Jackson

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- Neil H. Andrews, *Money and Other Fundamentals: English Perspectives on Court Proceedings, Meditation, and Arbitration*, **U Cam. Faculty of Law Research Paper** No. 38/2013 (2013) available at SSRN.
- **Stuart Sime,** A Practical Approach to Civil Procedure **(16th ed. 2013).**
- **Stuart Sime & Derek French,** Blackstone's Guide To The Civil Justice Reforms **2013 (2013).**

The banes of every civil-justice system are delay and expense. The two maladies are often run together in a single phrase as if they were one disease, but they are distinct problems whose antidotes sometimes work at cross-purposes. One solution to delay, for instance, is to impose early, firm deadlines during litigation, but that can simply induce parties to "lawyer up" and spend more money in the rush to meet truncated deadlines. Conversely, keeping the cost of litigation down may induce more people to sue, which will drive up the length of time to resolution.

In England, where I taught this past Fall, the delay-and-cost two-step has played out over fifteen years and two sets of procedural reforms. The first, and better known, effort occurred in 1998, when the Wolff reforms (named after Lord Chief Justice Woolf, principal author of the report *Access to Justice*) led to the creation of the Civil Procedure Rules. The principal innovation of the Woolf reforms was case management, an idea that had been growing in popularity on the American side of the Atlantic since the 1970s. But it also included a number of other innovations—such as pre-action protocols in which parties in some cases exchanged information before suit, greater resort to ADR, and a rule ("Part 36") that operates akin to but more broadly than Federal Rule of Civil Procedure 68—that were designed to both reduce delay and lower the cost of litigation.

After a decade's worth of experience with this new judicial approach, the general view was that the Woolf reforms did a better job reducing delay than lowering cost. Hence, in his massive *Review of Civil Litigation Costs*, Lord Justice Jackson proposed another series of reforms targeted specifically at the management of litigation costs. These reforms, often called the Jackson reforms (or simply "Jackson"), came into effect in April 2013. These three works attempt, with increasing levels of detail, to examine the Jackson regime. Professor Andrews' overview locates the reforms within the context of other movements in British procedure (such as mediation and arbitration). Professor Sime's well-known hornbook on civil procedure contains new chapters describing the effect of Jackson, and his book with Mr. French focuses exclusively on these reforms.

Each of the authors is a leading scholar of the British legal system. The value of these works lies not in their novel analysis, but in their clear and cogent descriptions of a set of reforms that should spark the American imagination. Although it is not possible to provide a full rendition of Jackson in the short space I have here, some of the highlights are worth mentioning.[1]

Costs Budgeting. Early on in certain cases (in particular, in many multi-track cases, which involve stakes of more than £25,000), each side must prepare a costs budget detailing the expenses that they expect to incur in the litigation. The budget, which is to be prepared on a pre-formatted spreadsheet, is shared with the client, the court, and the opponent, and limits are imposed on the amounts that barristers can charge for certain services (including preparation of the cost-budgeting worksheet). In

one sense, lawyers are not bound by the budget; they can work more hours or charge their clients more than the budget provides. But the budget provides the presumptive amount of costs that can be awarded to the client in the event that the client wins—recalling that the United Kingdom follows the English (or "loser-pays") rule. If parties do not agree to each other's costs budgets, the court can enter an order on the appropriate costs. Moreover, the court can reduce the parties' budgets when they seem disproportionate to the amount at stake. For instance, if a case has a value of £100,000, the budgets for each side may be £60,000 (or £120,000 in total). It would not be socially beneficial for this case to go forward on this basis, but both parties might feel justified in expending this amount because of the belief that they will recover their costs when they win. Indeed, a party with a strong claim or defense may even have an incentive to spend more than £100,000 (a result that would not occur under the American rule, under which each party bears its own costs). The court now has authority to require the parties to trim their costs budgets to ensure that the global amount expended is proportionate to the stakes of the litigation. Parties may spend more, but doing so will likely be on their own dime—even if they win on the merits. The budgeting rules can be found in Part 3 of the Civil Procedure Rules (Rules 3.12–.17).

The bench seems determined to enforce this new power. In a decision that is presently sending seismic waves through the bar, the Court of Appeals held that the plaintiff would be entitled to no costs when his solicitors were late in submitting a costs budget.[2] The untimely budget had called for an expenditure of more than £506,000—meaning that, should the plaintiff prevail, his solicitors may be looking at a £506,000 professional-malpractice claim.

Qualified One-Way Fee Shifting. Somewhat reluctantly, Britain has begun to permit contingency-fee agreements. One form of contingency fee (the "damages-based agreement") is familiar to Americans, although the caps on fees for a successful recovery (for instance, 25% for a tort claim) are often lower. Another form (the "conditional-fee agreement") is uniquely British: the barrister charges the traditional hourly rate (payable only in the event of recovery), but is then entitled to a "success fee" to compensate for the risk of losing the case. One of the Jackson reforms is to limit fee shifting by defendants in personal-injury cases, in which contingency-fee agreements are most common. Thus, contrary to the usual English rule, a successful defendant cannot generally receive its costs from a losing plaintiff. Qualified one-way fee shifting still makes a plaintiff liable for her own lawyer's costs, although here the rise of the contingency fee limits that prospect. These provisions appear in Rules 44.14–.16.

Proportionality. Already ensconced in the Civil Procedure Rules, the notion that costs must be proportionate to the nature of the case—enforceable through the principle that only proportionate costs are recoverable—was reinforced throughout. For instance, the revision to Rule 1.1(1) (the equivalent of Federal Rule 1) inserted four new words at the end: "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost." Proportionality also received greater emphasis in the drafting of a revised Part 44 (especially Rules 44.2–.12), which deals with the court's general power to award costs. With the exception of qualified one-way fee shifting, the usual loser-pay rule prevails: the losing party must pay the fees of the prevailing party for the costs that the other party has budgeted. This "standard-basis" fee shifting is, however, limited by the "indemnity principle," which holds that a party should not be responsible for more in costs than the other party would have been required to pay her own lawyer. For example, if a plaintiff has entered into a damages-based agreement to receive a 25% contingency fee, the defendant is liable only for fees in that amount.

The attribution is unclear (it was either George Bernard Shaw or Oscar Wilde, or perhaps it was Winston Churchill), but it has been said that England and the United States are two countries separated by a common language. The same may be said of law: We are two countries divided by our common legal

heritage. Backed by significant empirical data, the Jackson reforms are a thoroughly thought-out package of changes designed to bring down the cost of British litigation. It is therefore tempting to borrow pieces of the reforms—costs budgets seems an especially attractive notion—and consider their adoption in the U.S.

But that impulse presents problems of translation. Many of the Jackson reforms, and the powers that British judges have to control costs, are keyed to the reality that the United Kingdom, like much of the world, employs a loser-pays approach to fees. This approach can create some perverse incentives: parties with strong cases and financially solvent opponents have little reason to control their own spending on litigation. In a legal culture in which fees to the winning party are the norm, the power to withhold those fees might be a significant inducement to the parties to control costs. But withholding those costs (in other words, making each side bear its own costs of litigation) merely makes the British system run more along the lines of the American rule—a tendency reinforced by qualified one-way fee shifting. Moving in this direction may lead the parties in a U.K. lawsuit to make more rational litigation decisions in some respects. For instance, if costs budgeting works as expected, rational actors have less capacity to expend £120,000 on a £100,000 claim. But costs budgeting does not prevent all socially undesirable litigation behavior. For instance, if a court approves budgets of £40,000 per side for this £100,000 claim, a plaintiff with a very strong claim might nonetheless make an economically rational decision to expend £120,000 on litigation expenses: she will receive £140,000 in total (£100,000 on the judgment and £40,000 in costs recovery) but spend only £120,000, leaving her £20,000 to the good.

The American rule does a better job ensuring that parties do not spend more on a case than the benefits that they expect to recover. But, like the traditional English rule, it does not always ensure that the costs of both parties are proportionate to the needs of the case; for instance, under the American rule, both parties might have an incentive to expend a socially wasteful $60,000 on a $100,000 claim. The promise of Jackson—if parties truly limit their spending to their costs budgets and if judges become good at assessing expected recoveries—is to push forward only those cases that are economically viable (considering the costs on all sides). But the carrots and sticks that Jackson uses to realize this goal work best within the confines of the fee and cost structure of the English system. As significant a reform as it appears to be in English practice, Jackson provides few immediately transferable ideas for controlling costs in the American civil-justice system.

1. I am enormously grateful to Geoffrey Bennett, Susan Blake, and Stuart Sime for conversations that have helped to shape this discussion. Any errors in translating English procedure for an American audience are mine.
2. *See* Mitchell v News Group Newspapers Ltd., [2013] EWCA Civ. 1537, 2013 WL 6148230 (Nov. 27, 2013).

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