within the scope of standard disclosure[80] or they must have been referred to in statements of case or other material disclosed to the opponent. A party's duty to make 'disclosure' under the procedural rules embraces documents which 'are or have been in [the relevant party's] control'; and 'control' refers to material which 'is or was in his physical possession', or other material to which he has or has had a 'right to possession' or 'a right to inspect or take copies'.[81] However, there is no obligation to produce for inspection (as distinct from listing during the first stage of discovery) material which is subject to any of the following privileges:[82] legal advice or litigation privilege (together known as 'legal professional privilege'- on which see chapter 7);[83] public interest immunity;[84] the privilege against self-incrimination; [85] the privilege relating to 'without prejudice' negotiations;[86] 'conciliation' or `mediation' privilege.[87]

The duty to make disclosure extends to non-privileged confidential material.[88] However, when deciding whether to order disclosure and inspection of confidential material, the courts take into account these factors:[89] whether the information is available to the other side from some other convenient source;[90] whether sensitive material might be blanked out;[91] whether the class of recipients might be restricted so that the disclosing party is protected against misuse and dangerously wide dissemination of the material.[92]

[78] The court can order narrower disclosure in special situations: CPR 31.5(1), (2).
[79] On the continuing duty to make disclosure until the end of the relevant proceedings, CPR 31.11.
[80] See discussion in text above.
[81] CPR 31.8.
[82] CPR 31.3(1)(b).
[83] For detail, N Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 27; on recent judicial discussion, N Andrews (2005) CJQ 185-93; C Tapper (2005) 121 LQR 181-5; J Seymour [2005] CLJ 54-6; C Passmore (2006) NLJ 668-9.
[84] For detail, N Andrews, *English Civil Procedure* (Oxford UP, 2003), ch 30.
[85] ibid, ch 29.
[86] ibid, ch 25, paras 25.01 to 25.44.
[87] ibid, ch 25, paras 25.45 to end; see also chapter 6 of this book at 6-22 ff.
[88] *Wallace Smith Trust Co v Deloitte Haskins & Sells* [1997] 1 WLR 257, CA.
[89] eg, perhaps under CPR 31.12 when deciding whether to order specific disclosure.
[90] See *Wallace Smith Trust Co v Deloitte Haskins & Sells* [1997] 1 WLR 257, CA.
[91] *GE Capital etc v Bankers Trust Co* [1995] 1 WLR 172, CA.
[92] Neil Andrews, *Principles of Civil Procedure* (1994), 11-056.

2-28 *Protection of the Party Making Disclosure: the 'Implied Undertaking'*[93]

The implied undertaking requires the recipient of disclosure and his lawyer (and non-parties) to refrain from using the information so acquired for collateral purposes, notably to launch or fortify other proceedings. The undertaking also prevents the same recipients from revealing the information to non-parties.[94] The CPR has codified the implied undertaking as follows:

> `a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed,[95] except (a) where the document has been read to or by the court, or referred to, at a hearing which has been held in public; or (b) the court gives permission;[96] or (c) the party who disclosed the document and the person to whom the document belongs agree.'[97]

2-29 *Sanctions for Breach of the Disclosure Rules*

In general, the sanctions for such breach are criminal or quasi-criminal. A person will be in contempt of court if he presents a deliberately false statement contained in a statement of case, witness statement, disclosure declaration (under CPR Part 31), or in an expert's report. Contempt of court is treated as a serious procedural wrong and the civil court can punish the person in breach. The forms of punishment are fines, imprisonment, and seizure of assets.

The court can also dismiss a claim or defence if there has been deliberate destruction or falsification of evidence. For example, in *Arrow Nominees Inc v Blackledge* (2001) a litigant had falsified documents.[98] The Court of Appeal concluded that the litigant's

[93] eg, *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, CA.
[94] N Andrews *Principles of Civil Procedure* (1994) 11-048 to 11-53; also *Omar v Omar* [1995] 1 WLR 1428; *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31; *Miller v Scorey* [1996] 1 WLR 1122; an implied undertaking also protects unused material disclosed by the prosecution to a *defendant* in criminal proceedings, *Taylor v Serious Fraud Office* [1999] 2 AC 177, HL; *Preston BC v McGrath The Times* 19 February, 1999, Burton J held that there is no reciprocal undertaking preventing the Crown from disclosing the same information to non-parties, who then use it to bring or buttress civil proceedings against the original accused.
[95] cf, before CPR (1998), 'collateral' use included certain uses in same action: *Milano Assicurazioni SpA v Walbrook Insurance Co Ltd* [1994] 1 WLR 977; and *Omar v Omar* [1995] 1 WLR 1428; respectively, proposed amendments to writ or statement of claim.
[96] *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.
[97] CPR 31.22; even in situation (a), however, the court has power to make a special order restricting or prohibiting use of a document: CPR 31.22(2).
[98] [2001] BCC 591, CA.

behaviour had destroyed his credibility. It was no longer possible to believe his evidence, including the documents offered to support his case.[99]

The court can also draw adverse inferences against a party who is shown to have failed to comply with the disclosure rules in CPR Part 31.[100] Such a 'soft sanction' is more generally recognised in other legal systems as a response to procedural disobedience. The American Law Institute/UNIDROIT's *Principles of Transnational Civil Procedure* acknowledges this aspect of the 'civil law' tradition.[101]

It is an offence for a prospective defendant to destroy documents, or other evidence, in order to spoil his opponent's chances of winning the relevant case.[102]

6. *Fundamental Elements of Civil Evidence*

2-30 *Burden of Proof*

The claimant bears the burden of proof. For example, he must show that the defendant breached his contract, or failed to exercise reasonable care, or committed some other legal wrong. The defendant bears the burden of proof on points of defence, for example that the claimant failed to act reasonably in order to 'mitigate' his loss.[103]

[99] The decision contains some robust general statements. Chadwick LJ said: 'it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties, not to allow its process to be used as a means of achieving injustice.' Ward LJ said: 'Striking out is not a disproportionate remedy for such an abuse, even when the [guilty litigants] lose so much of the fruits of their labour. Deception of this scale and magnitude will result in a party's forfeiting his right to continue to be heard.'

[100] eg the first instance decision in *Infabrics v Jaytext* [1985] FSR 75 (affmd [1987] FSR 529, CA), decided under the old rules, but still relevant.

[101] Principles 17.3, 21.3; accessible at: http://www.unidroit.org/english/principles/civilprocedure/main.htm. Also published as *ALI/UNIDROIT: Principles of Transnational Civil Procedure* (Cambridge UP, 2006); the working group's membership was as follows: Neil Andrews, Clare College, Cambridge, UK; Professor Frédérique Ferrand, Lyon, France; Professor Pierre Lalive, University of Geneva and practice as an arbitrator, Switzerland; Professor Masanori Kawano, Nagoya University, Japan; Madame Justice Aida Kemelmajer de Carlucci, Supreme Court, Mendoza, Argentina; Professor Geoffrey Hazard, USA; Professor Ronald Nhlapo, formerly of the Law Commission, South Africa; Professor Dr Rolf Stürner, University of Freiburg, Germany. The two General Reporters for the UNIDROIT project were Professors Hazard and Stürner; the two reporters for the ALI project were Professors Hazard and Taruffo (University of Pavia, Italy).

[102] *Douglas v Hello!* [2003] 1 All ER 1087, Morritt V-C.

[103] An interesting qualification exists where the claimant seeks damages for expenditure which has been wasted as a result of the defendant's breach of contract. It has been held that the claim will succeed unless the *defendant* shows that the claimant had entered a loss-making contract, that is, one which would have resulted in economic loss to the claimant even if there had been no breach of contract (*CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, Hutchison J;

2-31 *Standard of Proof*

The level or quantum of proof in English civil cases is not high. It is enough that the court is satisfied that the relevant matter has been substantiated 'on the balance of probabilities'. This contrasts with the higher standard of proof in criminal cases. The prosecution must substantiate its case against an accused 'beyond reasonable doubt'.

However, the more serious or drastic the alleged civil wrong, the more the court will tend to require cogent proof. The civil courts have emphasised this need for more exacting proof where the case concerns allegations of assaults upon children or fraud claims.[104]

2-32 *Evidence at Pre-trial Hearings*

There is hardly ever any presentation of oral evidence at such hearings, although formally the rules permit this in exceptional circumstances. At a pre-trial hearing, witness evidence is received in the form of sworn statements. There is opportunity for the judge and the parties' lawyers to discuss the content of these statements.

Given that few actions reach trial, pre-trial hearings have considerable practical importance. At such a hearing, the court can award interim relief or payments or strike out a claim or defence, or dispense summary judgment.[105]

2-33 *Conduct of a Trial*

Adjudication at trial is nearly always by a single judge, without a jury.[106]

approved by Court of Appeal decision in *Dataliner Ltd v Vehicle Builders and Repairers Association The Independent* 30 August 1995); see chapter 11 at para 11-12.

[104] Lord Nicholls said in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, HL said: '... the criminal standard does not apply in civil cases, although the more serious the allegation or the greater its inherent improbability, the more the civil judge will require persuasion: When assessing the probabilities the court will have in mind as a factor...that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury....Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.'

[105] CPR 3.4 ('striking out') and CPR Part 24 ('summary judgment').

[106] Jury trial is confined to serious criminal cases (for example, murder, rape, armed robbery) and civil actions for defamation or misconduct by the police (the torts of defamation, malicious prosecution, and false imprisonment).

The general rule is that a hearing must be in public.[107] Where necessary to protect a person's safety, the court can order that the identity of a party or of a witness must not be disclosed.[108]

The 'trial bundle' contains the relevant documents for consideration. It consists of the following:[109] the claim form and statements of case; a case summary; witness statements 'to be relied on as evidence' and witness summaries; hearsay evidence notices; plans, photographs etc;[110] medical reports and responses to them, and other expert reports and responses; any order giving directions as to the conduct of the trial. In large actions, a core bundle must also be prepared.[111]

The court at trial may now 'control the evidence by giving directions as to (a) the issues on which it requires evidence', (b) the nature of the evidence which it requires to decide those issues, and (c) the way in which evidence is to be placed before the court.[112] It can also exclude admissible evidence and can limit cross-examination.[113] The court can restrict the number of witnesses (both lay and expert) used by each party.[114] But these restrictive powers must be exercised with caution.[115]

Preliminary questions of law or fact can be separated from other matters in the interest of economy.[116] Appeals are unlikely to succeed against such orders for the marshalling of the issues.[117]

2-34 *Jettisoning of Restrictions on Evidence*[118]

[107] CPR 39.2(1); CPR 39.2(3) and PD (39) 1.5 set out exceptions; the primary source is s 67, Supreme Court Act 1981; J Jaconelli, *Open Justice* (Oxford UP, 2002).
[108] CPR 39.2(4); PD (39) 1.4A emphasises the need to consider the requirement of publicity enshrined in Art 6(1) of the European Convention on Human Rights (incorporated into English law, Human Rights Act 1998, Sch 1).
[109] PD (39) 3.2.
[110] The notice requirement is strict: CPR 33.6, notably (3).
[111] PD (39) 3.6.
[112] CPR 32.1(1); for comment, *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd* [2000] 2 All ER 931, CA.
[113] CPR 32.1(2),(3); On the exclusion of evidence, *Grobbelaar v Sun Newspapers Ltd The Times* 12 August, 1999, CA (prolix defence in libel action).
[114] Fast-track: CPR 28.3(1) and PD (28) 8.4; CPR 32.1 (all tracks).
[115] eg, comments of A Colman (with V Lyon and P Hopkins), *The Practice and Procedure of the Commercial Court* (5th edn, 2000) (Sir Anthony Colman was formerly in practice as an advocate before this court; for many years, he has been one of its judges) 218-9, especially curtailment of the power to cross-examine the other party's witnesses.
[116] CPR 3.1(2)(j),(l); for the pre-CPR (1998) emergence of this aspect of trial management, *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446, HL, *Thermawear Ltd v Linton The Times* 20 October, 1995, CA.
[117] *Ward v Guinness Mahon plc* [1996] 1 WLR 894, CA, *Grupo Torras Sa v Al Sabah (No 2) The Times* 17 April, 1997, CA.
[118] On the historical influence of trial by judge and jury, N Andrews, *English Civil Procedure* (Oxford UP, 2003) 34-06 ff.

The civil jury's virtual disappearance has transformed the rules of evidence. Civil evidence now displays a strong trend towards 'free evaluation', that is, judicial assessment of relevant evidence without the constraints of technical rules governing categories of 'admissible evidence'. Those categories were introduced to protect the civil jury against 'potentially unreliable' material. But the jury no longer sits in English civil trials (except in actions for defamation, or in claims of false imprisonment or malicious prosecution).[119]

In short, there has been a spring-cleaning of civil evidence over the last few decades. During this period, various doctrines (as explained in the text below) have been abandoned or profoundly modified. It is interesting to note that English law has developed in this way so as to exemplify a global trend towards 'free evaluation' of evidence. This concept is embraced in the American Law Institute/UNIDROIT's *Principles of Transnational Civil Procedure*.[120]

'Best Evidence' Rule

2-35 A person is no longer obliged to produce the original version of a document. He can instead tender a copy. However, he must provide a satisfactory explanation for his inability to produce the original.[121]

Hearsay Evidence

2-36 This rule used to provide a considerable barrier to the court's access to relevant evidence. The traditional 'hearsay' bar concerned: second-hand or remoter reports of oral statements ('the defendant told me that his wife had said, "let's concoct a claim against these

[119] N Andrews, *English Civil Procedure*, ibid.
[120] Rule 25: accessible at: http://www.unidroit.org/english/principles/civilprocedure/main.htm. Also published as *ALI/UNIDROIT: Principles of Transnational Civil Procedure* (Cambridge UP, 2006), pp 137 ff; the working group's membership was as follows: Neil Andrews, Clare College, Cambridge, UK; Professor Frédérique Ferrand, Lyon, France; Professor Pierre Lalive, University of Geneva and practice as an arbitrator, Switzerland; Professor Masanori Kawano, Nagoya University, Japan; Madame Justice Aida Kemelmajer de Carlucci, Supreme Court, Mendoza, Argentina; Professor Geoffrey Hazard, USA; Professor Ronald Nhlapo, formerly of the Law Commission, South Africa; Professor Dr Rolf Stürner, University of Freiburg, Germany. The two General Reporters for the UNIDROIT project were Professors Hazard and Stürner; the two reporters for the ALI project were Professors Hazard and Taruffo (University of Pavia, Italy).
[121] In *Springsteen v Masquerade Music Ltd* [2001] Entertainment and Media LR 654, CA, Jonathan Parker LJ explained: 'the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence.'

people"'); and documents composed out-of-court. Here there has been a fundamental change. The Civil Evidence Act 1995 allows a party to use out-of-court oral statements, and documents, as evidence. Section 1 of the 1995 Act states:

> 'In civil proceedings evidence shall not be excluded on the ground that it is hearsay. 'Hearsay' means a statement made otherwise than by a person giving oral evidence…'

The court is required to assess the 'weight' to be attached to the hearsay evidence.[122] Section 4 of the 1995 Act specifies various factors which the court should consider when deciding what weight (if any) to attribute to a particular out-of-court statement, or to a document. These factors, which are rooted in common-sense, include:

> 'whether it would have been reasonable and practicable for the party by whom the [hearsay] evidence was adduced to have produced the maker of the original statement as a witness…whether any person involved had any motive to conceal or misrepresent matters…whether the original statement was an edited account, or was made in collaboration with another…'

Similar Fact Evidence

2-37 A civil court can legitimately take into account the fact that very similar events have occurred which cast doubt upon a party's case and which support the other party's version of the dispute.[123]

Improperly Obtained Evidence

2-38 There are no hard-and-fast rules here, as the following case illustrates. If evidence (which is not privileged material) has been obtained unlawfully, unfairly, or in violation of a party's rights, the court will assess the heinousness of the manner of its collection

[122] Lord Nicholls in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637, [2005] UKHL 10, at [36] summarised the position as follows: 'The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly. The principle underlying the Civil Evidence Act 1995 is that in general the preferable course is to admit hearsay evidence, and let the court attach to the evidence whatever weight may be appropriate, rather than exclude it altogether. This applies to jury trial [in civil cases] as well as trials by judge alone….'

[123] *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, [2005] UKHL 26.

against its relevance and weight. These factors will be 'balanced' against each other. The matter is necessarily impressionistic.

For example, in *Jones v University of Warwick* (2003) the defendant made a secret investigation of the claimant who claimed that she had suffered a serious disabling injury to her hand.[124] The defendant did not accept that the claimant had suffered this degree of injury and disablement. The defendant's investigator gained access to the claimant's home, posing as a market researcher. He took secret video evidence of the claimant's use of her injured hand in her home.[125]

Lord Woolf CJ in the Court of Appeal approached the matter as follows: the court should, first, weigh the evidence's importance to the trial—here the information was of considerable and direct relevance to a central issue; the court must next weigh competing arguments—in general, the court will here take into account the need to deter unlawful collection of evidence; the court then concluded that, on balance, the evidence should be received on these facts. The court considered that the manner of its collection had not been especially 'outrageous'. In its view, a minor sanction was appropriate on these facts. The court would adjust its costs to indicate disapproval of the defendant's trickery in trapping the claimant. It ordered that the defendant should not receive the costs of the decision concerning the admissibility of this evidence.

2-39 *Four Types of Evidence at Trial*

(i) Factual Witnesses

This is the predominant form of evidence at trial.[126] Witnesses can be compelled to attend a trial (or other hearing) by the issue of a 'witness summons'.[127] The witness must be offered compensation for travelling to and from court and for loss of time.[128]

The procedure for receipt of witness evidence is as follows. A proposed witness's testimony (his so-called 'evidence-in-chief') must

[124] [2003] EWCA Civ 151; [2003] 1 WLR 954, CA.
[125] This involved a tort (trespass) and an invasion of privacy (as recognised by Article 8 of the European Convention on Human Rights).
[126] Detailed account: N Andrews, *English Civil Procedure* (Oxford UP, 2003), paras 31.41 to 31.51.
[127] This phrase replaces the hallowed terms *subpoena ad testificandum* (order to attend to give oral evidence) and *subpoena duces tecum* (order to attend with relevant documents or other items): CPR 34.2.
[128] CPR 34.7; PD (34) 3, referring to provisions applicable also to compensation for loss of time in criminal proceedings.

be prepared in written form, signed and then served on the other parties.[129] This 'witness statement' must be supported by a statement of truth by the witness or his legal representative (the same applies to an expert's report).[130] It is an act of contempt of court to make, or to cause to be made, a dishonest and false statement and then to purport to verify this by a statement of truth.[131] Normally a witness statement will be received as evidence and so dispense with the need for the witness to give oral evidence on behalf of the party who has called him (so-called 'examination-in-chief').[132] This is because it would be inefficient to require him to repeat what he has already recorded in detail and in writing. However, the court can allow the witness orally to amplify his statement and to introduce matters which have subsequently arisen.[133] The interaction of witness statement preparation and 'litigation privilege' is considered in chapter 7 at **7-37** ff.

At the trial, the witness will give evidence on oath. The crime of perjury is committed if false evidence is deliberately given by a witness at trial. Conviction can result in imprisonment or fines.

The witness will answer questions posed by that opponent's lawyer (barrister or other advocate). This process of intense questioning is known as 'cross-examination'. During this oral process, the court does not itself conduct the examination of witnesses. Instead the judge is expected to listen to the parties' presentation and question-making. However, the judge might intervene to seek clarification, or to assist a litigant in person (a party who is unassisted by a lawyer).

(ii) Documentary Evidence

The next most important source of evidence is 'documentary evidence', which covers paper-based or electronically recorded information.

(iii) Real Evidence

This refers to 'things', such as the physical objects or site relevant to the case, or body samples.

[129] CPR 32.10.
[130] CPR 22.1(1)(c), 22.3.
[131] CPR 32.14.
[132] CPR 32.5(2).
[133] CPR 32.5(3)(4).

(iv) Expert Evidence

This is examined especially in chapter 4.

2-40 *Sequence of Trial*[134]

The trial proceeds as follows:

(1) counsel's opening speech (although this can be dispensed with);[135]

(2) examination-in-chief of claimant's witnesses (although this will not be oral where, as usual, the witness statement is received as a substitute for oral testimony);[136]

(3) cross-examination of claimant's witnesses by defendant's counsel;

(4) re-examination of witnesses;

(5) examination-in-chief of defendant's witnesses (although this will not be oral where, as usual, the witness statement is received as a substitute for oral testimony);[137]

(6) cross-examination of the same by claimant's counsel;

(7) re-examination of same;

(8) defendant counsel's final speech;

(9) claimant counsel's final speech; (the reason this is the last party intervention at trial is that the claimant bears the burden of proof, and so deserves to have the last say);

(10) judgment;[138]

(11) order for costs, including in appropriate cases a summary assessment of costs.[139]

[134] JH Jacob, *The Fabric of English Civil Justice* (1987) 169 ff.
[135] Fast-track: PD (28) 8.2; multi-track: PD (29) 10.2; detailed account: N Andrews, *English Civil Procedure* (Oxford UP, 2003), paras 31.21 to 31.24.
[136] CPR 32.5(2).
[137] ibid.
[138] Or direction to the jury; for rules concerning judgments, CPR 40 and PD (40); on the court's discretion whether to complete judgment once it has begun to deliver it (or to deliver it initially in draft form) *Prudential Assurance Co v McBains* [2000] 1 WLR 2000, CA; on the court's power to re-open a case before perfecting a judgment, *Stewart v Engel* [2000] 3 All ER 518, CA.