European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

JUDGES' COUNCIL OF ENGLAND AND WALES

ENCJ Timeliness Seminar
3rd - 4th November 2014, the Royal Courts of Justice, London

THE LORD CHIEF JUSTICE welcomed everyone to the seminar. Next year marks the 800th anniversary of Magna Carta, signed at a time when Scotland and Wales were independent countries and the King and his barons were Norman. The RCJ opened in 1884 against the background of appalling delay in the English justice system. All legal systems have a tendency to ossify. He said that we are all part of a European judicial system and all interested in the speedy delivery of justice; it is central to what we do to ensure that we achieve timeliness in that regard. The proof of the pudding will be whether we show we can deliver justice more speedily.

Monday 3 November

PLENARY SESSION I

NIELS GRUBBE (Denmark, coordinator of the seminar) began his talk by emphasising that justice delayed is justice denied. In some cases time is even more important than usual, e.g. cases involving children or crime. If we fail in the task of the timely delivery of justice, others will take it over from us. Time is also money: time pushes up the cost of a case.

What is undue delay? Time is needed, but the case can spend a lot of time "on the shelf". And what is the time expected by the parties? What causes delay? Some judicial conflicts can be resolved by ADR. There are shortages of resource. Other causes of delay are organisational, e.g. an inability to move cases from one court to another. Or there might be problems with the court management or the procedural rules. And the attitude of stakeholders has to be taken into account, as well as the attitude of the court administrators.

One has to enquire into the present situation in terms of timeliness and ask whether it could be better.
In all countries it could be better.
What can we do? Solutions involve not just the judiciary, but also the administrators, the Government, the advocates and the parties. What is our competence? We can act and decide, but we can also initiate discussions. What are the possibilities?

Quality must always be borne in mind: it involves making the right decision. But cost and time are also features of justice. We must balance these features.

Independence is also an important feature. In the quest for efficiency, judges know best and they are the ones to implement reform. But we may learn from others, even from commercial organisations.

Julia Mendlik- The Netherlands (The Netherlands, acting district court President) spoke on the subject of the Quality and Innovation Programme being introduced in The Netherlands. Its aim is to reduce delay by 40%, aligning civil and administrative law procedures with realise complete digital access. It is hoped that this will lead to a better service, at reduced cost and with reduced workload. The judiciary needs to develop the technology, work processes and organisational development. Paper will be removed from

the system. In civil there will be only one exchange of documents, followed either by settlement or a hearing in court. That demands a lot from the judge and from the parties. Before the hearing the judge needs to be case managing proactively. In the simplified procedure there will only be five weeks from filing the defence to the first hearing, with many decisions being given orally.

The reforms will introduce digital working. The judges will be working flexibly. There will be active case management with the early preparation of cases and speedy written statements. It will require the cooperation of the lawyers, with flying brigades, a commitment from the judiciary, the delegation to staff of simple steps in procedures and a working digital system. Any system would have to handle counterclaims and / or experts.

Tom Ward - Ireland (Dublin Circuit and District courts) spoke about family mediation in the Dublin family courts. It is a tripartite approach between the Family Support Agency, the Legal Aid Board and the Court Service. Many of the parties are unrepresented, but that is an opportunity as much as a challenge.

The Dolphin House Mediation scheme started in 2011. Scripts were prepared for the court staff on the role of mediation. The parties receive information on the usefulness of mediation. 1207 concluded agreements have been were reached up to September 2014, saving about 15% of court time. The saving is about €230,000 per annum. However, the initiative did not work at circuit court level as there was a low take-up, the cases being lawyer-led and cases already having started.

He thinks the initiative is providing access to justice in a timely manner. But there was still a lack of awareness as to what mediation involves.

Anne-Ruth Moltmann-Willisch - Germany (a German judicial mediator) spoke about extra-judicial and judicial mediation in Germany. An earlier attempt at mediation in Germany had failed as the parties could easily avoid the process and the decisions were not legally binding. But from 2012 onwards lawyers filing cases have to say whether they have been to ADR; however, the ADR is not compulsory and there are no sanctions for non-compliance.

Extra judicial mediation was introduced in 2012 against the background of much controversy.
A small scheme of judicial mediation, however, proved to be successful: 70% of cases which went to judge-led mediation settled. It was introduced into the law in 2012 and is provided by Guterichters, conciliation judges, inside court. The judges can advise on the merits of the case, although very few actually do so; whilst the judges can give non-binding judgments to the parties, the reality is that they do not. But the law saying what the Guterichters can do is imprecise. The conciliators are specially-trained and can draft settlement papers. Lawyers always accompany the parties. The proceedings are confidential. Building and inheritance cases are often conciliated, as are claims involving local authorities. Some cases come to mediation after being in the court system for about ten years.

WORKSHOP SESSION ONE: REDUCTION IN CASELOAD
The participants then went to discuss the topic of reduction of case load in break out groups. The issues and questions dealt with during the first workshop were:

1. Judicial dispute prevention
2. Alternative dispute resolution (ADR)
3. Amicable settlement
4. Extended competence of lower courts – limitation of appeal
5. Multiparty actions

WORKSHOP SESSION TWO: CAPACITY MANAGEMENT

1. Balancing workload and capacity
2. Transfer of cases, reallocation of judges, flying brigades

3. Retired judges and juridical assistants
4. Composition of the tribunal

PLENARY SESSION TWO

Lord Justice Geoffrey Vos – President elect of the ENCJ spoke to the meeting he explained the rationale for, membership of and workings of the ENCJ. He spoke about the Independence and Accountability project and also the Standards Group looking at Discipline. There will be a survey soon, conducted by the ENCJ, of judges' attitudes to independence.

Attendees then spoke to the Plenary Session referring to issues they had discussed in the workshop sessions. The success rate of mediation in Berlin and from mediation initiated in court, especially where the mediation is judge-encouraged, is about the same and averages about 90%. Even if the cases do not settle, mediation helps to clarify the issues. But the experience in England is that the final hearing must follow quickly on from any failed FDR or else costs start to escalate even more than one would expect.

Early Neutral Evaluation requires a larger pool of judges to be able to hear unresolved cases. ADR can add to cost and delay if it is a stage which has to be gone through. That is not to say that ADR is not to be preferred to final court adjudication.

It ought to be possible to have judicial guidelines not only in damages cases but also e.g. in child support cases. The use of test cases is widespread. But guidelines made by judges based on reported cases is unusual, especially if this is making guidelines for the future. That is not the same as the Judicial College guidelines on Personal Injury awards. However, the process only deals with quantification and not evaluation. And will parties still contest their cases in court despite the existence of guidelines? Is the payment of costs a sufficient sanction? Costs budgets will set the maximum costs which one party will be ordered to pay to the other but the experience of some judges in England and Wales is that fixed costs have no effect on parties behaviour.


ENCJ Timeliness Seminar, 3-4 November 2014, Royal Courts of Justice, London

Tuesday 4 November

Paul Gillgian, President of the ENCJ opened Day 2 with an explanation of the working and aims of the ENCJ. The network encompasses a range of Judges' Councils with strikingly different Northern and Southern European models.

Ivana Borzova – CEPEJ- talked about CEPEJ and in particular the experiences of the Saturn Centre.
Using 2012 data, CEPEJ has published a report evaluating European judicial systems. The SATURN Centre for Judicial Time Management is dedicated to avoiding breaches of Art 6 ECHR. It collects data into the length of court proceedings and suggests how to improve the situation with a list of recommendations (transparency, cooperation, case management etc). A document is being preparing on the desired length (Timeframes) of court proceedings with cases being heard at first instance in less than 24 months. SATURN is looking to implement its 15 priorities and 48 other guidelines. Individual states can ask CEPEJ for its assistance. The meeting was encouraged to read the SATURN guidelines.

Ruth Straganz-Schrofl – Austria addressed the question whether statistics can enhance performance. What does it mean to carry out one's duties "as quickly as possible"? She is able to measure individual judge's performance in terms of how long cases are taking, how long the judgment-writing process takes and what backlog a judge may have at any one moment of time.

On a more positive note, statistics aid a discussion on the number of judges needed to dispose of all the caseload in a timely fashion. They also help to enhance the performance of an individual judge. The presiding judge will, if necessary, talk to the particular judge. The statistics help provide some of the pieces of the jigsaw of performance management.

Alan Miller – Scotland (Sheriff) spoke about case management in cases concerning children. There had been a culture of adjournments. Case management was introduced, with control on the use of experts and the introduction of hot-tubbing. At the same time there were legal aid cuts, the Childrens Reporters were focusing on more complex cases and there was pressure on the court accommodation. The average timescale from lodging to decision is now 12 weeks and in complex cases the timescale has been cut from 55 weeks to 44 weeks. Case over-runs have ceased from a previous average case over-run of 8 days. Reporters are more proactive in progressing cases and are now arguing against 64% of appeals. Lawyers no longer try it on!

Vincent Bertouille – Belgium (Justice of the Peace) spoke to facilitating digital tools for judicial decisions. Belgium introduced an incapacity law in 2013 which created 80,000 running files. A database with standard text was introduced. "Evolutions" were introduced: an order can be made, notices sent out and the case listed, all with one handling of the data file — although a paper file is still retained. The digital support was in place before the legislation was implemented. The results were greater speed of process, with steps automatically taken. It also led to a universal application of the law.

The first problem was bringing everyone together; IT skills are not always present amongst the judiciary. Two main risks: the system only provides standard text (which therefore has to be adopted in special cases) and the procedure is in the control of clerks rather than judges. But more time is available for the more difficult cases.

Rachel Karp, England (Circuit Judge, England) spoke to reducing delay in public law cases from 55 weeks to 26 weeks. The Norgrove Report condemned the entire family justice system in June 2012. The legislation was introduced in April 2014. She spoke of the introduction of the Family Court. The 2014 Act

introduced a 26 week target for public law cases. It was a judge-led project, with Ryder LJ engaging with all participants and looking at the details of the process that led to delays. By the time the legislation was enacted the delay was already down to 38 weeks and standard orders had been introduced with an improved case management system.

The reforms have led individual judges to reflect on their practices. Timeliness does not depend just on legislation but on a whole-system approach to reform. Timeliness is wholly dependent on securing the required change in culture and the promulgation of a “can do” attitude needed to shake judges out of their comfortable habits.

WORKSHOP 3 PROCEDURES AND CASE MANAGEMENT

1. Procedural steps – reduction and time limitation
2. Case management and call-overs
3. Hearing – reduction and limitation
4. Written judgements – simplification and limitation
5. Small claims procedures

WORKSHOP 4 PROCESSING AND GOALS

1. Video and telephone meetings
2. Electronic recording
3. Electronic tracing and filing
4. Specialization
5. Staff
6. Court rooms
7. Requirements and goals for processing time
8. Consequences of not fulfilment

FINAL PLENARY SESSION – 4 November

England and Wales makes extensive use of telephone conferencing; other countries only use video conferencing and even then only for the trial. Some jurisdictions do not use such technology at all: in Ireland the concern is that an unseen witness might be giving evidence under duress. Skype has been used by some countries. The general view was that the use of such technology was "a good thing", especially with court closures and the like, but that it might still be a second best to live evidence. The resource implications are considerable. But are we serving the younger age groups well when they are so familiar with the use of such technology.

Who should carry out the case management? Should it be the trial judge or a procedural judge? If the latter, could there be challenges on the basis of perceived bias if the procedural judge has given an early indication? A procedural judge will be more robust in case managing a case he is also going to try — but that itself can cause delay, especially in busy courts, if a case has to come back before the same judge.

The issue of Litigant in Person raises difficulties in all jurisdictions. England and Wales has a very unforgiving approach to breaches of court orders, culminating in *Denton*, and offers no indulgence to LIPs: this may necessitate a much more simplified court process.

How strict should one be over time limits? Is it satisfactory to ignore breaches of a case management order if one can keep to the trial date?

Case flow management is used in Scotland for lower value cases where the cost of case management hearings cannot necessarily be justified. The deadlines are automated. But are what might be considered sensible timetables for represented parties unrealistic timetables when one is dealing with LiPs?

CONCLUDING COMMENTS

Niels Grubbe brought the seminar to a close, commenting that it appeared to have been a great success. All judges could always do better but raising the awareness itself helped.