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CIVIL LITIGATION: WHAT'S IT FOR?

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THE object of this article is to consider, or to speculate about, the roles and purposes of the institution of civil litigation in the 21st Century. The difficulty in providing a definition of "civil litigation" is mentioned a little later, but it must be emphasised at the outset that the subject is not concerned with the purposes of the parties who initiate or defend litigation - still less is it concerned with the purposes of the lawyers and judges who man the courts where civil litigation is conducted. The irrelevance of those purposes to the subject can be demonstrated by two elementary examples. First, we may take for granted that the institution was not created by the state in order to provide a living for lawyers. Secondly, even assuming for the time being that the resolution of disputes is a purpose of civil litigation, it cannot realistically be said that in the ordinary course of things the litigant's own purpose in bringing or defending an action is that his dispute with another shall be resolved. The claimant's purpose is normally to establish the validity of his claim and to obtain from the defendant what he has demanded, or the nearest possible thing to it; the defendant's purpose is to avoid such an outcome. It may be one of the judge's purposes to arrive at the (just) resolution of the dispute before him, and this may coincide with a purpose of civil litigation as envisaged by the State that developed or is currently responsible for maintaining the institution of civil litigation – which makes it a purpose of the institution itself.[1] Nevertheless, it is seldom a purpose of the parties to an action.

Civil Litigation

What, then, is "civil" litigation? For England, the House of Lords has held, in relation to the statutory phrase "proceedings in any civil or commercial matter",[2] that "proceedings in any civil matter" includes all proceedings other than criminal proceedings, and that proceedings in any commercial matter should be treated as falling within

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[1] See CPR 1.1 (1). However, this rule may refer to procedural justice only: *cf.* CPR 1. 1 (2) (a) – (d); Jolowicz, "Substantive and Procedural Justice in Civil Litigation" in B. Fauvarque-Cosson (ed.), *De Tous Horizons: Mélanges Xavier Blanc-Jouvan (*Paris 2005*)* 549 (hereafter "Substantive and Procedural Justice"). See note 12, below.
[2] Evidence (Proceedings in other Jurisdictions) Act 1975.

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proceedings in civil matters.[3] So, in England, "civil litigation" incorporates all forms of litigation except the criminal; proceedings against public authorities including those by way of the application for judicial review and proceedings relating to taxation are classed as civil. For many other countries, where the distinction between public and private law is regarded as fundamental, and also where – as in France – separate jurisdictions exist for private and public law litigation and where a criminal prosecution can be combined with a claim by a person who has suffered damage from the alleged crime, the English definition is inappropriate. In those countries "civil litigation" covers a much narrower range of cases.

Notwithstanding what has just been said, the English definition of civil litigation is adequate for the purposes of this article, that is, to include within its scope all litigation that is not criminal. In all such forms of litigation there is almost always a claimant who seeks to obtain an advantage for himself or his privies as the outcome, and a defendant who seeks to avoid being compelled either to do something that he would prefer not to do (including the payment of money) or to refrain from doing something that he wishes to do. Furthermore, active participation in such litigation is almost always voluntary. However clear it may be that a claimant would succeed in getting what he wants from another if he brought proceedings, he is under no compulsion to do so, and by the same token a potential defendant is free to accede voluntarily to the claimant's demand, however implausible it may be. He is under no duty to resist a claim against him. Equally, it is generally open to either party to bring ongoing proceedings to an end by abandoning or acceding to a claim, as the case may be. In other words the commencement of proceedings and their continuation to judgment at first instance or beyond is in the hands of the parties.

An Alternative to Violence

In *D.* v. *N.S.P.C.C.* Lord Simon of Glaisdale observed[4] that in many unsettled societies antisocial behaviour is restrained, if at all, by fear of reprisal, and that this leads to counter-reprisal and so to the vendetta. However, as society becomes more settled and government more effective, antisocial conduct comes to be controlled by adjudication in courts of law and so becomes a matter for society rather than for the injured individual, clan or tribe. And, since early law barely distinguishes between crime and civil wrong, the redress of the latter also becomes a matter for society.

[3] *In re Norway's Application (Nos 1 and 2)* [1990] 1 A.C. 723, 806, *per* Lord Goff.
[4] [1978] A.C. 171, 230.

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Lord Simon's opinion is confirmed in substance by Maitland's observation that there would be substantial truth in a theory to the effect that in the beginning the law expects the victim of a wrong to resort to self help and that only by slow degrees "it substitutes a litigatory procedure for the rude justice of revenge".[5]

It seems reasonably safe to say, therefore, that the earliest purpose of civil litigation was to provide an alternative to self help and to the violence to which it may give rise. If this is all that it is sought to achieve, all that is required of civil litigation is that its availability and, if necessary, its use should lead both parties to refrain from self help. In the ordinary course of events, such an objective will often be achieved without litigation. Where one party is weak and the other strong, the weak will not attempt to use violence against the strong, even if only to attempt to resist the demands made against him. Also, if the parties are in general agreement on the subject matter and circumstances of their dispute, there is no point in any attempt by the court to ascertain the truth of either party's allegations or denials, or to seek to do abstract justice between the parties.

However unfair the first of these propositions may be, its outcome is inevitable, at least unless and until some system for assisting the weak is developed, a development that would be pointless unless there were a purpose to civil litigation such as the protection of the weak against the strong. The second proposition, on the other hand must be qualified. If litigation is to take the place of self help, it is of the first importance that the parties to a dispute submit or with the tacit approval of society be compelled to submit to the jurisdiction of the court and to its judgment once that has been given. That, in its turn, requires two things: first that there be reasonable consistency of decision, which can only be achieved if there is a body of substantive law that controls judicial decisions. There must also be a body of procedural rules that will enable each party to "fight his corner": even a duel must be conducted in accordance with certain rules. Subject to those rules, the parties must be able to conduct *their* fight pretty well as they see fit. There is, in particular, no reason for the judge to intervene in the proceedings. Indeed, there are reasons why he should not: the view was once widely held that the best judge is the judge who, like a jury, knows nothing of the case he is to decide until the trial itself begins.[6] Certainly the judge has no duty to try to ascertain the truth. If the parties wish their dispute to be decided on agreed, assumed or even

[5] Pollock and Maitland, *The History of English Law before the Time of Edward* I (Cambridge 1968), 2.574. See also, E.J. Couture, "The Nature of Judicial Process" (1950) 25 Tulane Law Review, 1,7, where the civil action is described as "civilization's substitute for vengeance".

[6] Such an "uninformed" judge is best placed to ensure that his decision is based exclusively on the evidence and arguments presented by the parties.

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purely imaginary facts, that is their affair. If one party is content to let his opponent get away with some breach of procedural law that is his affair, as it is if he chooses not to rely on a legal argument or item of available evidence that would help to establish his case. The judge's role is to listen to the parties and to the evidence and the arguments that they choose to submit, and decide which has presented the more persuasive case and so has won the day.

If that sounds like a description of the basic ideas of the adversary system of the common law, that is no accident. It may well be that we go a long way to explain how the adversary system came into being if we accept the "civilization's substitute for vengeance" description of the civil action.[7] The parties appear before the court with issues between them, issues that they have identified for themselves by the process formerly known as pleading. They present their evidence and arguments and the judge or jury decides who is the winner. Neither the judge nor jury is required to say which, if either of them, is objectively right. To provide an alternative to self help, all that is necessary is that the parties' dispute, as they have chosen to formulate it, should be settled.

Dispute Resolution

It is not to be supposed that the sole, or even the principal, purpose of civil litigation in developed societies today is still the avoidance of violence. Nevertheless, the idea that it is not the court's role to decide which, if either, of the parties' cases is objectively correct has been reaffirmed in modern times by the highest English authority. The case of *Air Canada* v. *Secretary of State for Trade*,[8] decided by the House of Lords in 1982, concerned a dispute about landing charges at London Heathrow Airport and the parties were the major airlines of the world, on the one hand, and the Secretary of State and the British Airports Authority, on the other. The question arose as to whether the claimants were entitled to disclosure of certain documents that were relevant to the issues, but, having never seen the documents, the claimants could not say whether disclosure would assist or damage their case. Bingham J., as he then was, thought that he should see the documents in any case since they would help him to get at the truth, no matter which party would benefit. The Court of Appeal and the House of Lords disagreed.

Lord Wilberforce observed that a litigant in civil proceedings is not obliged to present evidence that would operate in his favour if it were actually presented, and observed that it often happens that, from the

[7] Above note 5.
[8] [1983] 2 A.C. 394.

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imperfection of evidence or the withholding of it, an adjudication has to be made which is not and is known not to be the whole truth of the matter. He went on, "Yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. *There is no independent power in the court to say that, nevertheless, it would like to inspect the documents with a view to possible production for its own assistance.*".[9] Lord Edmund Davies was even more blunt: "To urge that, on principle, justice is most likely to be done if free access is had to all relevant documents is pointless, for it carries no weight in our adversarial system of law".[10]

The *Air Canada* proposition is counter-intuitive and almost shocking to the outsider who looks at the activities of the courts, and not only to the outsider. The Overriding Objective of the Civil Procedure Rules is deciding cases "justly",[11] but all that the Rule tells us about "justly" relates to procedural aspects, such as ensuring that the parties are on an equal footing, saving expense and dealing with cases in ways which are proportionate. There is no mention of "finding the truth". However, the notes to an early draft comment on this omission and the comment itself are interesting, "Seeking the truth", it says, "is so obviously part of the court's role that it does not need to be stated expressly in the Rules."[12] The draftsman believed that something that the House of Lords had declared to be wrong was so obvious as to go without saying.

The draftsman is to be forgiven. He may have been ill informed, but his observation was prescient. The dogma of the *Air Canada* case is not only directly opposed to what most people would expect but probably runs counter to the instincts of many judges. There have, indeed, been signs of resistance to it, for example, Bingham J.'s first instance judgment in the case itself and a remark of Sir John Donaldson M.R. in a judgment of 1987, when he said, "Litigation is not a war or even a game. It is designed to do real justice between opposing parties and if the court does not have *all* the relevant information, it cannot achieve this object."[13] Formerly, however, the English judge, who traditionally knew next to nothing of the case he

[9] At p. 438.
[10] At p. 441.
[11] C.P.R. 1.1 (1), above note 1.
[12] C.P.R., 1.1 and footnote to the Third Revision (omitted from later Revisions).
[13] *Davies* v. *Eli Lilly and Co.* [1987] 1 W.L.R. 428, 431. Emphasis in original. Note the reference to the object of litigation. In *Jones* v. *National Coal Board* [1957] 2 Q.B. 55, 63 Denning L.J. said that the judge's object is "above all to find out the truth and to do justice according to law." *Cf.* his judgment in the Court of Appeal in the *Air Canada* case {1983] 2 A.C. at p. 411.

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was to try before entering the court room for the trial, was in no position to know whether he had received *all* the relevant information. And if, having heard the evidence offered by the parties he came to realise that, say, an identifiable witness who could give relevant information existed and had not been called, it would be too late for him to call such a witness without an adjournment even if it were in his power to do so.[14]

Now, however, with the advent of case management and the use of written evidence that is made available during the pre-trial period such as witness statements and written expert reports, a major change has come about. The old uninformed judge has been replaced by a judge who is possessed of a wealth of information well in advance of the trial. The likely consequences of this have probably not been fully realised so far in this country, but in France, where judicial case management came earlier than it did in England, the need to reveal the truth so far as possible in the course of litigation has been acknowledged in legislation.

French Law

Contrary to popular belief in this country, French civil procedure as set out in the code of 1806 was not "inquisitorial". True, it was not "adversary" in the full common law sense, but it was "accusatory". There was and is no episode of trial comparable to that of the common law, but it was for the parties to control the procedure, and it was for the parties to put their allegations, their proofs and their arguments before the court. The role of the court was passive and was no more than to decide between the rival cases of the parties. Throughout the 19th Century and the first half of the 20th, control of the proceedings was, in the words of a well known French writer, "abandoned to the parties".[15]

Eventually, this system gave rise to complaints about delays and adjournments, and in 1935 an attempt was made to find a cure by the appointment of a judge to "follow" the procedure - the *juge chargé de suivre la procédure*.[16] His role was to encourage the parties to comply with time limits and the like, but his powers were extremely limited. He could summon the parties to appear before him, but he could give no binding orders. The principle of this reform was that the parties should be encouraged to behave correctly but, at the same time, that there should be no departure from the traditional view that the litigation belonged to the parties.

[14] *Re Enoch & Zaretsky, Bock & Co.* [1910] 1 K.B. 327.
[15] R Morel, *Traité Elémentaire de Procédure Civile*, 2nd ed. (Paris 1949) no. 425.
[16] Décret-loi 30 October 1935.

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Unsurprisingly, this innovation did not achieve a great deal, and over the period from 1965 to 1971, the system underwent reform to give more power to the judges. At its beginning, every case, save the very simplest, is placed under the control of a judge whose business it is to take charge of its preparation for decision. Unlike his predecessor, this judge, who is now known as the *juge de la mise en état*, may give, and does give, binding orders. There are no prescribed time limits, but it is for the judge to lay down the timetable for the case before him, and it is for him to control the *instruction*, that is the process whereby the evidence is obtained and put before the court. He has considerable powers in relation to the *instruction* and may, subject to certain conditions, order of his own motion a particular fact-finding procedure such as the examination of witnesses, the personal appearance for interrogation of the parties,[17] or the obtaining of an expert report. He can also order the disclosure of documents, whether by a party or a non-party. This was at the time of its introduction completely new for French law, which previously knew nothing resembling common law discovery. For all practical purposes finalisation of the role of the *juge de la mise en état* in 1971 marks the beginning in France of regular judicial case management.

It is unnecessary to elaborate further on this feature of French law.[18] Its interest for present purposes is that with active case management came specific recognition of the importance of the truth in litigation. This recognition took a variety of forms, but the clearest and the most powerful was the amendment of the civil code – not merely the code of civil procedure - by the addition in 1972 of an article, the first paragraph of which reads: ''Everyone is bound to cooperate with the administration of justice with a view to revelation of the truth.''[19]

English law has not yet reached the same position as the French, and the reasoning of the *Air Canada* case retains its jurisprudential authority, though its life expectancy may be limited. The principal, if not the only, purpose of civil litigation is still conceived to be the resolution of disputes. In his report to the Lord Chancellor on the Woolf Reports,[20] Sir Peter Middleton asserted that ''the civil justice'' system encompasses all the ways in which people can legitimately resolve disputes and enforce their rights and the obligations of others under the law. He followed this with the observation that ''Justice – *by*

[17] The parties are not competent witnesses. It is for the judge to question the witnesses and the parties. When the judge has completed his questioning, the advocates may suggest to him that he ask additional questions.

[18] For a rather more extensive account, see Jolowicz, ''The Woolf Report and the Adversary System'' (1996) 15 C.J.Q., 198, 201–209.

[19] Code civil, art 10. See also code de procédure civile, art.11, al.1.

[20] *Review of Civil Justice and Legal Aid*, September 1997, Chapter 1.

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which I mean the satisfactory resolution of disputes – is part of the service sector of the economy."[21]

Sir Peter's definition of the civil justice system is certainly intended to cover far more than the institution of civil litigation alone, though that is obviously included; it is in fact the only method that enables the *enforcement* of rights and obligations. On the other hand, it has for long been the case in England that the proportion of disputes that have to go through civil litigation to trial for their resolution is very small, and substantially smaller than in most other European countries; it is clearly the policy of the Woolf reforms that that proportion should become even smaller. In 1982 Sir Jack Jacob expressed the opinion that, "The emphasis of the rules or codes should be on methods of the disposal of proceedings without trial or without a final determination by the courts,"[22] and a similar view was stated by Lord Woolf himself when he said, "My approach to civil justice is that disputes should, whenever possible be resolved without litigation".[23]

This kind of thinking may be inspired by the widespread belief, which is not unique to England, that it is in a variety of senses "better" that the parties to a dispute should settle their dispute by agreement – spontaneous or induced – than by litigation.[24] The old Rules of the Supreme Court enabled a defendant to pay money into court by way of an offer to his opponent; if the payment was accepted the claim was settled, but otherwise, unless the claimant recovered more under a favourable judgment than had been paid in, he was penalised in costs.[25] Under the Civil Procedure Rules,[26] actual payment into court is not required, but either party may make an offer to settle, which, if it is made in the correct form and is not accepted, is capable, in the appropriate circumstances, of imposing a costs penalty on his opponent.

In addition to the development of these methods whereby one party may create an incentive for his opponent to settle, the so-called pre-action protocols[27] are intended not only to simplify pending litigation by calling for such action as the exchange of information between the parties, but also to encourage and assist the parties to

[21] *Ibid.*, para 1.4, emphasis added.
[22] "Accelerating the Process of Law", in *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (London 1982), 9.
[23] *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), p.107.
[24] Probably the best known modern article, at least in the common law world, that speaks cogently against settlement is that entitled "Against Settlement" by Owen M. Fiss of Yale University. Professor Fiss does not believe "that settlement as a generic practice is preferable to judgment ... It should be treated instead as a highly problematic technique for streamlining dockets. ... Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised": "Against Settlement" (1984) 93 Yale L.J. 1073.
[25] R.S.C.Ord. 22.
[26] C.P.R., Part 36.
[27] C.P.R., Practice Direction Protocols.

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reach a settlement. This is also an objective of the active judicial case management that is central to the new rules to assist the parties to reach if possible an agreed settlement of their dispute.

Finally, in this context, it is a policy of the new rules to encourage the parties to resort to other methods of dispute resolution – methods such as arbitration, mediation, conciliation and so on, generally known collectively as "alternative dispute resolution" ("ADR"). In some countries ADR – not by that name - has a long history. In France, for example, the code of civil procedure of 1806[28] insisted on an attempt at conciliation by a *juge de paix* as a condition for the admissibility of many categories of action, but in England, while various methods of ADR had been used voluntarily by the parties to disputes for many years, the first judicial recognition of its desirability came in 1994 in relation to commercial cases[29] and more widely a year later.[30] Under the Civil Procedure Rules the court's powers in this regard have been further extended. First, the court may encourage the parties to adopt an alternative dispute resolution procedure if that seems appropriate,[31] and may of its own motion stay the proceedings while the parties explore the possibility of using such a procedure.[32]

It is clear, therefore, that litigation has fallen out of favour as a method of dispute resolution. It has in fact become the least favoured of all the available methods. This does not mean that civil litigation will eventually disappear, though the number of litigated cases is already in decline. First, there are classes of dispute that can only be finally resolved by the application of the coercive power of the state, which it is in the power only of the courts to order; secondly, cases affecting personal status and persons under disability and the like may call for orders of a kind that only the court can make; thirdly, there will always be parties to a dispute who, either from sheer recalcitrance or because of their views of the significance of their dispute are unwilling to submit to resolution otherwise than through litigation.

It is, therefore, inevitable that the courts will continue to resolve disputes[33] for the foreseeable future, but even so the Chief Justice of New South Wales was undoubtedly correct in his strenuous denial that a court is a publicly funded dispute resolution centre.[34] Indeed, the

[28] Art. 48. The provision came from the law of 16–24 August 1790 (*organisation judiciaire*).
[29] *Practice Statement (Commercial Cases) Alternative Dispute Resolution* [1994] 1 W.L.R. 14.
[30] *Practice Direction (Civil Litigation: Case Management)* [1995] 1 W.L.R. 508.
[31] CPR 1.4. (2) (e).
[32] CPR 3.1, (2) (f).
[33] Only in special circumstances such as those in which the court's approval of the settlement of a claim by a person under disability is required, are court proceedings possible in the absence of a dispute. For an interesting corollary developed by Lord Mustill in the field of arbitration, see *Channel Group v. Balfour Beatty Ltd.* [1993] A.C. 334, 355–357.
[34] The Honourable J.J.Spigelman A.C.: "Judicial Accountability and Performance Indicators" (2002) 21 C.J.Q. 18, 26.

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Chief Justice went further, and denied that courts deliver a service at all: they administer justice in accordance with law. "They no more deliver a 'service' in the form of judgments and decisions than a Parliament delivers a 'service' in the form of debates and statutes."[35] As the Chief Justice says, "the enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by public process with public outcomes – these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them 'externalities'. They constitute, collectively, a core function of government."[36]

Over and above the public purposes that are served by civil litigation, there are others of a quasi public nature, especially as they relate to the interests of non-parties to the action. It is true that in the paradigm case involving a dispute between two natural persons – the model around which the classical common law adversary process developed – the interests of non-parties, if any, are wholly dependent on those of the claimant. In a simple personal injury case affecting the principal earner of a family, for example, where, once he has been awarded damages, the financial position of his dependents is (assumed by the law to be) restored to its pre-injury level.[37]

Where, on the other hand, one or more of the parties to a dispute has corporate personality, the interests of shareholders, employees and, indeed of others, may well be at stake. Under the law as it now stands, it is not to be suggested that the court can directly and explicitly take those interests into account in reaching its conclusion, but this does not mean that they must always be entirely without influence. The conflict of interests involved in *Bromley London Borough Council* v. *Greater London Council*[38] provides a clear illustration. The Greater London Council - then the local government authority for the whole of London – resolved to reduce the fares charged to passengers using London Transport by 25% and that the cost of this would be met by an increase in taxation in each of the boroughs of which London consisted. One of these boroughs took action against the Greater London Council to challenge this increase and succeeded in the House of Lords. The question was decided ostensibly as if it were no more than a dispute between the parties, and

[35] *Ibid.*
[36] *Ibid.*
[37] Even in such a case it is more than likely that insurers will have an interest.
[38] [1983] 1 A.C. 768. It is true that a similar case in France would be for the *juridiction administrative* and would not be regarded as "civil".

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the House concluded that the proposed tax increase would be unlawful. In reality, of course, as was perfectly apparent, the competing interests of local taxpayers, on the one hand, and those of the users of London Transport, on the other were directly involved. In the end the interests of the taxpayers prevailed.[39]

It has been suggested earlier that, if no more is needed of a dispute resolution procedure than the production of a way to resolve the parties' dispute which the parties will accept and adopt to bring their dispute to an end, it is unnecessary that the decision should be "correct". So long as the parties are willing to act on the basis of the proposed solution – for whatever reason – that is all that is required.

Such an approach is harmless and useful if the dispute resolution process used is a form of ADR or other extra judicial procedure, including, of course, a voluntary agreement between the parties, reached without third party involvement. It is not harmless if the parties have resorted to litigation. The most important reason of principle for this assertion lies in the fact that litigation takes place in the courts of law before judges appointed by the State to exercise the judicial power over persons subject to its jurisdiction. It is one thing for a judge to seek to persuade the parties to a dispute to try to reach an amicable settlement or resort to ADR: it is quite another for him to pronounce a judgment that he has reason to believe is based on findings of fact that are incorrect or flows from an incorrect application of law based, for example, on an untested concession by one or more of the parties. If he were to do so he would make a mockery of the rule of law.[40] This is all the more important where the litigation is such as to bring into play one of the public or quasi-public purposes such as those mentioned above.

This means that where civil litigation is brought to an end by the judgment of a court of law, it is necessary that that judgment should be "correct". So much was actually laid down in the legislation of the former socialist Republics. For example, the Principles of Civil Procedure of the Soviet Union and the Union Republics called for the *correct* and expeditious trial and decision of civil cases.[41] However, to call for correct decisions is more easily said than done, not only because the truth may be evasive, but also because there are no objective criteria by which the correctness of a judicial decision can be

[39] For a comparable case, see *Air Canada* v. *Secretary for Trade* [1983] 2 A.C. 394 (above, text at note 8), where, in proceedings between most of the major airlines of the world, on the one hand, and the Minister, on the other, concerning landing fees at London Airport (Heathrow) the competing interests of airline passengers and taxpayers were at issue, but were not explicitly mentioned.

[40] See *Goldsmith* v. Sp*errings Ltd.* [1977] 1 W.L.R. 478, 486, *per* Lord Denning M.R. and *cf. ibid.* at p.508, *per* Bridge L.J.

[41] Article 2, translated A.K.R. Kiralfy in (1963) 7 *Law in Eastern Europe* 299.

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assessed. There is, however, a negative proposition that can be made, namely that it would be bizarre in the extreme to hold to be "correct" a decision that the judge himself did not believe to be correct because he was deprived of information which could and, in his opinion, should, have been available to him or if for some reason such as agreement between the parties, he was prevented from applying the law he believed to be applicable.[42]

It would appear to follow that a procedure incorporating aspects of the preparation for decision of civil law systems is called for at the pre-trial stage of common law procedure. In particular the judge should play a part in the collection and preparation of the evidence and should not be inhibited by directions not to "descend into the arena", lest he run the risk of having "his vision clouded by the dust of conflict".[43]

In the early 19th Century Lord Eldon L.C. is reported to have said, "truth is best discovered by powerful statements on both sides of the question,"[44] and just over a century later, Wigmore claimed that cross-examination is the greatest legal engine ever invented for the discovery of truth.[45] Unfortunately Lord Eldon's observation assumes that the truth rests in the case made by one or other of the parties to the litigation, which is not necessarily the case, and Wigmore's is intrinsically difficult to accept: cross-examination is no doubt capable of revealing untruth, but any hitherto unrevealed truth that it may be able to reveal cannot but be, at best, a matter of inference and conjecture.

It has been noticed above that following the development of case management in France it was made explicit in legislation that the judge (amongst others) has a responsibility to the truth that goes beyond deciding between the rival contentions of the parties. There was more than one reason for the 1972 amendment to the civil code[46] but one of these was, it is suggested, that with the advent of case management the involvement of the judge in a search for the truth became a realistic possibility. Recognition that no system of procedure can guarantee discovery of truth does not mean that all decisions must be based exclusively on what the parties have chosen to lay before the court. Once it becomes possible for judges to issue directions to the parties relating to matters of proof during preparation for the decision stage,

[42] The decision in the *Air Canada* case was procedurally correct but prevented any attempt at discovery of the truth. See "Substantive and Procedural Justice", above note 1.

[43] *Yuill* v. *Yuill* [1945] P. 15, 20, *per* Lord Greene M.R.; Jones v. *National Coal Board* [1957] 2 Q.B. 55, 63, *per* Denning L.J.

[44] *Ex parte Lloyd* (1822) Mont. 70, 72n.

[45] Wigmore, *Treatise on the Anglo- American System of Evidence in Trials at Common Law* (Boston, Mass. 1940) para. 1367.

[46] Above note 19.

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they are likely, from time to time, to issue directions that do not merely seek to achieve economy in time and money, but rather seek to assist them to found their decisions on the nearest approximation to the truth that can be achieved.

In England, the centuries of use of the civil jury and adherence to the adversary system ensured the survival of the ''uninformed'' judge who was in no position to introduce new elements into the fact finding process,[47] but that hero of the past is unlikely to survive much longer in the age of case management, now already nearly a decade old. The judge of today already has a wealth of information about the case in his charge during the pre-trial stage, and is well placed to make use of that information, if he is so minded, in a search for the best possible approximation to the truth. He may not yet have begun to make much use of his new de facto powers,[48] but it seems likely that judges of the generation that came to the law after the CPR were introduced and who are not seeped in the previous system will not be so reluctant to do so.

[47] Above note 14.

[48] It is possible that CPR 32.1(1) is to be interpreted as empowering the judge to direct that particular evidence or even an identified witness should be produced. Rule 32.1 (1) reads: ''The court may 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 the evidence is to be placed before the court''.

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