CIVIL JUSTICE

England's solution: how civil justice could be cheaper

By Anthony Grant

All lawyers will be affected by moves from the Chief Justice and Rules Committee to press for changes allowing citizens of ordinary means to resolve disputes in the country's courts.

And it is particularly relevant to my areas of law – trusts and estates - that there is a simplified and cheaper system of civil justice.

The current justice system is long past its use-by date. It was created when people wrote with ink and quills, and most disputes had only a handful of documents. Judges could deal with several civil trials in a day.

The advent of computers, emails and photocopiers has caused almost all disputes – both big and small – to be swamped with paper.

The more paper there is, the more time it takes to assimilate all the facts and their significance, and the greater the legal fees will be.

This is one of two major problems with the historical system of English civil justice. A second concerns the risks to which lawyers are subject, causing them to engage in defensive lawyering.

In most countries, doctors practise "defensive medicine," which increases costs. The same is true with law. We practise defensive lawyering, whether consciously or not.

The courts have steadily increased the causes of action to which lawyers are subject. If a claimant has four potential causes of action but his lawyer pleads only one, the client may turn on the lawyer when he loses and say the others should have been pleaded.

The same applies to evidence and submissions. The more evidence and submissions that are given to a court, the less likely we are to be sued by a disappointed client.

It would be much simpler if a judge could say he/she would allow only one cause of action to be pleaded. That way, the lawyer would not be sued for omitting the others.

In today's article I refer to one initiative taken to overcome some of the problems with the current system of civil justice.

It involves a court in England which is now known as the Intellectual Property Enterprise Court, or IPEC.

This began as the Patents County Court, but it was not much of a success. It had two significant failings: it was based in North London, was remote from its potential users and the name deterred litigants. These defects have been remedied by renaming the court and by giving it a home in the Strand and Fetter Lane.

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Some of the rules applying to litigants using the court are:

- they may claim up to £500,000;
- with limited exceptions, a winning party will not get more than £50,000 for costs;
- costs are limited at each stage of a proceeding;
- court fees are fixed by reference to the amount claimed, so a small claim means low fees;
- applications to the court can be heard by phone and resolved by the judge in writing without a hearing;
- to help self-represented litigants, the court publishes the High Court Rules applying to IPEC cases;
- the court rarely allows a trial to take more than two days;
- the court publishes a claim form that litigants must complete, together with notes to assist them;
- the claim form can be filed online;
- the court publishes guidelines for different types of claim and how they should be pleaded;
- a claimant must file a "statement of truth" to accompany a claim;
- the judge identifies the issues of fact and law to be resolved. I regard this as one the court's most important innovations as it reduces much of the expense involved in civil litigation. It also absolves lawyers from the risk of claims from clients who say more issues of fact and law should have been pleaded;
- the court will usually permit only one witness to give evidence of a disputed issue of fact;
- the court has a discretion to exclude expert evidence; and
- a judge can determine the dispute on the papers.

The court takes an active part in controlling the proceedings and sets time limits which it says are likely to be enforced strictly.

The presiding judge says imposing time limits caused outrage among some litigators but, as time has passed, this has led to a "genuine change of culture".

How have these radical changes worked?

Well, there are now six IPEC courts in England, there is a pilot IPEC court in Melbourne and there is serious contemplation of similar courts in Singapore and France.

There are two broad systems of justice: adversarial and inquisitorial. In the former, lawyers control when and how a case will proceed; in the latter, judges do.

The former model has been steadily eroding in New Zealand. Judges now take control of proceedings, imposing time limits for various actions that it directs the parties to perform.

Back in the 1970s and 1980s, lawyers could simply agree among themselves to adjourn a case *sine die* and it might not be listed again for a year or more. But those days have gone forever.

Now judges refuse to allow extensive adjournments. But few revolutionary changes have been made to the traditional adversarial model.

Importantly, IPEC is a specialist court with specialist judges. With non-specialist judges it would never attract enough business to survive. I would love to see a court which focuses on equity and allied areas of the law.

The procedural innovations with IPEC show some of the ways our system of civil justice could be transformed.

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Anthony Grant is an Auckland barrister specialising in trusts and estates law