PRELIMINARY OR SUMMARY PROCEEDINGS: SCOPE AND IMPORTANCE GENERAL REPORT (COMMON LAW)

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I. INTRODUCTION: DISPOSITION BY ADJUDICATION WITHOUT A NORMAL TRIAL

In both the common law and civil law, legal proceedings have become so costly and time-consuming and the results are often so unpredictable that access to justice is sometimes more apparent than real. The result is that the formal civil justice system is at risk.

Around the world it is losing ground to competing informal systems that claim faster, better and cheaper results. Everything from ADR in developed legal systems to criminal self-help in systems in transition claims to offer procedures better than those of the formal systems.

In the common law, unless both parties consent, substantive relief is usually available only upon the culmination of a complete civil proceeding with a trial involving live testimony and cross-examination. (By a "complete civil proceeding" we mean one that "goes all the way" and is not settled or disposed of in some other way short of trial). While it gives a high guarantee of due process, this method of resolving proceedings often involves considerable expense and delay.

To counter this, most procedural systems (or litigants) have developed methods for resolving litigation short of a trial.

In common law systems the most common methods —default judgment and party disposition— involve no adjudication by the court and they occur through the consent (either explicit or implicit) of the parties.

Default judgment most often arises from the failure of the defendant to respond to the notice of proceeding or to participate in the proceeding in a timely manner. Party disposition covers "settlement" in which the parties agree to a settlement of their dispute and this puts and end to the litigation; and also "discontinuance" in which the plaintiff gives up and withdraws or drops her claim. Often discontinuance and settlement are combined when the plaintiff agrees to discontinue the proceeding upon settling the matter with the defendant.

However, there exist in the common law procedures that operate without the consent of the parties by which the court may grant relief without a full trial on the merits e.g., motions to dismiss for failure to state a cause of action, and summary judgment. We propose to describe these procedures as "*Disposition by adjudication without a normal trial*". In some countries in the civil law, such as Brazil, there exists a form of "summary (or preliminary) proceeding". This concept or category of procedures is considered in detail by our civilian co-reporter, Ada Pellegrini Grinover (Sao Paulo). It was inspired by Italian scholarship, but has not yet been adopted in Italy. This procedure permits the court to grant an urgent judgment, based on limited evidence, which advances the final decision on the merits. This decision does not necessarily end the proceeding and does not have *res judicata* effect.

However, in effect it inverts the dynamics of the process. After the decision is given, it is the defendant who must now seek relief from the judge (to reverse the original decision and restore the status quo). The adverse effects of time (waiting for the end of the long full proceeding) are now against the defendant because the plaintiff already has the relief sought. Defendants who know that they have no right and will not be able to convince the judge will just abandon the proceedings. Adopting this procedure is a response to the two basic problems that plague civil procedure under both the civil and common law systems, expense and delay: it costs too much to participate in civil litigation and it takes too long to obtain a resolution if "ordinary proceedings" are allowed to run their course.

In commencing our study, we were not aware of any precise analogues in the common law to the procedures that are emerging in the civil law and which are described as "summary (or preliminary) proceedings" by pro-

fessor Pellegrini Grinover. However, there is clearly a need in common law procedural systems to develop effective responses to the problems of undue expense and delay.

Responses currently in vogue in common law jurisdictions include reducing the amount of procedure, case management, and mandating ADR or diversion to tribunals other than courts. However, the responses we wish to focus on in our report are common law analogues to the civilian "summary (or preliminary) proceedings" *i. e.*, dispositions by adjudication without a normal trial.

This strategy seeks to confront the twin problems by making it possible for the parties to shorten the process by obtaining judgment, in appropriate cases, other than by going through the whole process to a full (and final) trial.

II. National Reports

We forwarded the following questionnaire to our national reporters:

1. *Description of procedures*

Describe the procedures that exist in your country for disposition by adjudication without a normal trial (*ie*, that produce a final result involving the granting of relief, based on a court order without the consent of the parties and without a full *inter partes* hearing on the merits?) *e. g.*, motions to dismiss, summary judgment, etc. Please emphasize those proceedings that most closely resemble the summary proceedings described by professor Pellegrini Grinover.

2. *Commentary and analysis*

In describing your procedures, please address the following questions where appropriate:

a. For each of these procedural mechanisms could you describe the features of the normal/full procedure that are eliminated or curtailed under these procedures?

b. Under what circumstances are these procedures available?
c. Are these procedures intended to be used as part of a normal proceeding or in place of a normal proceeding? Is this what actually occurs in most cases?
d. In what proportion of cases that would otherwise be resolved through a normal/full procedure are these procedures used?
e. What procedural concerns (*e.g.*, delay, expense) are these procedures intended to address, and how are they intended to address them?
f. In your view do these procedures adequately address these concerns?
g. What procedural concerns (*e.g.*, fairness) do these special procedures raise, and how do they raise them? Do these special procedures attempt to address such procedural concerns? How?
h. In your view how could these concerns best be addressed?
i. In your view, do you think that these procedures will be used more or less in the future than they are now used?
j. Could you add any other comments that would assist us in understanding the use of such procedures in the cultural, legal and economic context of your legal system?
k. Do you believe the civilian "summary (or preliminary) proceedings" described by professor Pellegrini Grinover might usefully be adopted in your country?

3. *Rates of disposition other than by adjudication*

In addition, we would like you to place these procedural mechanisms in context by providing us with any information you might have about the rates of disposition other than by adjudication.

Typically in most common law jurisdictions the percentage of cases that reach a trial is very low, and the vast majority of cases are disposed of by default judgment or settlement. Please comment on this observation for your country and give figures (or estimates) of the:

- Percentage of cases filed that result in a trial.
- The percentage of cases disposed of by default judgment.
- The percentage of cases disposed of by settlement.

We received seven national reports as follows:

- England and Wales. Mr Neil Andrews, University of Cambridge.
- Canada. Professor Lorne Sossin, University of Toronto.
- South Africa. Professor Wouter de Vos, University of Stellenbosch.
- Singapore. Professor Jeffrey Pinsler, National University of Singapore.
- Israel. Professor Stephen Goldstein, Hebrew University of Jerusalem.
- Australia. Mr David Bamford, Flinders University.
- United States of America, Professors Tom Rowe and Paul Carrington, Duke University.

We are grateful to these national reporters for their fine reports. In various places, their descriptions of the procedures in their countries have been incorporated with only the slightest adjustments.

Nevertheless, we urge readers to refer to the writings of these reporters that are cited in the footnotes to this General Report, and to read the national reports for more detailed discussions of the particularities of the procedures in those countries. These national reports may be found at http://research.osgoode. yorku.ca/iapl.

III. General Report

1. *Overview*

The balance of our report follows our inquiry into the common law analogues to the preliminary or summary proceedings available in the civil law. The first part describes two forms of relief, available in South Africa and Israel respectively, of which we were previously unaware, that the national reporters have described as closely resembling the Italian preliminary or summary proceeding.

While it is not entirely surprising to find such procedures in South Africa and Israel, given the historical influence of the civil law on those legal systems, the procedures that are described form a useful conceptual link to the relevant common law counterparts.

The second part describes the procedures that form the most common analogues generally available at common law-striking out pleadings and summary judgment.

Although the continuous trial with viva voce evidence and cross-examination is the hallmark of common law procedure, it is recognized that some cases do not require it, either because the issues in dispute are purely legal, and not factual, or because the factual issues in dispute can be resolved without oral testimony.

The procedures described in the second part are mechanisms for identifying such cases and for adjusting the proceeding to avoid the expense and delay associated with ensuring that trial is held and that it is trial where a trial is simply not necessary. Also noted is the fact that in most common law systems, it is possible to commence a proceeding in anticipation of this result by means that presume that the dispute can be resolved "on the papers alone".

The third part describes procedures that provide provisional relief (*i. e.*, interim injunctions, etcetera).

These are the procedures that, among those generally available in the common law, are arguably most closely related to the Italian preliminary or summary proceeding in that they provide relief before a trial is held.

However, because they are sought in cases in which an oral trial is thought necessary, it is regarded as important to common lawyers to emphasize their provisional nature, and to take steps to ensure that they will not preempt the process of adjudication.

These are cases in which a trial is warranted, but in which the delay involved threatens the potential to achieve justice between the parties. In investigating these procedures, we did encounter some that were anticipatory and, in this respect, seemed particularly close to the Italian preliminary or summary proceedings, but they were very narrowly circumscribed in their use and, in some cases had been banned or determined to be unfair.

The fourth part describes programs that have been established, particularly with respect to smaller matters, for streamlining the process so as to reduce expense. In many cases, efforts are made to reduce the extent of pre-trial disclosure and to reduce the length of the trial by requiring direct evidence to be tendered in writing, and generally to encourage the parties to move forward expeditiously.

They are innovations introduced during recent civil justice reforms as a response to the potential of the expense of traditional procedures to reduce access to justice in which a trial is warranted.

The fifth part makes brief mention of some of the current efforts to incorporate non-adversarial forms of dispute resolution into the process so

as to provide alternative means of disposing of cases where this is suitable. These are the newest wave of reforms. Samples of these procedures are mentioned in outline to suggest the range of options that are being explored to address the expense and delay of traditional common law procedure in litigation.

2. *Procedures that provide for disposition by adjudication without a normal trial*

As mentioned, we proceeded with our survey of the common law on the assumption that there were no analogues to the civil law procedure described by our co-reporter professor Pellegrini Grinover. We were surprised, however, to learn from our South African and Israeli national reporters that similar procedures existed in their countries. As can be imagined, this is, in part, a product of historical civil law influences on their legal systems.

However, while these South African and Israeli procedures can be analogized to the civil law procedure described by our co-reporter professor Pellegrini Grinover, they can also be viewed as specific variations or extensions of the summary judgment procedures that are used fairly routinely elsewhere in the common law, as described in part 3(b) below.

A. *South Africa: Provisional sentence*

The procedure that resembles the Italian preliminary or summary proceeding in South Africa is known as the "provisional sentence".[1] Given its background, the resemblance is not entirely surprising. As the South African Reporter, professor Wouter de Vos reported, the South African legal system is hybrid in nature. Much of the substantive law can be traced to the Roman-Dutch law of the 17th century which was, of course, civil law, but much of the procedural law is common law imported by the English who came to govern the Cape in the 19th century. Consequently, there is an

[1] See Rule 8; Malan, Oelofse, De Vos, Pretorius & Nagel Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes (Butterworths, 1986).

English orientated judicial and procedural framework, which serves as the mechanism for the enforcement of continental flavoured substantive rules of law. Professor de Vos described the Provisional Sentence in the High Court (the procedure of which serves as a model of South African procedure) as follows:

> Provisional sentence is a remnant of Roman-Dutch law, which had survived the drastic reforms of civil procedure introduced by the British rulers in the Cape. The remedy is unknown to other common law procedural systems, but it has a long and interesting continental history. It has its origin in the Italian cities of the 11th and 12th centuries, where a rudimentary executory procedure involving the taking of a pledge by a creditor, armed with written proof of indebtedness, developed. From there the remedy found its way to France during the 13th century, where it became known as *garnissement de main*. The next development was its reception in the Netherlands during the 15th and 16th centuries, where it was known as *handvulling* or *provisie van namptissement*. Thus it became part of Roman-Dutch law, which became the law in the Cape during the 17th century. (See Malan *et al*., *Provisional Sentence*, ch 2.)
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> The procedure whereby provisional sentence can be obtained in modern practice is unusual. The plaintiff initiates the action by means of a special summons calling upon the defendant to pay the amount in question or, failing such payment, to appear in court on a day named to admit or deny his liability. The defendant responds with an affidavit setting out his defence and indicating whether he admits or denies the signature appearing on the document. The plaintiff may then react by means of a replying affidavit, whereupon the matter is set down for a hearing. As a rule the court adjudicates the matter on the papers, in accordance with the motion procedure. But the court may hear oral evidence as to the authenticity of the defendant's signature (or that of his agent), which appears on the document sued upon, and relating to the authority of the defendant's agent. Provisional sentence is therefore a hybrid remedy containing elements of both the action and motion procedure.
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> In theory there are two phases in the proceedings, namely the provisional case and the principal case. In order to succeed in the provisional case the plaintiff must show that his claim is based on a valid instrument and that he has complied with all the formal requirements. Assuming that that is the case, the defendant could only avoid provisional sentence if he could prove on a preponderance of probabilities that the plaintiff is unlikely to succeed in the principal case. For this purpose the defendant may

raise any one of a number of defences relating to the underlying obligation, for example fraud or misrepresentation.

If the court refuses provisional sentence, it may order the defendant to file a plea within a stated time. Thereafter the parties proceed with the principal case in the manner of an ordinary action. If the court grants provisional sentence the plaintiff is entitled to immediate payment. But, as the term implies, the judgment does not amount to a final judgment. The defendant is safeguarded in two ways:

(i) On request by the defendant the plaintiff must furnish him with security *de restituendo* to the satisfaction of the registrar, against payment of the judgment debt. This is to protect the defendant in the event of the plaintiff losing the principal case.
(ii) The defendant against whom provisional sentence was granted is entitled to proceed to the principal case to endeavour by the normal process to obtain a reversal of the judgment. But there are two rather strict requirements, of which one must be complied with before the defendant can proceed as stated above.
    a. The defendant must pay the judgment debt and costs; or
    b. If the plaintiff on demand fails to furnish security as required the need to satisfy the judgment debt and costs falls away and the defendant can forthwith enter into the principal case.

A defendant who is entitled and wishes to proceed into the principal case must within two months of the granting of provisional sentence deliver a notice of his intention to do so. Thereupon the defendant must deliver his plea within a stated time. If the defendant fails to comply with these requirements the provisional sentence *ipso facto* becomes a final judgment and the security given by the plaintiff lapses.

It is clear that provisional sentence constitutes a drastic departure from the normal trial procedure. It is also evident that a defendant in these proceedings faces formidable obstacles. But in my view this remedy is justified because it is founded upon the reality of commercial practice. In the normal course of events the holder of a liquid instrument has an indisputable claim and should be afforded a speedy avenue to enforce it. The defendant is afforded the opportunity to resist provisional sentence and even if he fails in this respect he can still proceed to the principal case if he so wishes. However, in this regard he must reckon with the requirement of payment of the judgment debt and costs, which for many is impossible to

meet. Therefore, in practice, most provisional sentences automatically become final judgments after the lapse of the two month period.

B. *Israel: Summary judgment*

The national reporter for Israel, professor Stephen Goldstein described the corresponding procedure in Israel, which is known in that country simply as summary judgment. The Israeli Rules of Civil Procedure 1984 permit summary judgment by the plaintiff in claims for a liquidated sum based on contact (express or implied) on which there is written evidence, or based on a statutory obligation; governmental claims for liquidated sums for taxes, etcetera; and claims for ejectment.[2] The critical feature of this procedure is that once it is filed as a summary judgment proceeding, the defendant may defend only with leave of the court, which requires an application supported by an affidavit showing a *prima facie* defence on the merits and verifying the facts on which this defence is based.

The potentially harsh results of this are softened somewhat by the fact that, as with affidavits in support of other interim motions, the affidavit need not be confined to matters within the personal knowledge of the affiant but may be made pursuant "to the best of his belief" provided that the affiant sets forth the reasons for this belief. In addition, on the motion for leave, the judge or registrar may, despite the general rule to the contrary, "order, for reasons that are to be recorded, that the defendant not be examined as to his affidavit". This limitation is justified because the issue is whether the defendant has a *prima facie* defence and the trier is not to enter into issues of credibility but rather to rely on the presumption that the facts set forth in the defendant's affidavit are true.

The Israeli summary judgment can be traced to Order 14 of the Rules of the Supreme Court of England, which, when adopted in Palestine was limited to contractual obligations of which there is written evidence. It was expanded to encompass other claims after the establishment of the State of Israel and the procedure underwent fundamental change so that it is now the functional equivalent of procedures existing in some civil law systems. Originally, the plaintiff had to attach to the statement of claim an affidavit verifying the facts on which the claim was based and stating that, in the

[2] Rule 202, Israeli Rules of Civil Procedure 1984.

plaintiff's belief, the defendant had no defence to the claim. The affidavit requirement was abolished in 1963 and today the only difference between a complaint filed in the summary judgment procedure from one filed in the regular procedure is the title of the complaint, which reads: "Summary Judgment Procedure". Accordingly, summary judgment evolved into an expedited form of debt collection.

However, when, in 1986, holders of negotiable instruments were given the right to execute upon them as if they were judgments, the summary judgment procedure was no longer needed because the holder could collect directly through the Execution Office without a judicial proceeding. Since that time, a debtor seeking to deny liability must file an opposition setting forth the defence verified by an affidavit in the Execution Office. When this is done, the Execution Office stays the execution and refers the matter to the court which then deals with the opposition "as an application for leave to defend in a summary judgment procedure". In this way, the opposition operates to transform the process into a summary judgment procedure providing a super-expedited debt collection process for negotiable instruments.

Expansion of the procedure to encompass ejectment and eviction claims did not change its basic function as a debt collection mechanism, but subsequent expansion into other areas has meant that the procedure now applies to most types of claims, including claims for unliquidated damages so that it has become the functional equivalent of the *procedimento d'ingiunzione* of the Italian Code of Civil Procedure pursuant to which an *ex parte* claim for a liquidated sum supported by documentary evidence may produce a conditional judgment. If the debtor does not file an opposition to the judgment in 20 days, the judgment becomes absolute.

Apart from the practice in the Italian procedure of entering the judgment on an *ex parte* basis, the Israeli summary judgment is similar in cases involving negotiable instruments because the execution process operates as if the instrument itself were a conditional judgment, and because the judgment in the Italian procedure becomes enforceable by execution or as the basis for a lien only when it becomes absolute. In fact, the Israeli procedure is more pro-active than the Italian procedure because the defendant must obtain leave to defend on the merits, the right is not automatic on filing a response.

One criticism of the Israeli summary judgment procedure relates to the procedural entitlements of defendants in cases involving set-off and coun-

terclaims.[3] At one time this was not a basis for granting leave to defend, although it has since become an accepted basis. Counterclaims, which, under Israeli law, can be distinct claims, and which can exceed the value of the initial claim, still do not form a basis for leave to defend in a summary judgment procedure, and must be brought separately. This ensures that they do not delay the plaintiff in a debt collection action; and the courts have granted leave to defend in cases involving counterclaims that are closely connected to the main claim. Further, in cases in which there is a *prima facie* valid counterclaim, a defendant may seek a stay of execution where there may be difficulties in enforcing the counterclaim if it cannot be offset against the plaintiff's judgment, or where execution on the initial claim will cause irreparable harm.

Another concern with the summary judgment procedure relates to queue-jumping. If a defendant has been given leave to defend, the action proceeds as an ordinary action in all respects, including the right of the defendant to file a counterclaim, and the date of the hearing for the main action is set immediately, with the hearing to be held as soon as possible. This means of obtaining an expedited trial has been popular with litigants who may otherwise wait many years for a trial date and who may find that high inflation has dramatically reduced the ultimate value of the judgment. Thus, there has been great incentive to file claims in the summary judgment procedure even where it was almost certain that the defendant would seek and receive leave to defend, particularly since there is no downside risk to doing so. Some defendants, themselves, have been glad of the opportunity to expedite the matter.

The Courts were sympathetic to litigants faced with long delays and they acquiesced in the expanded the use of the procedure, exacerbated the problem for clams brought in the ordinary way. In 1980, a special committee appointed by the Minister of Justice recommended abolishing the procedure, but the Advisory Committee to the Minister of Justice on the Rules of Civil Procedure recommended abolishing only the expedited trial feature of cases in which leave to defend was granted, and the rules were amended accordingly in 1984.

In smaller matters, few defendants request leave to defend and few requests are granted. Thus, the procedure probably has little or no effect on

[3] S. Goldstein, "'Procedural Rights' and the 'Choice of Originating Proceedings'", 32 *HaPraklit* 189 (Hebrew).

the filing of defences, suggesting that the procedure served only to add another step to the process. However, in larger matters, roughly half the filings produce requests for leave to defend with roughly half of those being granted. This greater proportion of successful defences suggested that the procedure may serve some cautionary function in discouraging defendants with no meritorious defence from resisting judgment.[4]

As will be seen in the following sections, notwithstanding its civilian roots, there are a number of functional similarities between the Israeli summary judgment procedure and the summary judgment procedure elsewhere in the common law.

3. *Procedures that dispense with an oral trial where it is not necessary*

Because the pre-trial proceeding stage in common law proceedings can be very lengthy —and usually the merits of litigation are only resolved at the trial— procedures have been developed to allow parties to precipitate an earlier decision on the merits. The two most often used methods are discussed in this section.

The first of these procedures involves striking the pleadings where they disclose no reasonable cause of action or defence (or, as it is called in some jurisdictions, moving to dismiss for failure to state a claim (or defence) on which relief can be granted). In this procedure (affidavit) evidence is neither required nor permitted, as the question is simply one of the legal sufficiency of the claim or defence.

The second of these procedures is summary judgment. Early on in the proceedings, where it can be shown by affidavit evidence and documents that there is *no genuine issue for trial, ie,* the claim or defence is factually without merit, despite what is alleged in the pleadings. The unique aspect of summary judgment procedures is that they "pierce the pleadings" *ie,* they get beyond the allegations made in the litigation and get down to actual evidence in the possession of the parties. It is an important proce-

[4] S. Goldstein, "Summary Judgment Proceedings in Israeli Law", *Israeli Reports to the XV International Congress of Comparative Law* (AM Rabello, ed) (Jerusalem, 1999), p. 183; S. Goldstein, "Summary Judgment Proceedings in Israeli Law", *International Perspectives on Civil Justice* (IR Scott, ed.) (London, 1990), p. 11; S. Goldstein, "Civil Procedure, Israel", *International Encyclopedia of Laws*, 2a. ed., R Blanplain (ed.), The Hague, 2001, p. 101.

dure, but one that has typically been used with discretion in the common law because of the tradition that disputed issues of fact ought to be resolved at a trial on the basis of oral testimony. Hence, a summary judgment motion will normally only be successful where it can be shown that there are no issues of credibility as to material facts.

A. *Striking out/Motion to dismiss for failure to state a cause of action or defence*

England and Wales. As reported by Mr Neil Andrews, the National Reporter for England and Wales, the courts in England and Wales can, on motion by a party or on their own motion, strike out a pleading (now known as a "statement of case") *inter alia* if it "discloses no reasonable grounds for bringing or defending the claim" or if it "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".[5] For example, the Court of Appeal considered such a motion under Civil Procedure Rule 3 (CPR 3) in a claim against two local authorities for failure to discharge their statutory responsibility for children's welfare in supervising foster care so as to prevent sexual abuse by foster-parents.[6] The test for granting the motion was said to be whether there was "no real prospect of success" in bringing the claim. A similar challenge was considered by the House of Lords in a claim brought by a creditor of a bank that collapsed in 1991 because of internal fraud by its senior employees.[7] The *creditor* sued the Bank of England for its failure to supervise the banks and the statement of case was challenged because the cause of action required a showing of dishonesty by the Bank of England.

Canada.[8] The Canadian National Reporter, Professor Lorne Sossin, explained that defendants may move to have some or all of a claim struck as disclosing no reasonable cause of action, or on the grounds that the claim is frivolous, vexatious and an abuse of process. This is done in cases where

[5] CPR 3.4(2)(a), (b), (c). The court can also order a summary judgment, which is discussed below, on its own motion: CPR 24.5(3).

[6] *S v Gloucestershire CC* [2000], 3 All ER 346 (CA).

[7] *Three Rivers DC v Bank of England* (No. 3) [2001], 2 All ER 513 (HL).

[8] In the Canadian federal system, the rules of civil procedure are promulgated by the provincial governments (except in the cases of the territories and the Federal Court), but the basic procedures and the underlying principles are fairly consistent from one province to another with few exceptions.

the harm alleged by a plaintiff in a statement of claim does not amount to a legal wrong for which a defendant may be held liable.[9] The Court balances the public interests in ensuring that plaintiffs have an opportunity for their day in Court and that defendants are not harassed by the unwarranted use of the Courts. The claim is read generously in favour of the plaintiff[10] and no evidence may be brought in support of the motion to strike, so that the sufficiency of the claim is considered on the basis that all facts could be proven as pleaded.[11] The question is purely a legal one: "whether, assuming the plaintiff can prove the allegations pleaded in the statement of claim, he or she will have established a cause of action entitling him or her to some form of relief from the defendant".[12] Moreover, in light of costs sanctions for adverse results in motions and liberal rules for amending pleadings, the Canadian procedure is unlikely to be used to harass plaintiffs by threatening to strike their claims on grounds of technical inadequacy in their pleadings.

Novelty itself is no ground for striking a claim as disclosing no reasonable cause of action. This was established in a claim against the police for failing in the course of an investigation to warn a discrete group of women in a downtown Toronto neighbourhood that they were being targeted by an assailant. Such a duty had not at that time been recognized, but the Court held that the test in such cases is whether it is "plain and obvious" that the matter could not succeed.[13] This test, which has *been adopted by the Supreme Court of Canada as a national standard*,[14] *wich has* had a significant impact on the ability to test the limits of recovery in novel situations, and it may serve to distinguish Canada from other Commonwealth countries. One may wonder how the plain and obvious test might have played out in the course of the famous House of Lords decision in *Donoghue*

[9] For example, Rule 25.11 and Rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*.

[10] *Hunt v Carey Inc* [1990], 2 SCR 959.

[11] Of course, this applies only to those facts capable of proof: *Operation Dismantle v. The Queen* [1985], 1 SCR 441; L Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto, Carswell, 1999).

[12] *Dawson v Rexcraft Storage and Warehouse Inc.* (1998), 164 DLR (4) 257 (Ont. CA) at 263.

[13] *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto* (1990), 74 OR (2d) 225 (Div Ct), leave to appeal to the Court of Appeal denied.

[14] *Hunt*, *supra*, note 10.

v Stevenson.[15] *(which established the Commonwealth rules on the law of negligence in the context of a motion to strike)*. Striking out is not used solely to dispose of defective claims, but may also be used to resolve cases that turn on legal questions alone and that do not require the pre-trial and trial procedures related to fact-finding *(e.g., in many situations* such as those involving defences relating to *statutes of limitations and res judicata*). In addition, this mechanism may be used to narrow the matters in issue "where the determination of the question may dispose of all or part of an action, substantially shorten the trial or result in a substantial savings of cost".[16]

South Africa. Defective pleadings are subject to challenge by either party in South Africa through a procedure known as "an exception".[17] As in England and Wales, and in Canada, the relevant pleadings are accepted as correct and no other facts are introduced. The "excipient", may argue either that the pleading is vague and embarrassing, due to insufficient or unclear factual allegations, or that the pleading lacks one or more averment necessary to sustain a claim or defence. The first of these objections is regarded as technical and excipients must first give respondents the opportunity to rectify the pleading before seeking an exception before the courts. In making the second of these objections, however, excipients may proceed directly to give notice and to set the matter down for hearing. Again, affidavits are not required as the question is one of the legal sufficiency of the claim or defence. If an exception succeeds and the respondent fails to amend the pleading within a prescribed time, the excipient can move for judgment or for the dismissal of the claim. Exception reduces delay and expense by enabling the parties —"to obtain a speedy and inexpensive decision on a question of law. The question of law is whether the pleading concerned contains the necessary allegations of fact, which if proved, would sustain a cause of action or defence.

In addition to the exception, in appropriate cases, a defendant may respond by a special plea.[18] There is some controversy about whether a defendant who raises a special plea should also "plead over" on the merits or first proceed with the special plea.[19] Some special pleas, such as those

[15] *Donoghue (or McAlister) v Stevenson* [1932], AC 562 (HL).
[16] *Dawson v Rexcraft, supra* note 12.
[17] Rule 23.
[18] Rules 22 & 23.
[19] Van Winsen, Cilliers & Loots, *Herbstein & Van Winsen The Civil Practice of the Superior Courts in South Africa* (4a. ed., 1997 Juta), at 472-473.

based on prescription and *res iudicata* could dispose of the action. They are called "pleas in abatement". Others, such as those based on mis-joinder or non-joinder, serve only to postpone the proceedings. They are called "dilatory pleas". These traditional English common law pleadings terms have been replaced by more modern terms in other countries. Special pleas are heard by a procedure that does not go into the merits of the case, and generally that does not require evidence. A special plea is like an exception in that it addresses points of law, but it differs from an exception in that it can be raised only by a defendant and it is based on facts beyond the plaintiff's pleadings.

Singapore. The situation in England and Wales, Canada and South Africa is to be contrasted again with that in Singapore in which, according to the National Reporter, professor Jeffrey Pinsler, there is no marked delay in the ordinary procedure leading to a trial. A very clear case would have to be shown before the court strikes out an action or defence, the rationale being that the parties have a prima facie right to contest the issues between them at trial. Courts will strike out an action or pleadings in a claim or defence where they are obviously unsustainable or where the action involves a re-litigation of issues. The courts are more willing to strike out paragraphs of a pleading which are improper or, if appropriate, give leave to amend.

Australia. The national reporter for Australia, Mr David Bamford, described the procedure for obtaining judgment without going to trial that is available when the dispute involves a point of law capable of being determined by a court as preliminary issue.[20] This exception to the continuous oral trial is permitted where the determination of the preliminary issue will resolve the matter or significant issues in the dispute. It requires the consent of all parties to the proceeding. Where factual matters remain in dispute the court will allow determination of preliminary issues only in exceptional cases. While there some difference in approach between jurisdictions as to when this procedure is available, the general approach remains relatively restricted.[21]

United States. As the national reporters from the United States, professors Tom Rowe and Paul Carrington reported, there are two forms of dis-

[20] ACT O37; FCR O29; NSW Pt 31 rr2,6; Qld r483; SA r75.2; Tas 559; Vic r47.4; WA O32 r5 or within inherent jurisdiction (*Landsal Pty Ltd (in liq) v REI Building Society* (1993), 113 ALR 643.

[21] *CBS Productions Pty Ltd v O'Neill* (1985), 1 NSWLR 601.

position on the pleadings in the Federal Rules of Civil Procedure. The first is the Motion to dismiss (also known in some systems as "demurrer"). Rule 12(b) of the Federal Rules of Civil Procedure permits early motions to dismiss on several grounds, most of them procedural, but including the failure to state a claim upon which relief can be granted. That ground may also be presented in a defendant's answer to a plaintiff's complaint and at later stages of a federal civil case. As the reporters explained, a motion under Rule 12(b)(6) challenges the legal sufficiency of the allegations in a plaintiff's complaint, in effect saying "so what?" —the motion poses the question whether, even assuming that everything the plaintiff alleges is true, the plaintiff is on any legal theory entitled to relief.

The second form of disposition on the pleadings is the motion for judgment on the pleadings. After the pleadings (complaint, answer, etcetera) are closed, Federal Rule 12(c) permits either side to move for judgment on the pleadings. Such a motion could rest on procedural rather than substantive grounds, but defendants may assert in a Rule 12(c) motion the substantive ground that the plaintiff has failed to state a claim upon which relief can be granted. A plaintiff might also in some rare circumstances be able to use the Rule 12(c) motion for judgment on the pleadings to seek a judgment and relief in plaintiff's favour, as when the defenses asserted by a defendant were legally insufficient.

B. *Summary judgment*

Summary judgment procedures, in various shapes and forms, have been part of civil procedure in common law jurisdictions since the 19th. century. In the beginning they were devised to counter "sham" defences put forward by defendants to "buy time", delay the plaintiff, and put off judgment day for as long as possible. A particular problem was the practice of people who were liable on bills of exchange (negotiable instruments) of asserting spurious defences to delay collection of their debts. "In 1855 the [English] Parliament enacted legislation to enable the courts to 'pierce the pleadings' in such cases, in order to render prompt decisions without trial against deadbeats taking advantage of the laws delay to the injury of their honest creditors".[22] Under this Act the defendant had to get leave of

[22] Carrington and Babcock, *Civil Procedure* (1983), 744.

the court to defend these actions, which could be done only by paying the money into court or by swearing to the defence in an affidavit.

From these beginnings summary judgment grew. For example, in England by 1883 it had been extended to cover cases where the plaintiff sought to recover a debt or liquidated demand in money and actions for the recovery of land. By 1937 it had been extended to all actions except defamation, malicious prosecution, false imprisonment or where fraud was alleged. (Similar extensions were taking place in other Commonwealth jurisdictions.) Today in many jurisdictions the procedure has been generalized so it is available to either the plaintiff or defendant in any type of case where the moving party can establish on the basis of affidavit evidence that there is no genuine issue to be tried.

The common element in summary judgment procedures over time is that of 'piercing the pleadings', going beyond the mere allegations of the pleadings and looking to the available evidence to see whether there is a genuine defence, or today, a genuine issue to be tried. While it was initially developed as a response to deadbeat debtors "taking advantage of the laws delay to the injury of their honest creditors" this is still an area in which it probably has its greatest impact, even though summary judgment is now often available generally, to both plaintiffs and defendants. Hard data on the rate of default judgments and successful summary judgment motions are difficult or impossible to find because courts typically do not record these data. But anecdotal evidence and intuition suggest that today most cases of debt collection result in default judgments or summary judgment. And a major reason for defaults in these types of cases is that defendants seeking to defend are immediately faced with a motion for summary judgment which can only be won by adducing hard evidence of a valid defence.

England and Wales. Both claimants and defendants can move for summary judgment if their opponents case lacks a "real prospect" of success. Summary judgment is available to test the legal and the evidential merits of claims or defences in whole or in part. The procedure promotes the "Overriding Objective"[23] of the Rules by helping to ensure that cases are dealt with in ways that are proportionate to their size, importance and complexity and in ways that are proportionate to the financial positions of the

[23] *Swain v Hillman* [2001], 1 All ER 91 (CA).

parties and the available court resources.[24] As the national reporter explained, summary judgment promotes the Overriding Objective by saving expense, speedily disposing of claims and defences, helping to allot judicial resources appropriately, and promoting settlement of the action by permitting an early judicial examination, albeit cursory, of the merits of the case.

Summary judgment has been available to claimants for some time, but the rules now make it available to defendants as well so that their options are no longer confined to striking out claims that are bad in law, but include the opportunity to challenge the sufficiency of the evidence supporting the claim. This raises some concern that summary judgment could be used to harass claimants whose meritorious claims are vulnerable in the early stages of a proceeding because they lack full evidential support, and that this threat could result in "front-loading".

The test for summary judgment is whether the claimant "has no real prospect of succeeding on the claim or issue" or whether the defendant "has no real prospect of successfully defending the claim or issue". The court must also consider whether "there is no other compelling reason why the case or issue should be disposed of at a trial". Summary judgment applies to most actions and it may be sought after the defendant has acknowledged service of the claim form, or filed a defence, unless the court or a specific rule provides otherwise.

The hearing is normally conducted by a Master or a district judge and it may involve written evidence. At the hearing the court can give judgment in favour of the applicant, whether claimant or defendant, or dispose of part of the claim or defence; dismiss the application so that the matter will go to trial; or grant a conditional order if it appears improbable that the claim or defence will succeed, requiring the defendant to make a payment into court or a claimant to take some specified step, such as clarification of a pleading, failing which the defence or claim will be struck out.

Canada. In Canada, summary judgment is a relatively common form of disposition prior to trial in cases where there is no "genuine issue for trial".[25] Either party can move for summary judgment after the close of pleadings

[24] CPR 1.1(2)(e).

[25] R. van Kessel, *Summary Judgments and Dispositions Before Trial* (Toronto, Butterworths, 2002).

by delivering a notice and supporting affidavit material and a factum setting out the facts and legal arguments on which they rely. This procedure is often used after some of the discovery process has been completed. Like the determination of an issue before trial, summary judgment can be used to dispose of some or all of the issues, but in the case of summary judgment, the procedure addresses the evidentiary sufficiency rather than the legal sufficiency of the party's claim or defence.

The court balances the need to assess the evidence with the need to refrain from making findings of facts that are genuinely in dispute. This has given rise to considerable debate in the jurisprudence over the standard. Generally speaking, the courts will grant summary where there is "no chance of success", but in a 1990 decision, an Ontario court observed that it was required "in taking a hard look at the merits, [to] decide whether the case merits reference to a judge at trial" bearing in mind that "the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward".[26] This "good hard look" standard, in which the judge was expected to look past the allegations made by the parties to the evidence mustered in support of those allegations gave rise to some uncertainty as to whether the simple assertion of a contradictory position on the facts would warrant a trial, and so it was held that only a *genuine* issue of credibility could give rise to a genuine issue for trial. The prevailing standard reflects in a flexible way the dual goals of summary judgment: to ensure that parties entitled to judgment should not face undue delay and expense, and to ensure that the procedural rights of parties to discovery and a plenary trial on the merits before a judge are protected.[27] The concern for the proper use of resources is reflected in the costs consequences of bringing summary judgment: where it is deemed not to have been reasonable to make such a motion, the losing party will be liable for a higher costs scale.

Recently, the courts of Canada's most populous province, Ontario, have taken a more analytical approach, which involves identifying the elements of the claim, the range of facts needed to support the claim, and the evidentiary foundation for those facts so as to "isolate, and then terminate, claims

[26] *Pizza Pizza Ltd v Gillespie* (1990), 75 OR (2d) 225 (Gen Div).

[27] K. Kelertas, "The Evolution of Summary Judgment in Ontario" (1999), 21 Advocates' Quarterly 265.

and defences that are factually unsupported".[28] However, the question remains one of the extent to which a judge in a summary judgment motion should weigh the evidence presented. The Court of Appeal (*purporting to follow US case law*) has admonished motions courts that they should "never assess credibility, weigh evidence, or find the facts",[29] but it is difficult when taking a "good hard look" not to weigh the evidence, implicitly or explicitly, along the way.[30]

The presentation of evidence is central to the determination of a summary judgment motion and the moving party has the burden of proof with respect to the evidence adduced. However, the responding party must "put its best foot forward" and produce evidence that shows there is a genuine issue for trial. It cannot rely on the possibility of further evidence emerging at a later point in the proceedings. Evidence is tendered by way of affidavits, but these affidavits may include the affidavits of non-party witnesses and they may be the subject of oral cross-examination out of court. Accordingly, with the transcripts put before the courts so that even in the absence of viva voce evidence in the courtroom, the evidence has been tested through the adversarial process.

South Africa. The summary judgment procedure in South Africa is to be contrasted with the position in England, *where* the procedure is well accepted for claimants but is newly available to defendants, and in Canada, *where* it is fairly common. In South Africa, summary judgment is confined to actions based on a liquid document; for a liquidated amount of money; for delivery of specified movable property; or for ejectment; and it is only appropriate where a defendant has given notice of the intention to defend but, in the plaintiff's view, the defendant has no *bona fide* defence and is simply engaged in delaying tactics. The plaintiff submits a notice of motion and an affidavit to this effect, whereupon the defendant may resist judgment either by giving security to the plaintiff to the satisfaction of the registrar of the court for any judgment including costs that may be given, or by satisfying the court by means of an affidavit, or with leave of the court by oral evidence, that there is a *bona fide* defence to the action. It is extremely rare for the court to receive oral evidence and there is no cross-

[28] *Dawson v Rexcraft, supra,* note 12.
[29] *Aguonie v Galion Solid Waste Material Inc* (1998), 38 OR (3d) 161 (CA).
[30] Watson *et al*., *The Civil Litigation Process: Cases and Materials*, 5a. ed. (Toronto, Emond Montgomery, 1999), at 463.

examination. In view of this drastic departure from the normal trial process, in which the defendant is permitted only to give a different version by means of an affidavit, the courts require strict compliance with the Rules of Court to grant such relief.

Singapore. In Singapore, summary judgment applications may be heard between one and three months after the application, as opposed to between five and eight months for trials in the High Court and as early as four months in subordinate courts. This lack of substantial delay may help to explain why some 12% of cases are resolved by trial, as opposed to the less than 5% that are resolved in this way in other common law countries. Still, of the balance, roughly half the cases are disposed of by summary judgment. The motion is heard in chambers and is almost always based on affidavit evidence, although occasionally with cross-examination. Thus, they obviate the need for pleadings, formal discovery processes, affidavits of the evidence in chief and other procedures related to trial. They are relatively inexpensive as costs are fixed. However, only claimants with very strong cases succeed on this procedure. If the respondent can show that the matter should be tried, the court will not grant summary judgment. An application for summary judgment may be made after the defence pleading has been filed and served. To the extent that points of law or construction would dispose of the whole action or an issue in the proceedings, the court may also give summary judgment. The court may act on the application of a party or its own motion in the course of any proceeding to determine a point of law or construction as long as it gives the parties an opportunity to be heard. Although the summary judgment procedure is not as significant in reducing delay in Singapore as elsewhere, the procedure is popular and used often. As professor Pinsler explained, last year, 42% of cases filed were disposed of by summary judgments and default judgments.

Australia. In general terms, plaintiffs in Australia may apply for summary judgment either on filing an originating process (South Australia) or after the defendant enters an appearance or defence (all other jurisdictions). The plaintiff is required to file an affidavit setting out the evidence on oath needed to establish the basis of the plaintiff's claim and the plaintiff must depose that there is no defence to the claim. A defendant wishing to oppose such an application is required to show cause why summary judgment should not be granted by affidavit and, if this is done, the application is set down for hearing and determination by the court. The applicant car-

ries the burden of establishing that summary judgment is appropriate.[31] In some jurisdictions, procedural rules extend the ability to seek summary judgment to defendants.[32]

A court will grant an application for summary judgment only if it is clear that there is no triable issue or, as the High Court of Australia put it, "no real question to be tried".[33] If the defendant raises an arguable defence or a question of law or fact that needs investigation, the application for summary judgment will be dismissed. In practice this has been a very low threshold, and defendants are able to resist summary judgment in all but the clearest of cases. Queensland has attempted to raise the threshold by adopting the current English provision whereby the court is to grant summary judgment if is satisfied that the defendant has no real prospect of successfully defending the claim.[34] This has been construed as meaning 'real' as opposed to 'fanciful'[35] or 'so slim as to be fanciful'.[36] The new Rule is said to "…call for a more robust approach by the Court, consistent with the overriding purpose of the [Rules] which is 'to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'. South Australia requires the defendant to satisfy it that the claim should not be permitted to go to trial because the plaintiff cannot succeed on any possible view of the law or facts. This reflects the more traditional approach.[37] Tasmania provides that a court may, if the action is frivolous, or the defendant has a good defence on the merits, enter judgment for the defendant. An alternative procedure open to the court is if it thinks that matter should proceed summarily and without appeal and the parties consent.[38] Some jurisdictions limit the availability of the procedure to certain types of cases. In Tasmania, for example summary judgment is not available for in claims for defamation, malicious prosecution, false imprisonment or fraud.[39]

[31] *Cordinup Resorts Pty Ltd v Terana Holdings Pty Ltd* (1997), 143 FLR 18.
[32] Queensland (R293); South Australia (R25.04).
[33] *Fancourt v Mercantile Credits Ltd* (1983), 154 CLR 87 at 89.
[34] Rule 292 Uniform Civil Procedure Rules 1999 (Qld).
[35] *Foodco Management Pty Ltd v Diaz Keinert Pty Ltd,* unreported (2001), QSC 291.
[36] *McPhee v Zarb & Others* Unreported (2002), QSC 4.
[37] *Shipard v Motor Accidents Commission* (1997), 70 SASR 240.
[38] Tasmania (R367 Supreme Court Rules 2000).
[39] R356(2) Supreme Court Rules 2000 (Tas).

United States. The United States Federal Rules also contain provision for summary judgment, which is available both to plaintiffs and defendants although it is more often sought and obtained by defendants. The standard for full or partial summary judgment under Federal Rule 56 "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". Unlike motions to dismiss for failure to state a claim, or motions for judgment on the pleadings summary judgment does not test the legal sufficiency of the pleadings but determines whether there is sufficient proof on material issues for the case to go to trial, or if it should be disposed of without trial. If a trier of fact might go either way on the admissible evidence the motion must be denied as it is not designed to resolve genuine and material issues of fact or witness credibility but rather to decide whether there are such issues at all. The standard is similar to that for pre-verdict and post-verdict judgments as a matter of law (previously, and often still, referred to respectively as motions for a directed veredict and for judgment notwithstanding the verdict), by which matters tried before juries are disposed of by the court rather than the jury. In the opinion of the reporters, the standard is high, but summary judgment motions are granted with some frequency and they are not, as has been thought, reversed on appeal more often than other trial-court rulings.

Applications. It should also be mentioned that in most Commonwealth countries, in cases where it is not anticipated that the case will involve disputed questions of fact requiring *viva voce* evidence to determine credibility, the matter may be commenced in a form other than by way of action, the form variously being called "originating notice", "originating application", or just "application". Applications proceed through an exchange of documents, unless the respondent contests the procedure and succeeds on a motion to have the matter converted to an action.

For example, Rule 6 of the High Court Rules in South Africa provides for Applications or "motion procedure" for matters that can be decided on the papers only without oral evidence. The applicant addresses a notice of motion to the respondent setting out the relief sought and attaching an affidavit with the material facts. The respondent answers with an answering affidavit and the applicant may respond with a replying affidavit. Counsel then attend the hearing and make argument and the court decides. Exceptionally, as in Canada, the judge can allow oral evidence where a factual dispute of a limited nature has arisen on the papers. In Canada, a trial of an issue is also allowed on a summary judgment motion. How-

ever, the application procedure is used where there do not appear at the outset to be any disputed issues of fact, and where it is prescribed by statute. Although the motion procedure is the exception to the rule, it is used extensively in the High Court of South Africa.

4. *Procedures that provide provisional or anticipatory relief*

A. *Interim injunctions, attachments, receiverships, orders to remain in the country*

Remedies such as interim injunctions, Anton Piller orders, Mareva injunctions, are described in this way as "provisional" because they are not intended to be final dispositions of the proceedings on the merits. On the contrary, they are ostensibly intended to preserve the rights that are the subject matter of the dispute pending trial. However, the reality is that the granting of such remedies will often be outcome determinative, and in deciding whether or not to grant such relief the court may take that fact into account. Provisional relief is granted when there is a serious question to be tried, irreparable harm will be suffered unless an injunction is granted, and there will be greater harm suffered by the party seeking the injunction than by the party resisting the injunction pending a decision on the merits. Special safeguards include the obligation of the party present to provide full and frank disclosure of the strengths and weaknesses of its case, and the obligation to undertake to pay damages in the event that the relief should not have been granted.

England and Wales. Preliminary orders may be issued prior to trial as part of the courts' power to issue interim injunctions.[40] In 1975,[41] the focus on the need to show a *prima facie* case on the merits shifted to a consideration of the relative hardship to the parties of granting or refusing the injunction pending the outcome of the trial. Consideration of the merits became an exceptional "tie-breaking" factor. In the view of the national reporter for England and Wales reporter, this approach was not justified except when it was impractical to conduct a pre-trial assessment of the case's merits and subsequent decisions have produced exceptions to per-

[40] Supreme Court Act 1981, s 37.
[41] *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396 (HL).

mit review of the merits of the case.[42] Still, the procedural safeguards for the granting of interim injunctions include an undertaking to indemnify the defendant (and in some situations non-parties) should the interlocutory order subsequently be held to have been improperly made.[43] In addition, in interim injunctions involving restraints on publication, section 12(3) Human Rights Act 1998 (which relates to freedom of expression) requires the court to consider "the extent to which… the material has, or is about to, become available to the public; or it is, or would be, in the public interest for the material to be published", and this, therefore, involves a consideration of the merits of the case.[44]

The English jurisprudence on provisional remedies has been highly influential and it has been followed closely in other the Commonwealth countries.

Mareva injunctions,[45] now known as "freezing injunctions"[46] operate as *in personam* orders restraining defendants, and certain non-parties, such as the defendants' banks, from dealing with their assets. These injuctions preserve assets from dissipation pending final execution against the defendant, but they generally allow some of those assets, above a protected sum, to be dealt with by the defendant for ordinary domestic or business expenses and for legal advice in resisting the order. Freezing injunctions are different from the Italian provisional remedy in that they do *not* operate to transfer any proprietary interest in the defendant's assets-they simply restrain the defendant from dealing with those assets. They are usually granted *ex parte* (without notice) before the main proceedings against the defen-

[42] N. Andrews, English Civil Procedure: Fundamentals of the New Civil Justice System (Oxford UP, 2003), ch 18, section B (3), and N Andrews, Principles of Civil Procedure (1994), paras 9-040 to 9-050.

[43] A. A. S. Zuckerman, "The Undertaking in Damages-Substantive and Procedural Dimensions" [1994], CLJ 546; Neil Andrews, Principles of Civil Procedure (1994), paras 10-046 to 10-051.

[44] *Douglas v Hello! Ltd* [2001], QB 967 (CA).

[45] S. Gee, *Mareva Injunctions and Anton Piller Relief* (4a. ed., 1998); LA Collins, *Dicey and Morris on the Conflict of Laws* (13a. ed., 2000), N. Andrews, "Provisional and Protective Measures: Towards an Uniform Protective Order in Civil Matters" (2001-4), 6 Uniform Law Review 931-949; LA Collins, "Provisional and Protective Measures in International Litigation", in *Essays in International Litigation and the Conflicts of Laws* (Oxford UP, 1994), P. Schlosser *Jurisdiction and International Judicial and Administrative Co-operation,* Hague Academy on International Law's (2000), vol. 284, Collected Courses, reprinted as offprint (The Hague/Boston/London, 2001).

[46] CPR 25.1(1)(f) renames the injunction.

dant have commenced and they are reviewed soon after at an *inter partes* hearing, when the court decides whether to continue or to discharge it. *Ex parte* applicants must make full and frank disclosure to the court of the strengths and weaknesses of their cases. Freezing injunctions are now awarded regularly[47] both in respect of assets and located in England and Wales ("domestic assets") and those located elsewhere ("worldwide").

Procedural safeguards include the need to show: a good arguable case that the applicant is entitled to damages or some other underlying relief; that the underlying cause of action has accrued, and is not merely anticipated; that there exists a real risk that the respondent's assets will be removed or dissipated unless the injunction is granted (not merely through innocent transactions made in the ordinary course of business); that the damage in granting the injunction can be compensated for by the applicant's undertaking or is clearly outweighed by the risk of injustice if the order is not made; and that the applicant will indemnify the respondent if the injunction is wrongly granted, and is ready to provide a guarantee, if necessary, to support this undertaking.

As regards non-parties, freezing orders do not confer proprietary rights upon successful applicants, and so a non-party creditor can apply to have a pre-existing debt discharged by the defendant without first obtaining judgment against the defendant.[48] Further, once notified of the order, a non-party is obliged not to act inconsistently with it.[49] Frequently, a *defendant's* bank will be notified even before the *defendant* so that the bank will be restrained from honouring its client's cheques and instructions where required by the injunction.[50] Freezing injunctions can apply to assets located outside England and Wales, and "worldwide" injunctions are now granted regularly to secure foreign assets and to obtain information about them, the latter purpose frequently being of greater practical significance.[51] In

[47] Even in 1979, applications were made at the rate of about 20 per month: *Third Chandris Corpn v Unimarine* [1979] QB 645.

[48] *Iraqi MOD v Arcepey* (*The Angel Bell)* [1981] QB 65 (CA).

[49] Annex to PD (25), concerning freezing injunctions (domestic or 'worldwide' assets), at sub-heading "Parties other than the Applicant and Respondent".

[50] *Z Ltd v A* [1982], QB 558 (CA).

[51] L. A. Collins, *Essays in International Litigation* (Oxford UP, 1993); P. Kaye, "Examination of Judgment Debtors as to their Assets Abroad: Courts' Powers and Jurisdiction" [1989], LMCLQ 465.

addition, the English courts grant such orders in aid of proceedings commenced in Brussels or Lugano contracting states[52] and elsewhere,[53] particularly in cases involving large and sophisticated fraud.[54]

"Search Orders", which used to be known as "*Anton Piller* Orders"[55] allow applicants to inspect defendants' premises and remove or secure evidence of alleged wrongdoing. These orders are made *ex parte* so that the applicant can seize vital evidence before it is lost or destroyed. They are generally used in cases of breach of intellectual property rights and confidentiality. Although relatively infrequent, they can be granted before or after the main proceedings have been commenced, or even after judgment has been granted. When an order is sought in anticipation of the main proceedings, the applicant must undertake to commence and serve notice of the main action forthwith. Search orders may not be used to establish a cause of action-applicants must have a very strong *prima facie* case on their main action to obtain them. There must be a very serious risk of damage to the applicant's interests; and the court must be satisfied that the respondent has the relevant material and will destroy it unless subjected to a search without notice. The execution of search orders is usually subject to various requirements and to the supervision of an independent solicitor to ensure fair-play and to prevent oppression.

Canada. A similar approach to interim or interlocutory injunctions is taken in Canada.[56] The test is based on the standards established in England[57]as modified by the Supreme Court of Canada: the court must be satisfied that there a serious question to be tried; that the applicant will suffer irreparable harm if the injunction is refused; and that the balance of convenience favours the injunction.[58] The test in Quebec is similar in the

[52] Civil Jurisdiction and Judgments Act 1982, s. 25.

[53] Civil Jurisdiction and Judgments Act 1982 (Interim Relief), Order 1997, SI 1997, 302; and the Rules of the Supreme Court (Amendment), 1997 (SI 1997 No. 415), noted LA Collins (1996), 112 LQR 8 and N. Andrews [1996], CLJ 12.

[54] *Credit Suisse Fides Trust SA v Cuoghi* [1998], QB 818 (CA), noted D Capper (1998), 17 Civil Justice Quarterly 35 at 37-40.

[55] CPR 25.1(1)(h), see M Dockray, *Anton Piller Orders* (1992); and S Gee, *Mareva Injunctions and Anton Piller Relief* (4a. ed., 1998).

[56] R. Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto, Canada Law Book, 2002); and E. Meehan, *Injunctions* (Toronto, Carswell, 1996).

[57] *American Cyanamid, supra*, note 41.

[58] *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*, [1987] 1 SCR 110; *RJR MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311.

first two requirements, but concentrates in the third requirement on preventing this interlocutory order from precipitating a result in the case.[59]

Like the English courts, Canadian courts have been concerned about the reduction in the threshold requirement relating to the strength of the plaintiff's case from a *prima facie* case to merely a showing of a serious question to be tried. One commentator, who regarded the judge's preliminary assessment of the merits as generally important, has identified six situations in which the more stringent test is appropriate: where it cannot be determined where the balance of convenience lies; where the facts are not in dispute; where the case turns on a pure question of law; where particular substantive issues are involved, such as libel; where the injunction is sought against a public entity; and where the rights of the parties are finally determined on the interlocutory motion.[60]

The concern that about irreparable harm, *ie,* harm that might ensue from the granting or withholding of an injunction and that cannot be remedied by the relief awarded following a trial remedy has been described by the Supreme Court of Canada as follows: "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision… or where a permanent loss of natural resources will be the result where a challenged activity is not enjoined".[61]

The highly discretionary nature of the third element —the balance of convenience— has been demonstrated in cases involving challenges to the constitutionality of legislation, where stays have been sought pending the review of an administrative tribunal determination.[62] However, the context of these cases may be different from that of other private law disputes, where the harms to the parties may be commensurable.[63] Finally, it is worth noting that courts and commentators in Canada have doubted the suggestion in the *American Cyanamid* decision that "where everything else is

[59] Article 752, *Code of Civil Procedure.*
[60] Sharpe, *supra*, note 56 at 2.370.
[61] *Metropolitan Stores, supra*, note 58 at 405-406. P. Perell "The Interlocutory Injunction and Irreparable Harm" (1989), 68 Can Bar Rev 538.
[62] *Metropolitan Stores*, *supra* note 58.
[63] *RJR Macdonald*, *supra* note 58.

equal 'it is a counsel of prudence to … preserve the status quo'" because, as the Canadian national reporter observed, courts may be interfering just as much by preserving the "status quo" in the face of an application for an injunction as by altering it.

Australia. Australian courts too provide the full range of common law interlocutory orders aimed at preserving the rights of the parties pending adjudication, including injunctions and other forms of restraining orders that extend beyond the subject matter of the dispute to include the assets of defendants, such as Mareva injunctions. While these are not final orders, often they have that effect in bringing about a resolution of the dispute without trial.

Israel. The principles underlying provisional relief are much the same as they are in England and Wales and in Canada, the need to prevent defendants from frustrating the enforcement of an award that might be granted is balanced with the corresponding concern not to exercise the coercive powers of the court in the absence of a fair procedure. However, the extensive delays in the Israeli court system, which the national reporter has indicated can reach four or five years in some jurisdictions, coupled with high inflation, can exacerbate this problem. In extreme cases, justice delayed is indeed justice denied. This situation has weighed in favour of preliminary relief, both in the forms available and in the ease of obtaining it, even at some expense to defendants' procedural rights.[64]

In addition to the forms of provisional relief already discussed, Israeli courts can grant civil law remedies that were established during the Ottoman Turkish law, which prevailed before the First World War, such as temporary attachment (*saise conservatoire* and *saise revendication*). There is also the possibility of orders for temporary receiverships and orders restraining defendants from leaving the country pending the outcome of the trial, although the availability of this latter kind of order has been reduced in recent years.[65]

The conditions for granting preliminary relief in the case of injunctions once emphasized the strength of the plaintiff's case and not the indications that such relief was warranted in the particular case, and the reverse

[64] S. Goldstein, "Recent Developments and Problems in the Granting of Preliminary Relief", 40-41, *Revue Helleniquede Droit International* 13 (1987-1988).

[65] S. Goldstein, "Preventing a Civil Defendant from Leaving the Country as a Form of Preliminary Relief", 20, *Israel Law Rev* 18 (1985).

was true for orders restraining defendants from leaving the country pending disposition of the matter. The evidentiary requirements were lax until recently when change was prompted by academic criticism and the adoption in 1992 of the Basic Law: Human Dignity and Liberty, which includes provisions protecting property and the right to leave the country. The Basic Law generally enhanced recognition of defendants' rights, and the Rules of Civil Procedure were revised in 1996 to require a *prima facie* case on the merits of the claim, and a showing that the absence of a temporary attachment order may hinder the enforcement of the judgment. Further the Supreme Court held that in determining whether to grant orders restraining defendants from leaving the country, the Basic Law required courts to give great weight to the right of a person to do so.[66] The court must be persuaded that *prima facie* there is a good case on the merits, that there is a grave and tangible danger that the proceeding will be impeded or the execution of the judgment heavily burdened and that there are no lesser measures available to accomplish the same end, and that the proceedings could not readily be conducted despite the defendant's absence. The national reporter was of the view that this form of provisional relief ought to have been eliminated entirely.

In 2001 the Rules of Civil Procedure were amended to create a new scheme regulating the granting of preliminary relief.[67] For all forms of relief, the court must be satisfied on the basis of *prima facie* reliable evidence, that the plaintiff has a good case on the merits, and the court must consider the relative damage to each side of the granting of the order and any damage to third parties, and whether the request is made in good faith and will not cause greater injury than is necessary. Where necessary, preliminary relief may be granted up to seven days before the action is filed, provided the plaintiff has filed a written undertaking as to any damages that might result and, unless relieved of the obligation, the plaintiff posts security for damages. Only temporary attachments, Mareva injunctions and Anton Piller orders can be issued *ex parte*, other temporary injunctions, orders preventing the defendant from leaving the country and in-

[66] *Lev v The Regional Rabbinic Court* 48 (2) PD 491 (1992); *Binken v State of Israel* 48(1) PD 290 (1992); *Weisglass v Weisglass* 48(4) PD 529 (1992).

[67] S. Goldstein, "The Problematic Nature of Preliminary Relief: A Comparative Analysis based on the Israeli Experience", in *Studi in Onore di Vittorio Denti,* vol 3 (Padova, 1994), at 181.

terim monetary payments generally require an *inter partes* hearing. The new rules include the requirement, except in the case of temporary attachments, for the court to fix the date for a full hearing within 14 days. The hearing is generally not more than one day and it is based on affidavits and cross-examination. At the hearing, the court may revise or rescind the order where circumstances have changed, new facts have been disclosed, or the order appears unjustified. The court may also order an expedited hearing on the merits of the dispute.

The new rules also contain provisions specific to temporary attachments, Mareva injunctions, preventing a defendant from leaving the country, Anton Piller orders, and temporary receiverships. Temporary attachment, like its French counterpart, the *saise conservatoire* and the *saise revendication*, used to be limited to certain kinds of cases but this form of relief has recently been expanded in Israel and elsewhere to include all actions for money judgments. Attachment is intended to be conservatory only and it does not effect a transfer of ownership in the property that has been seized for safekeeping. In some cases, the property remains with the defendant who is appointed a trustee for its safekeeping. Only rarely is possession transferred to a plaintiff as trustee. The rules provide mechanisms for third parties to assert any rights in the property that they might have. Israel also adopted Mareva injunctions, orders "restricting the use of property", for situations in which the defendant's property is located abroad because temporary attachments, which are *in rem* forms of relief directly against the property, can only be effective for property located in Israel. As *in personam* remedies, Mareva injunctions can restrain defendants from dealing with property located elsewhere.

Anton Piller orders —"seizure of property"— have also been introduced to permit the court to appoint a person to search, photograph, copy or seize materials that might be required for determining a claim to prevent it from being hidden or destroyed; and temporary receivers may be appointed to preserve property that might be required to determine a matter or satisfy a judgment. The receiver is authorized to manage assets as the owner would. This is generally ordered where several people share administrative rights in property in dispute.

These new rules have enhanced the safeguards for defendants and they have increased the uniformity in the requirements for obtaining preliminary relief and the standards for granting it. However, although all orders are conditioned upon the risk of adverse consequences, the extent of the risk

and the gravity of the consequences vary between temporary attachments, which require only a "reasonable fear" that the failure to issue the order "will hinder" the execution of the judgment, and orders preventing defendants from leaving the country, Anton Piller orders and temporary receiverships, which require a "substantial fear" that the failure to issue the order "will substantially hinder" the maintenance of the action or the execution of the judgment.

United States. In recent years American courts[68] have held that Mareva injunctions were an impermissible expansion of the equitable powers of the courts in the absence of democratic endorsement in the form of legislation. According to the courts, such innovations involved "the balancing of important competing interests and crafting of appropriate safeguards and standards to ensure that the balance is fairly administered in the individual case" and this was "best left to statutes and rules rather than *ad hoc* judicial decision-making". This was particularly so "where judicial innovation may have far-reaching impact on the existing balance between 'debtors' and 'creditors' rights".[69]

B. *Anticipatory relief: interim payments, cognovit notes, warrants*

Some common law jurisdictions have other provisional remedies that are less often used, but that perhaps come closest to that described by professor Pellegrini Grinover. These remedies entail the power to order interim payments of damages based upon the prediction that at the trial the plaintiff will win on the substance of the matter, and upon the understanding that if the case is eventually won by the defendant, the money will be paid back to the defendant. This goes beyond the effect of provisional grants of relief precipitating an early resolution of the dispute by affecting the litigants' capacities to wait for the results of trial process, or by forecasting the likely result of the litigation and thereby prompting settlement.

Interim payments of damages. In this way, although in Israel preliminary relief may be either conservatory or anticipatory in nature, and it is generally designed to ensure that plaintiff with meritorious claims are not

[68] *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc*, 527 US 308 (1999). *Credit Agricole Indosuez v Rossiyskiy Credit Bank*, 94 NY2d 541, 729 NE2d 683, 708 NYS2d 26 (2000).

[69] *Ibidem*, at 729.

be prevented from receiving relief by the delay involved in the trial process, it may sometimes involve interim awards of payments, for example, in road accidents or claims for support. Similarly, in some Australian jurisdictions interim payments of damages may be ordered pending a final adjudication of the claim. Procedural mechanisms vary, but, for example in New South Wales interim payments may be ordered if the defendant has admitted liability or a judgment has been rendered with damages to be assessed or the court is satisfied that the plaintiff would obtain judgment for substantial damages. The Court may not make the order if the defendant is not insured and not a public authority and would suffer undue hardship. Some types of claims are excluded from these general provisions, such as personal injury claims arising from motor vehicle accidents, which are provided for in separate legislation. In South Australia courts can give declaratory judgments as to liability and order interim payments on account of damages to be conclusively assessed at some later date. There may still be an extensive proceeding required to determine the amount and timing of payments, but it enables a personal injury victim to bring an action without waiting for injuries to stabilize. (In Canada widely available "no fault" insurance benefits have arguably obviated the need for interim payment procedures.)

Cognovit notes. In some states in the United States it is still permissible to include in credit contracts a "cognovit" clause in which the consumer waives in advance the right to be notified of court hearings or suits for non-payment. These agreements are also called "confessions of judgment" and they amount to the agreement to the entry of judgment upon a triggering event such as a missed payment. While the Supreme Court has declined to declare cognovit notes unconstitutional, many states have banned them as unfair to consumers.

Canadian "*warrants*". In Ontario and, possibly, elsewhere there exists the "ultimate summary procedure", judgment first, trial later in tax collection cases. Various statutes provide the Minister of Finance with an enforcement mechanism pursuant to which the Minister may issue a "warrant" directed to the sheriff, and these statutes provide that the warrant has the force and effect of a writ of execution issued out of the Superior Court of Justice. Once the Ministry has given a taxpayer notice that taxes or other levies are due if the taxpayer does not pay, the Ministry simply issues a warrant (effectively a writ of execution) and it is executed unless the taxpayer moves to set it aside. It should similarly be noted that provisional

support orders are routinely issued and executed upon before being finalized. Forms of execution may include suspension of the judgment debtor's driver's license.

5. *Mechanisms that streamline procedures to reduce the expense involved*

As a response to the fact that it has become uneconomic to litigate claims of small or even medium-sized amounts under the ordinary or general procedure, many jurisdictions have developed specialized procedures (and often specialized courts) for small claims, and some jurisdictions have introduced simpler procedures, which must be used in cases involving modest amounts of money or property in the higher courts. Both of these may involve a hearing that is different from a normal trial.

A. *Small claims procedure*

Small Claims Procedure in England and Wales provides "an accessible, quick, cheap and informal means of deciding disputed civil claims which involve comparatively small sums of money"[70] with "brisk and efficient" adjudication.[71] In small claims there is little "pre-trial" procedure before the brief hearing and litigants often act for themselves. For most claims, the amount in issue must be less than £5000 and for claims for personal injury and repairs by residential tenants the claims should be for less than £1000. The Woolf report noted that in 1994 three times as many small claims proceeded to a final hearing as other claims.[72] In 2001, this amounted to 58,000 small claims hearings,[73] the largest portion of the proceedings governed by the Civil Procedure Rules. The procedure was designed for individuals but is more often used by small businesses. (Similar small claims courts or procedures exist in Canada and the U.S.)

[70] Lord Woolf, *Access to Justice: Interim Report* (1995), 104 para 8, citing the *Civil Justice Review* (1988); and C.J. Whelan (ed), *Small Claims Court: A Comparative Study* (Oxford, OUP, 1990).

[71] *Starmer v Bradbury*, The Times, 11 April 1994 (CA).

[72] Lord Woolf, Access to Justice: Interim Report (1995), 102 at para 1.

[73] Judicial Statistics; Annual Report (Lord Chancellor's Department, Stationery Office, 2001), tables 4.7- 4.11.

As with all claims the parties ordinarily must serve on other parties copies of all documents, including any expert's report, on which they intend to rely at the hearing. Oral or written expert evidence may be used only with leave of the court. Preliminary hearings are available only when necessary to facilitate compliance with special directions given for the case or to dispose of the case summarily or strike out a statement of the case. In these situations, preliminary hearings may be treated as final hearings. The main hearings are intended to be fair and informal and free from evidential formality, including oath taking, and the judgment can restrict the amount of cross-examination undertaken. Judges are expected to participate actively, asking questions of witnesses and parties, and hearings are normally held in public. Litigants may be represented by barristers, solicitors, legal executives or lay persons and they may appear in person, with companies appearing through their officers or employees. Alternatively, the parties may agree to permit the court to deal with the matter without an oral hearing. A party can ask the court to decide the matter on the papers in its absence. If the hearing is conducted in the absence of a party without consent, the party can apply for the judgment to be set aside and the claim to be re-heard, provided the court is satisfied that the applicant has a reasonable prospect of success and a good reason for not attending or being represented at the hearing and for failing to give written consent for the hearing taking place in his absence.

The judgments must be reasoned although the reasons may be brief and may be given orally at the hearing, and the court is empowered to give any remedy otherwise available as a final remedy in an ordinary county or High Court trial. A party may ordered to pay another party's court fees, and expenses for attending the hearing, including loss of earnings (which also applies to witnesses); and expert fees. Appeals are generally heard by district judges, unless the judge was a circuit judge, in which case the appeal lies to at High court judge.

In the view of the national reporter for England and Wales, the informality of the procedure appropriately reduces expense and delay in small matters, permitting parties to represent themselves and, thereby enhances access to justice. Without such a procedure, claimants would be left to face the disproportionate expense of conducting more formal adjudication in the county courts on "the fast-track".[74] Small claims procedure places

[74] The fast-track is generally applicable to claims within the £5,000 to £15, 000 band.

different demands on judges. While it may be less demanding intellectually than larger complex cases, it can still challenge a judge's sensitivity and tact, particularly where one side is represented and the other is not, and the judge must ensure procedural equality.

B. *Summary trial, simplified procedure and case management*

Two provinces in Canada have introduced procedural innovations that reduce pre-trial discovery and that simplify the presentation of evidence at trial. These procedures are the summary trial in British Columbia (now adopted in several other provinces) and the simplified procedure in Ontario.

Summary trial. The British Columbia summary trial was introduced to prevent the summary judgment procedure from being circumvented. The summary trial is very different from summary judgment, even though the material before the court is similar. Summary judgment can only be granted when it is shown to the court that there is no genuine issue to be tried. However, the summary trial procedure is available even where there is a genuine issue to be tried and results, in effect, in a "paper trial"; the court tries the factual issues, but on the basis of affidavit evidence and oral argument. Judges have discretion to require the matter to go to a full trial where this is warranted and it is accepted that some cases will be unsuitable for the process, such as factually complex cases or those involving apportionment of responsibility between parties. The determination of whether the procedure is suitable is discretionary and the resulting standards have not been entirely uniform. The summary trial procedure is arguably the most radical procedural innovation in the common law world, rejecting the age-old principle that factual disputes are to be resolved on the basis of oral evidence at a trial.

The procedure requires 14 days' notice and the judge can only give judgment where it is possible to find the necessary facts to decide the issues of fact or law, and the judge may nevertheless decline to give judgment if it would be unjust to do so. The chambers judge may consider factors such as the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question. However, even where a fuller airing of the credibility dispute may be possible following the ordinary procedure, the court

must consider whether the result reached through the mechanism of a summary trial would be unjust. As an optional model of diverting civil litigation, the summary trial procedure has continued to be popular as an adjudicatory option. Surveys conducted in 1992 and 1993 revealed that almost half the cases were resolved in this way permitting hearings of often a month's duration to be reduced to chambers matters of a day or two.[75]

Simplified procedure-"rationing procedure". Ontario's civil justice reform has included the introduction of simplified procedure for claims for money or property of a value less than or equal to $50,000.00. Parties may manipulate their pleadings to avoid the procedure, but they do so at risk of cost consequences should a trial judge find that they should have followed this form of procedure. Under simplified procedure, there are no examinations for discovery, and no cross-examination on affidavits or examination of witnesses on a motion. After the close of pleadings, a party may elect either to pursue summary judgment or for a summary trial. Since its introduction in 1997, the procedure has been used steadily in roughly a quarter of all civil cases filed. The balance of the statistics on simplified rules suggest that the proportion resolved by summary judgment or by simplified trial are similar to that in civil cases that follow the ordinary procedure.

Summary judgment is available to dispose of the action unless the judge is unable to decide the issues in the action without cross-examination or it would be otherwise unjust to do so. Summary judgment is brought by way of a motion with supporting affidavits. Although the court ought not to resolve genuine issues requiring a trial, the threshold is intended to be lower than summary judgment in the ordinary method of proceeding. Alternatively, a party may opt for a summary trial in which the parties adduce evidence by affidavit and cross-examinations and oral argument are each limited to an hour.

Similar approaches to simplifying procedure can be found in the Quebec Code of Civil Procedure, in which the right to oral examinations on discovery has been eliminated in cases where the amount claimed is less than $25,000,[76] and in the Small Claims Court procedure in which parties

[75] CLE Society of British Columbia, *Civil Litigation Conference Materials* (12 July 1996), at 2.1.03.

[76] *An Act to reform the Code of Civil Procedure*, L.Q. 2002, C. 7. A Russell "Revising Civil Procedure in Quebec: A Necessary Process" (2002), 5 Canadian Forum on Civil Justice, 11.

often represent themselves.[77] Still, the national reporter for Canada expressed concern at the use of the amount in dispute without more to determine the extent of procedure available to the parties. Small matters are sometimes complex and they may also involve graver harm, more important rights, or greater consequences to the parties than larger claims. The policy preference indicated in the introduction of simplified procedure may permit litigants to try cases that are otherwise economically unviable, but as he commented, "drawing bright procedural lines based solely on the damages claimed in civil litigation turns a private calculation (how individuals quantify harm or loss) into a public calculation (how the civil justice system allocates rights to discovery and cross-examination), without reference to other indicia of the public interest".

Following pilot projects in most Canadian provinces case management programs have been implemented with fast track provisions. Settlement conferences are voluntary in some provinces and mandatory in others. Where the matter is to be case managed, the plaintiff chooses the fast track or the standard track based on the complexity, expense, importance and number of parties involved in a civil action. A judge is assigned to the matter to hold a case conference to set the timetable for the proceeding. Under case management, the parties require leave to miss deadlines, and cannot simply do so on consent. A settlement conference is conducted within 90 days after the first defence is filed for the fast track, or within 240 days for the standard track. If no settlement is reached, the Case Management Judge or Case Management Master supervises the litigation to ensure an expeditious resolution.

C. *Fast track procedure*

Among the 2001 amendments to the Civil Procedure Rules was the addition of a fast track procedure. As the national reporter for Israel explained, the existing procedures already provided for simplified forms of proceeding in small claims that were similar in scope and approach to those exist-

[77] In Ontario, claims for amounts of $10,000.00 or less proceed by way of a more flexible and informal judicial procedure where parties are often unrepresented and where judicial officers often serve on a part-time or *ad hoc* basis and take a more controlling part in the litigation of a claim: M. Zuker, *Small Claims Court Practice*, Toronto, Carswell, 1998.

ing in the England and Wales courts. The fast track procedure was introduced for slightly larger claims that could be disposed of through a streamlined procedure. The initial allocation of claims to this procedure is based on the amount in dispute and it is not discretionary. However, a court may transfer the case to the regular procedure if it is not suitable for the fast track, possibly because of the complexity of the facts and evidence involved, the number of parties, complications caused by the existence of counterclaims and third-party action, the extent of oral evidence and expert testimony involved, and the effect of the determination of the case on the public at large. Where the parties agree, however, courts may also order cases to proceed in the fast track even if they are above the monetary limit.

Unlike the ordinary method of proceeding in most cases, pleadings must be verified by affidavits and the parties must attach any legal authorities and a list of all documents relevant to the case, not only those on which they intend to rely. The documents in the possession of the pleader are to be attached, and the whereabouts of the others, if known, are to be specified. Thus, disclosure is given without prompting of the other party and as part of the pleading process itself. Within 45 after the close of the pleadings, the parties file affidavits from all the witnesses on which they intend to rely to serve as the witnesses' direct testimony. Counterclaims are limited to those involving parties to the main dispute and those that, if filed as separate claims, would be filed in the fast track procedure or that arise out of the same transaction or occurrence as the original claim. Third party claims may only be filed with leave so as to prevent the process from being unduly burdened.

The availability of preliminary relief is not affected, but requests must be made in writing "as early as possible after the reason for such relief has arisen". In dealing with a request for preliminary relief, the court has great flexibility, which includes summarily dismissing an unfounded request, requiring the plaintiff to send the request to the defendant to respond in writing within seven days so that the court can determine the matter on the written statements, and ordering an oral hearing to be held as part of the preliminary hearing.

The court sets the timetable at the close of pleadings for a trial date not later than six months hence. The court may also hold one preliminary conference within thirty days of the close of pleadings if necessary "to expedite, simplify and accelerate the proceeding and to clarify the most suitable way of determining the case". At the preliminary hearing, the court: re-

views the suitability of the case for the fast track process; confirms that the parties have complied with all the requirements of the fast track process; determines the questions that are truly in dispute; determines requests for preliminary relief; appoints agreed upon or court appointed experts; determines filing dates for witness affidavits; determines the list of witnesses at trial; presents suggestions for compromise settlements, or for determining the case by a "compromise judgment" or for referring the case to arbitration or mediation; and imposes any costs or fines for non-compliance with the procedure or unnecessary delay.

The parties must attend in addition to their representatives so as to promote settlement except where this is unsuitable. The rules provide that where possible, the judge who decides the case at trial should be different from the judge who presides at the preliminary conference. This is unusual in Israeli procedure and the national reporter felt that it reduced the power of the judge in the preliminary conference to persuade the parties to settle the case or to use ADR.[78]

The rules also make special provision for the trial, including that it should normally be completed within a day, or should continue from day to day uninterrupted, and in any event should not be interrupted for more than 14 days. This is specified in the rules because the normal practice in Israeli litigation is to have short sessions of evidence and argument over the course of several months or years.[79] The presiding judge is expressly authorized to limit the examination of a witness where it is not relevant or where it is unfair or unduly burdensome. Written arguments are to be submitted at least a week before the trial and oral summations immediately following the evidence. The court renders judgment immediately following the trial or within 14 days. The judgment is to be reasoned but concise, "unless the court believes that the reasoning should be more detailed because the judgment contains an innovation in the law, or is of special importance to the public at large or because of other unusual circumstances which must be recorded". The national reporter expressed hope that if litigants com-

[78] S. Goldstein, "Expediting the Administration of Justice: Financial Means and Constitutional Concerns", *Law in Motion: 1st.World Congress*, Brussels, 1997, at 211.

[79] S. Goldstein, "On Comparing and Unifying Civil Procedural Systems", *Butterworth Lectures 1994: Process and Substance*, R. Cotteerell (ed.), London 1995, 1, pp. 18-23; S. Goldstein, "Towards a New Israeli Civil Procedure: Away from the Worst of Both Worlds", *Essays on European Law and Israel*, AM Rabello (ed.) (Jerusalem, 1997), p. 728.

plied with these various novel requirements, it might improve the litigation process more generally.

6. *Mechanisms that provide for dispute resolution outside the adversarial process*

It is important to place the need for preliminary or summary proceedings into the context of the movement to diversify dispute resolution so as to include alternatives to the adversary system.

A. *Ombudsmen, and mandatory mediation*

The England and Wales reporter noted that outside the court system, Ombudsmen and tribunals, for example employment tribunals, dispense speedy, cheap and informal justice in a wide range of consumer, financial and governmental areas. Some Ombudsmen even adopt an exclusively written procedure.[80]

Following the recommendations of a study, and a pilot project in the Ottawa region, Ontario has introduced mandatory mediation "to reduce the cost and delay in litigation and facilitate the early and fair resolution of disputes". Under the program, the parties must each pay for a minimum of 30 minutes preparation and 3 hours mediation[81] within 90 days after the first filing of a statement of defence. The "user-pay" feature of the model has made it controversial as has the timing, which makes it almost inevitable that the mediation will occur before discoveries, the purpose of which is to foster a resolution based on an improved understanding of the case. The program is also controversial because the professional standards of mediators remain largely unregulated. The statistical studies have had mixed results: in 2001, 40% of Ontario cases were settled after mandatory media-

[80] Lord Woolf, *Access to Justice: Interim Report*, 1995, 111 at para 40, referring to adjudication by Ombudsmen in the fields of Legal Services, Parliamentary and Local Government, Insurance, Pensions, Banking, Building Societies and revenue matters; N. Andrews, *Principles of Civil Procedure* (1994), paras 19-19 & 21-17; R. Nobles, "Keeping Ombudsmen in their place: The Courts and the Pensions Ombudsman", 2001, PL 308.

[81] One commentator has argued that the realistic cost of a typical one-day mediation casts doubt on the claim that mandatory mediation is a cost-effective means of reducing the delay and expense of litigation: M. Teplitsky, "Excessive Cost and Delay: Is There a Solution", 2000, 19 Advocate's Soc J 5.

tion, 14% were partially settled and 46% remained unsettled. Court-connected mediation have, however, been better accepted with half the Canadian provinces adopting such programs over the last decade.

B. *Mediators and compromise judgments*

In 1992 the Courts Law in Israel was amended to authorize the court, with the consent of the parties, to refer a matter to mediation. The Law provides for the selection of the mediator by appointment of the parties with the approval of the court, or alternatively by choice of the court from the parties' list, or by the court at its discretion. The mediator may meet with the parties together or separately and with others and with the parties without counsel. The proceedings are privileged. The court proceedings are stayed during this time. The expense and delay involved in regular litigation has made mediation a very popular alternative, and litigants are routinely referred to it. Although it is new, it continues a tradition in which Israeli judges have historically been quite involved in the process and in inducing litigants to settle.

The Law also provides for a process known as a "compromise judgment", in which the court, with the consent of the parties adjudicates the matter before it, in whole or in part, by way of compromise. As the national reporter explained, the origin of this provision may have been a traditional Jewish Law procedure whereby the parties authorize a rabbinic court to decide their dispute, in its discretion, "either by law or by compromise". The process has been used extensively and successfully to streamline the civil litigation process, particular in tort and insurance actions.[82] Generally, the judge takes the initiative to recommend the procedure in which, instead of a full hearing, the parties may agree to present only written or oral statements of proof, or written affidavits, along with concise statements of their legal positions, and the parties may agree to a judgment without reasons or with very concise and generalized reasoning. This approach may be applied to all or some of the issues in dispute. While the court may decide solely in favour of one side or the other, it generally

[82] "Let Justice be Done, Though the Heavens Fall", 46 *HaPraklit* 257, 2002, Hebrew; Y. Terkel, "One by Law and One by Compromise" 3 *Sha'arei Mishpat*, 15, 2002.

pursues a compromise as it has been directed to do by the parties.[83] Further, as might be expected give the nature of a compromise judgment, the ambit of review on appeal is more limited than in ordinary procedures.

C. *Case appraisal and neutral evaluation*

Queensland provides for a system of case appraisal whereby a case appraiser makes a provisional determination on the case. If the parties do not elect within 28 days to go to trial the determination is entered as an order of the court. The parties can agree to this procedure or it can be ordered by the court. In the event of non-compliance, the action may be stayed and the non-compliance taken into account in making costs orders in that proceeding or related proceedings. The case appraisal is intended to be quick and informal, using any process that will lead to a "sound opinion". In special circumstances the case appraiser can take oral evidence on oath and seek the issue of subpoenas to compel attendance. If the parties elect to go to trial, the appraisal remains confidential. If the party seeking a trial does not achieve a judgment greater than the case appraisal determination, the party may be ordered to pay costs of both the action and the case appraisal.

New South Wales has adopted a similar procedural step called "neutral evaluation". In this process an independent evaluator seeks to identify and reduce the issues of fact and law and to assess the relative strengths and weaknesses of each party's case and offer an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages. The court can refer the matter to neutral evaluation without the consent of the parties and the parties are required to participate in "good faith". The neutral evaluation is intended to be carried out within 28 days of the reference and the evaluator must indicate to the court the probability of success, quantum damages or likelihood of other remedies. Tasmania has also introduced neutral evaluation. Along with mediation this is procedure can be ordered by the court without the consent of the parties but its impact is likely reduced by the parties' right to withdraw at

[83] J. E. Coons, "Approaches to Court Imposed Compromise. The Uses of Doubt and Reason", 58 *Northwestern U L Rev*, 750, 1964; S. Goldstein, "The Anglo-American Jury System as Seen by an Outsider (Who is a Former Insider)", *The Clifford Chase Lecture Series*, vol. 1, B. Markesinis (ed.), Oxford, 1996, p. 161.

any time. Like New South Wales little detail is provided as to the use of any opinion reached by the neutral evaluation. The new Federal Magistrates Service has introduced neutral evaluation and case appraisal as some of primary dispute resolution processes used by the Service although it has only developed special rules and guidelines for mediation.