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# Vanishing Trials?: An English Perspective

Robert Dingwall\* and Emilie Cloatre\*\*

This paper reviews the recent history of civil litigation in England and Wales.<sup>1</sup> While previous work by Professor Kritzer<sup>2</sup> has shown an absolute decline in trials over the last fifty years, with some fluctuation around this trend, this comment suggests that this may now have bottomed out. Given the evidence of a simultaneous, and continuing, decline in the number of claims filed, it may even be the case that trials are, at least temporarily, playing a larger part in the civil justice system than they have for many years. In contrast to the experience in the U.S., these changes seem to be intended and unintended consequences of deliberate policy decisions by government and senior judges, which have changed the options and incentives for other stakeholders. As such, it is important to be cautious about the extent to which comparable trends in countries with comparable common law jurisdictions have comparable explanations. In particular, we will argue that the English experience should not be seen as a simple indicator of the “Americanization” of English law or English litigation culture. Nevertheless, Professor Galanter’s concern for the wider social implications of a declining trial rate also has relevance to the United Kingdom and its jurisdictions.

In his contribution to this volume, and in other recent papers,<sup>3</sup> Galanter has noted two trends in U.S. litigation: a slow, long-term decline over the last hundred years or so in the proportion of cases tried in U.S. federal and state courts and a steeper decline over the last thirty years in the absolute number of cases coming to trial. He attributes the first of these to the failure of judicial ability to increase supply in proportion to the increased volume of legal business. In effect, access is rationed by delay and congestion, which increases the attractiveness of settlement or abandonment of claims. However, the system’s activist response to the consequences of a diluted service by product innovation—case management and alternative forms of dispute resolution—has collided with other social and cultural changes in the U.S. These include the relabelling of “access to justice” as a “litigation explosion” with a view that excessive litigation is having an adverse effect on society and the economy, a loss of confidence in the benevolence of government and collective institutions, and a growing preference for private dispute reso-

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1. The United Kingdom has three distinct jurisdictions for civil purposes: England and Wales; Scotland; and Northern Ireland. Unless otherwise indicated, all data and interpretations presented in this paper relate exclusively to the jurisdiction of England and Wales.

2. Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004).

3. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

lution (the resolution of conflicts in ways that are invisible to wider public scrutiny). He outlines five trajectories that the legal system might be following:

- Convergence with Mainland European practice, marginalizing trials in favor of paper-based processes that accumulate a dossier of evidence on which a decision can be made;
- Displacement of trials to court-like forums elsewhere;
- Assimilation of law into the culture and standard operating practices of major organizations and institutions, suppressing the demand for trials through the “legalization” of everyday practice;
- Transformation of the role of law within the governance of advanced societies so that it merely supplies *post hoc* legitimacy to negotiated outcomes based on the unconstrained use of power rather than promoting a competing principle of power restrained by universalistic ideals of justice;
- Evolution, where law is the passive object of market actors seeking an improved way to pursue their own interests.<sup>4</sup>

Galanter’s overall conclusion is that the U.S. is increasingly becoming a society permeated by law, but in ways that are unregulated by legal actors because of the attrition in both the proportion of cases coming to trial and in the absolute numbers of trials. He questions the extent to which this serves public, as opposed to corporate, interests.

Kritzer has contributed a preliminary attempt to consider whether Galanter’s analysis is unique to American experience, or whether it can be generalized across the common-law world.<sup>5</sup> He examines civil and criminal trials in England and Wales and civil trials in Ontario, Canada for varying periods from the late 1950s until the year 2000. In general, he finds that civil trials have been declining. However, in England at least, criminal trials have remained at a relatively stable level in absolute terms, regardless of fluctuations in the crime rate and changes in the jurisdictional boundaries of the courts.

Since this paper concentrates on civil litigation, we shall confine ourselves to discussing that aspect of Kritzer’s analysis. The difficulty that he faces is that, although the statistical series remain reasonably consistent across the period, the organizational structure of courts that they describe goes through three very significant changes: in 1971, when a pattern of jurisdiction and court location established in the 1870s was radically modified;<sup>6</sup> in 1990, when the boundary between the two tiers of civil courts—County, dealing with lower value cases, and High, then dealing with cases worth over £5000 (\$8,625)—was redrawn to direct more

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4. *Id.* As Galanter outlines his sources, particularly in the work of Menkel-Meadow, the treatment of evolution is not strictly Darwinian because of the way in which it contains notions of teleology, movement towards “a better way.” An evolutionary approach, in the classic sense, would not treat one element as passive but would emphasise the co-evolution of law and markets, with each seeking to adapt to the other within a particular historical context. This does not produce “a better way” in any absolute sense, but merely a temporary and unstable equilibrium that represent the mutual fitness of law and markets for that time and place. While Galanter’s scenario will be evaluated in its own terms later in this paper, these reservations should be kept in mind.

5. See generally Kritzer, *supra* note 2.

6. REPORT OF THE ROYAL COMMISSION ON ASSIZES AND QUARTER SESSIONS, 1969; Courts Act, 1971 (Eng.).

business to the lower court;<sup>7</sup> and in 1999, when a package of reforms devised by Lord Woolf, who later became Lord Chief Justice, was introduced to promote judicial case management.<sup>8</sup> Cumulatively, these changes have tended to encourage litigants towards the 218 county courts, which have, over the same period, also developed an extensive small claims jurisdiction. This now covers claims up to £5000 (\$8,625). The county court and the High Court may both hear all other claims with one exception—claims may not begin in the High Court unless they exceed £15,000 (\$25,863) in money claims and £50,000 (\$86,212) in personal injury cases. The High Court, based in London and regional centers, is supposed to hear cases that are more complex or require specialized judicial expertise; although, in the light of the experience discussed below, the U.K. government is now considering whether to promote a full merger of these overlapping jurisdictions.<sup>9</sup>

Most of Kritzer's time series stop shortly after the implementation of the Woolf reforms, which makes it difficult to disentangle the effects of the kind of longer term change that Galanter explores from those of learning to deal with a radically changed civil procedure. We have the advantage of a longer post-Woolf time series and some of the evaluation work commissioned by the U.K. Department of Constitutional Affairs (DCA) to document and interpret the effects of the changes.<sup>10</sup> Dingwall also brings his "insider" experience as a former member (1998-2001) of the Civil Justice Council (CJC), a body initially chaired by Lord Woolf, and including representatives of all the major stakeholders, set up to monitor the effects of the reform package.<sup>11</sup> We look first at the available statistical data and then consider how this may be understood in terms of both the intended and unintended consequences of the reforms as a means of testing the generalizability of Galanter's proposed explanations.

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7. REPORT OF THE REVIEW BODY ON CIVIL JUSTICE, 1988, Cm. 394; Courts and Legal Services Act, 1990, c.22 (Eng.).

8. ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995), *available at* <http://www.dca.gov.uk/civil/interfr.htm> (last visited Mar. 15, 2006); ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996), *available at* <http://www.dca.gov.uk/civil/final/contents.htm> (last visited Feb. 20, 2006); R. CIV. PRO. 1998, c.12 (Eng.).

9. A Single Civil Court?: The scope for unifying the civil jurisdictions of the High Court, the county courts and the Family Proceedings Courts, DCA Consultation Paper, CP 06/05 (2005), *available at* [http://www.dca.gov.uk/consult/civilcourt/civilcourt\\_cp0605.pdf](http://www.dca.gov.uk/consult/civilcourt/civilcourt_cp0605.pdf) (last visited Feb. 20, 2006).

10. The government department responsible for policy relating to the legal system was known as the Lord Chancellor's Department until 2003. The DCA's mission is somewhat different from that of its predecessor and a number of key functions have been hived off to various agencies, particularly Her Majesty's Courts Service, which actually administers the courts, with responsibility for support staff, premises, etc. *See* Department for Constitutional Affairs, Departmental Overview, *available at* <http://www.dca.gov.uk> (last visited Feb. 20, 2006); Her Majesty's Court Service, About HMCS, *available at* <http://www.hmcs.courts-service.gov.uk> (last visited Feb. 20, 2006).

11. For further details on the CJC, *available at* <http://www.civiljusticecouncil.gov.uk/> (last visited Feb. 20, 2006).

## I. RECENT TRENDS IN CIVIL JUSTICE CLAIMS AND TRIALS IN ENGLAND AND WALES

This section presents data on the number of claims and trials in the High Court (Queen's Bench division) and the County Courts from the mid-1990s until 2004, the latest year available. This data is derived from the annual DCA reports, available online since 1998,<sup>12</sup> and two DCA reports specifically evaluating the effect of the Woolf reforms.<sup>13</sup>

### A. High Court (Queen's Bench division)

The Queen's Bench division of the High Court is competent mainly for higher value cases in contract or tort. Kritzer presents data from 1960 to 1998 showing a substantial long-term decline in the number of trials.<sup>14</sup> As Figure 1 shows, allowing for a degree of turbulence around the time of the Woolf reforms, both the number of cases set down and the number decided at trial seem to have been slowly declining since 1998. As Kritzer notes, changes in the method of data collection have now made it impossible to determine how many trials actually commence.<sup>15</sup> However, the series dealing with setting down a case (asking for a trial date to be allocated), and with completed trials, remain consistent. The first is a reasonable indicator of the willingness in principle of the parties to go to trial, even if they actually expect to settle *en route*, and the second gives some indication of the volume of trial business, even if it is an imperfect proxy for the allocation of judicial time.<sup>16</sup> However, this data probably underestimates the decline in demand faced by this court. The relationship between the number of cases set down and the number of trials actually held in a given time period is not just a function of settlement rates but also of the degree of congestion—the waiting time from filing to trial.

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12. For the data from 1998 to 2004, available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

13. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, EMERGING FINDINGS: AN EARLY EVALUATION OF THE CIVIL JUSTICE REFORMS (2001), available at <http://www.dca.gov.uk/civil/emerger/emerger.htm> (last visited Feb. 20, 2006); DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, FURTHER FINDINGS: A CONTINUING EVALUATION OF THE CIVIL JUSTICE REFORMS (2002), available at <http://www.dca.gov.uk/civil/reform/ffreform.htm> (last visited Feb. 20, 2006).

14. Kritzer, *supra* note 2, at 739.

15. *Id.*

16. *Id.* at 741. In a personal communication to the authors, Kritzer has also shown that the trends in trial starts and trial completions track each other quite closely (trials may start and not be completed for various reasons such as the parties agreeing to settle or the plaintiff realizing the case is unsustainable and withdrawing their claim).

*Trials before Queen's Bench Division<sup>17</sup>*

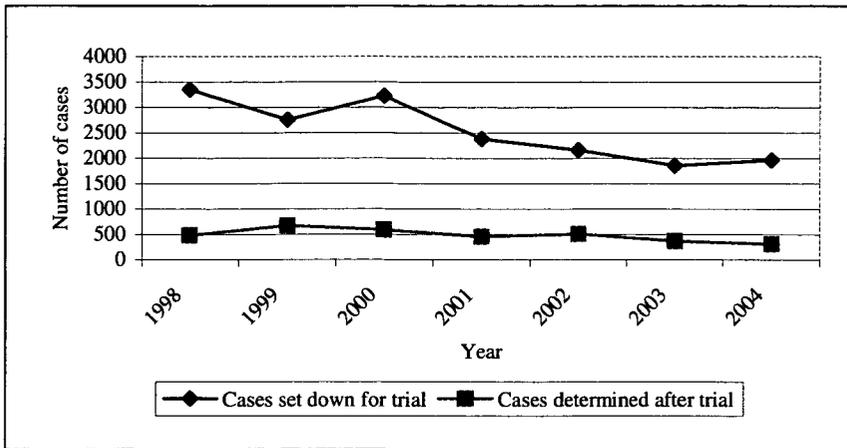


Figure 1

*Queen's Bench Division: Time from Setting Down to Disposition 1998-2004<sup>18</sup>*

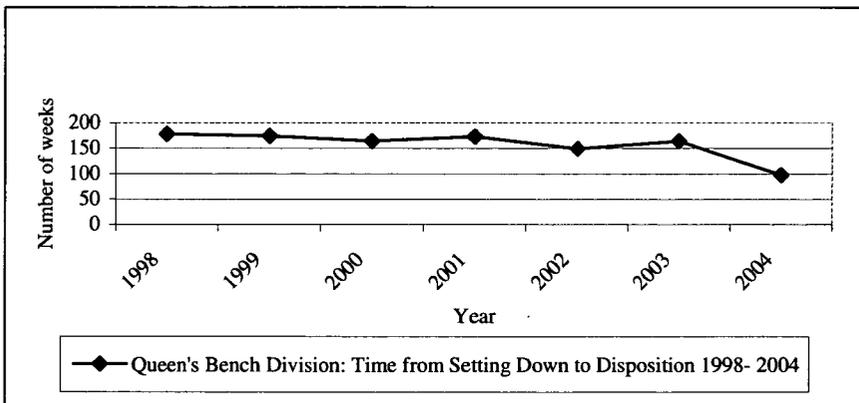


Figure 2

Figure 2 shows that the waiting time has decreased sharply so the number of trials is only being maintained at its current level by pulling forward cases that would otherwise be heard at a later date. Assuming that there is some minimum level of delay that is functional for the system—in terms of ensuring judicial time is efficiently deployed and the parties have sufficient notice to ensure that their paperwork is in order and their witnesses are available—this volume of business is ultimately unsustainable. It is like an old-fashioned problem in high school arith-

17. Figure 1, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

18. Figure 2, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

metic: where one pipe is filling a water tank slowly, while another drains it rapidly, the tank will eventually be empty.

This conclusion is reinforced by an analysis of the trends in claims filed with this court—remember that trials can only take place on the basis of what is filed. Figure 3 is taken from the DCA's 2002 evaluation report and shows a clear rupture in the number of claims before and after the introduction of the Woolf reforms in April 1999.

*Number of claims in the Queen's Bench Division from January 1997 to November 2001*<sup>19</sup>

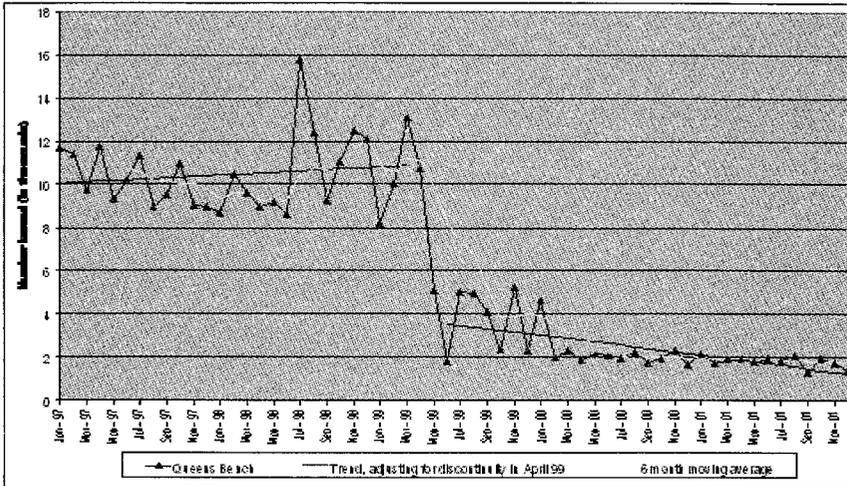


Figure 3

The graph requires some care in interpretation because it covers a relatively short time period. The rise prior to April 1999 may be explicable as an attempt by lawyers to press cases into the system before the rules changed and some of the subsequent drop may simply reflect such bunching. However, one would expect the trend to begin to turn upwards again as lawyers gained more experience with the new system. Figure 4 shows clearly that this is not the case. There has been a sharp continuous reduction in the number of cases brought to the High Court since 1999.

19. Figure 3, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, FURTHER FINDINGS: A CONTINUING EVALUATION OF THE CIVIL JUSTICE REFORMS (2002), available at <http://www.dca.gov.uk/civil/reform/ffreform.htm> (last visited Feb. 20, 2006).

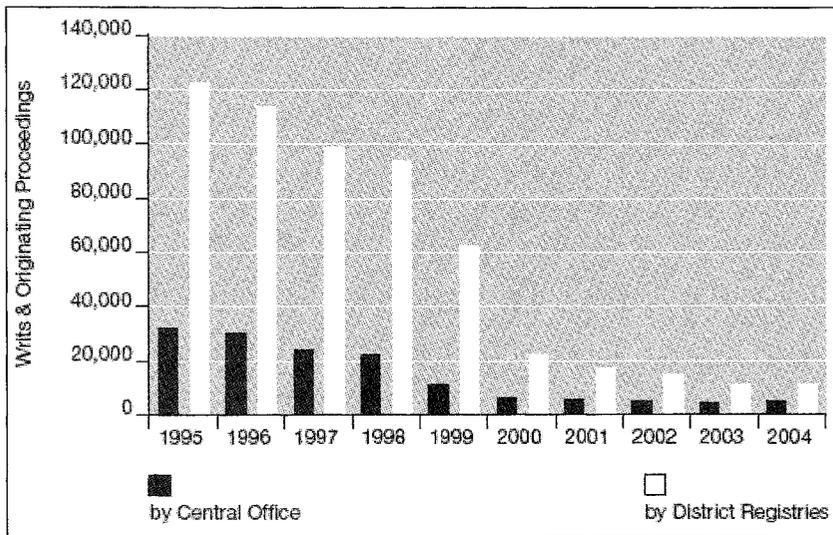
*Queen's Bench Division: Claims issued 1995-2004*<sup>20</sup>

Figure 4

It can be somewhat misleading to concentrate exclusively on absolute numbers rather than looking at rates, which correct for possible changes in the population of events that generate these data. There is an obvious problem with claims in that we do not know what relationship they bear to claimable events. However, if we consider the relationship between claims and trials, we find that there is about one trial for every thirty-five claims in 1998 and one trial for every eight claims in 2004.<sup>21</sup> This would be consistent with the notion of trials being pulled forward to sustain a given level of activity, but it also raises the question of whether we are looking more at an issue of vanishing claims than of vanishing trials.

Before considering whether these figures have any wider significance, it is important to rule out any factors that might be specific to the situation of the High Court. In particular, as noted above, a series of system reforms over the last thirty years have been designed to shift business away from this court to the County Courts. We might, then, expect to see an increase in case volume in the lower courts such that the decline in High Court business is simply an indication of the

20. Figure 4, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT, 2004, available at <http://www.official-documents.co.uk/document/cm65/6565/6565.pdf>. (last visited Feb. 20, 2006).

21. This is a very crude indicator, since the lags in the system mean that claims filed in any given year would not be set down for trial until at least 18-24 months later. Strictly speaking, the number of cases set down for trial in any year should be expressed as a function of the number of claims filed approximately two years earlier. Given the upheavals of 1998-2000, and the evidence of changing speed of movement through the system, this would be difficult to do in any fashion that would lead to a convincing time series. The figures presented here are better seen as orders of magnitude that are indicative of a trend and consistent with other data rather than as bearing a great deal of evidentiary weight in their own right.

success of policy-makers in diverting lower-value cases to a cheaper forum staffed by judges with less experience or more limited skills.

### B. County Courts

The County Courts in England and Wales deal with the majority of civil litigation (contract, tort, recovery of land, some equity cases), including small-claim procedures, which now constitute the majority of cases dealt with in the County Courts. Once again, Kritzer provides data on the trends in the County Courts up to 2003, which show a steady decline in the number of trials since the 1960s.<sup>22</sup> Initially, this can be explained by the introduction of the small claims procedure, but hearings under this process have also been in decline since the mid-1990s. Figure 5 shows that this pattern has continued through to 2004, although there has been a slight post-Woolf increase in the number of County Court trials (from 15,167 to 15,734) between 2003 and 2004, possibly representing some shift of business from the High Court now that parties have the option of being heard in either forum for higher-value cases.<sup>23</sup>

#### County Courts: Trials and Small Claims Hearings 1998-2004<sup>24</sup>

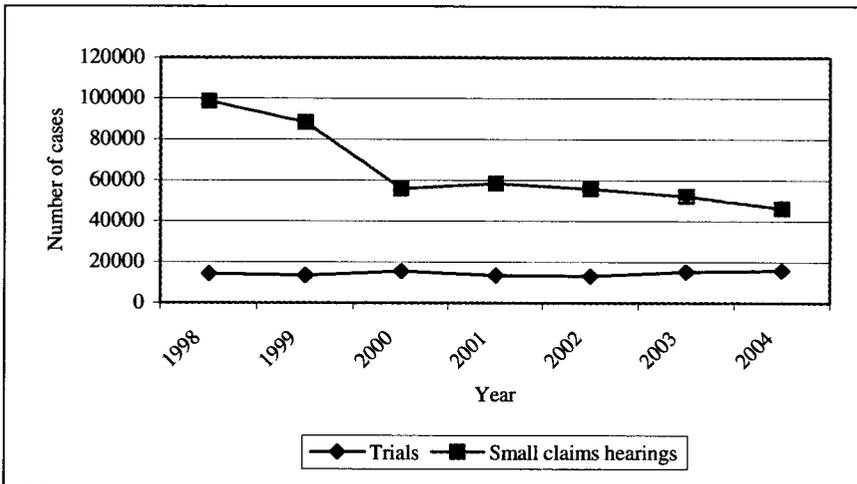


Figure 5

Turning again to look at how this relates to the experience of claim filing, we can see that this has also been declining. Figure 6 shows the DCA data for the total number of claims filed over the immediate period of the implementation of the Woolf reforms.

22. Kritzer, *supra* note 2, at 746.

23. Compiled from DCA, Judicial Statistics Annual Reports 2003 and 2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

24. Figure 5, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

*Number of claims in the County Courts from January 1997 to November 2001<sup>25</sup>*

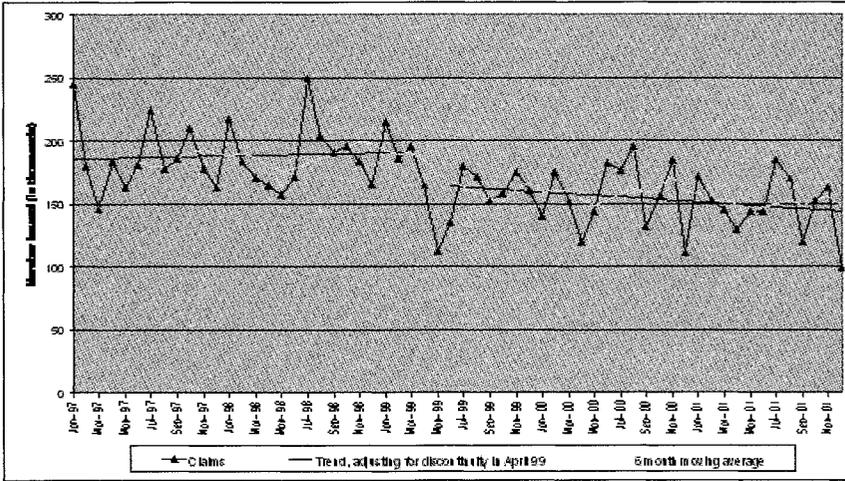


Figure 6

Different types of claims showed slightly different patterns, but the overall picture is remarkably consistent. Claim volumes were rising up to April 1999 but have since been gently declining. Figure 7 shows the longer-term picture for County Court claims.

*Number of Claims in County Courts 1988-2004<sup>26</sup>*

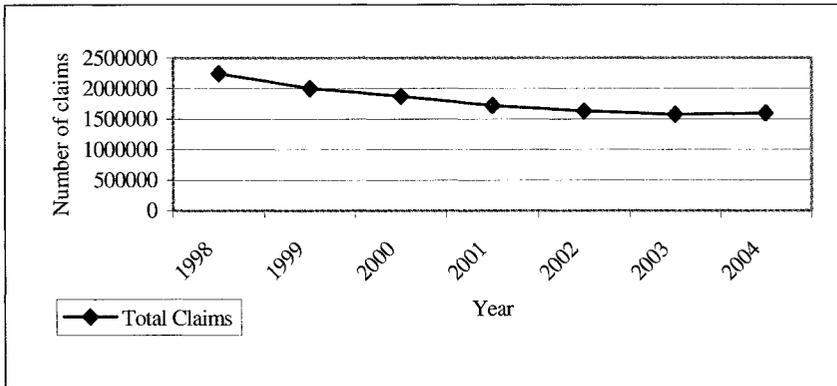


Figure 7

It is difficult to repeat the estimates about changing relationships between trial and hearing numbers and claims because of the great diversity of County

25. Figure 6, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, FURTHER FINDINGS: A CONTINUING EVALUATION OF THE CIVIL JUSTICE REFORMS (2002), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

26. Figure 7, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

Court business and the number of simple debt claims that will be handled administratively without a trial ever being contemplated. However, if we take the crude data on claims filed, and trials and hearings conducted, we find that there is roughly one hearing for every 20 claims in 1998 and one for every 25 claims in 2004.

### C. Interpreting Recent Trends

If we consider these data together, it is clear that there is some evidence of a transfer of business from the High Court to the County Courts; overall though, the numbers of civil trials in England and Wales are, at best, flatlining at levels well below those of the 1970s and 1980s examined by Kritzer, as illustrated by combining the data from Figure 1 and Figure 5, in Figure 8.

*High Court and County Court business 1998-2004<sup>27</sup>*

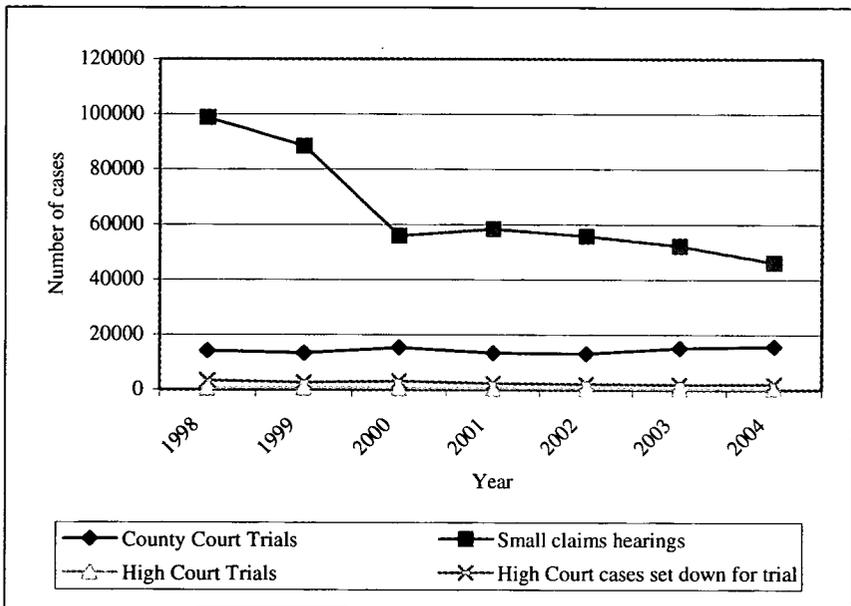


Figure 8

However, it is not clear that this reflects a reluctance to try cases so much as a reluctance to file claims. Figure 9 shows the DCA's own assessment of the period around the implementation of the Woolf reforms.

27. Figure 8, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsarlist.htm> (last visited Feb. 20, 2006).

*Number of Claims in the High Court, Queen's Bench Division and the County Courts, January 1997 to November 2001<sup>28</sup>*

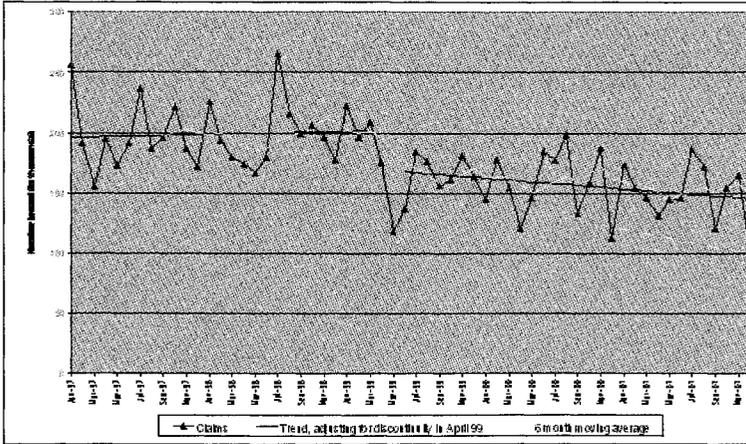


Figure 9

We have compiled Figure 10 on the same basis. Although there is a very slight turn upwards in 2004, with about 1.5 percent more claims filed than in 2003, it is not yet clear that this has any real significance, or if it is simply a random fluctuation.

*Number of Claims in the High Court, Queen's Bench Division, and County Courts 1998-2004<sup>29</sup>*

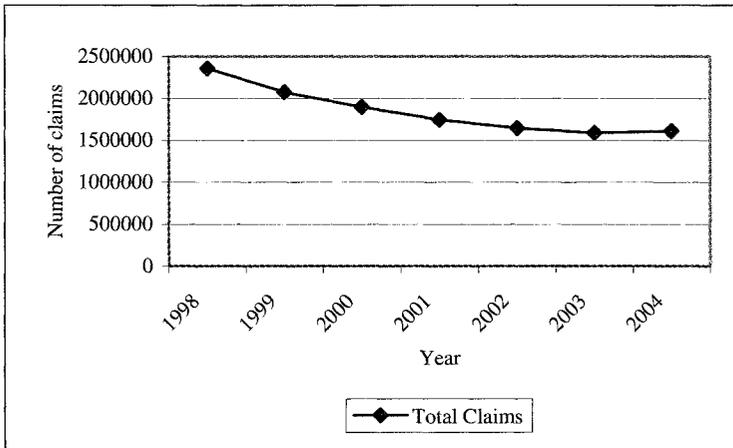


Figure 10

28. Figure 9, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, FURTHER FINDINGS: A CONTINUING EVALUATION OF THE CIVIL JUSTICE REFORMS (2002), available at <http://www.dca.gov.uk/civil/reform/ffreform.htm> (last visited Feb. 20, 2006).

29. Figure 10, compiled by authors from DCA Judicial Statistics Annual Reports, 1998-2004. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL STATISTICS ANNUAL REPORT (Eng.), available at <http://www.dca.gov.uk/jsar/list.htm> (last visited Feb. 20, 2006).

The most plausible interpretation of these data is that the number of civil trials may actually have bottomed out in England and Wales, or even increased somewhat relative to the number of claims being filed. Taking our data together with those presented by Kritzer, it is clear that the number of trials is at a historically low level, but that this is associated with other evidence of the avoidance of litigation more generally. It is more probable that courts are not being brought cases to try rather than the courts are simply trying fewer cases.

## II. THE WOOLF REFORMS: INTENDED AND UNINTENDED CONSEQUENCES

In order to understand this apparent avoidance of litigation, it is important to look at the recent organizational reforms, and their avowed aims of diverting cases from court. Lord Woolf, one of the most senior judges in England, and later the Lord Chief Justice, was asked in 1994 to review the rules and procedures of the civil courts in England and Wales. He published an Interim Report in 1995 and a Final Report in the following year, proposing changes in rules and procedure that were published in 1998 and came into effect April 1, 1999.<sup>30</sup> The Woolf inquiry was the Conservative government's second attempt to reform the civil justice system following the perceived failure of the Civil Justice Review of 1988.<sup>31</sup> In the first chapter of the Interim Report, Woolf laid out his fundamental principles.<sup>32</sup> In his view, the public provision of a civil justice system was one of the hallmarks of a civilized society.<sup>33</sup> "The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government."<sup>34</sup>

However, the system was compromised by lack of access, which denied citizens, whether individual or corporate, remedies for breaches of their rights or failures in others' duties. An accessible system should aim to be the following: just; fair; proportionate in the relationship between costs and issues; reasonably speedy; understandable to users; responsive to users; certain; and effective. These aims were compromised by: an adversarial environment; the expense of litigation—both in terms of excessive absolute costs and disproportion between costs and the value of claims; uncertainty about costs; internationally uncompetitive costs; delay—in progressing cases, settling cases and hearing cases; complexity of procedure; limited availability of legal assistance; and low legal system priority, relative to criminal and family business. The remedy would be a set of procedural reforms that explicitly introduced judicial case management to the U.K..

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30. See *supra* note 8.

31. See *supra* note 7.

32. LORD HARRY WOOLF, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES, June 1995 (Eng.), available at <http://www.dca.gov.uk/civil/interim/contents.htm> (last visited Feb. 20, 2006).

33. *Id.*

34. *Id.*

Woolf's Final Report set out the author's vision of a "new landscape" for civil justice. This would have the following features:

- Litigation to be avoided wherever possible—mainly by encouraging greater use of ADR and pre-action protocols, standardized sets of documents describing the claim and the relevant evidence;
- Litigation to be less adversarial and more cooperative—through stronger judicial censure and penalties on aggressive, partisan or uncooperative behavior by lawyers or expert witnesses;
- Litigation to be less complex—with a single set of rules for High Court and County Courts, a simplified set of documents and penalties for the tactical abuse of rules or documents;
- The timescale of litigation to be shorter and more certain—courts would take over control of the scheduling and of the issues to be tried;
- The cost of litigation to be more affordable, more predictable, and more proportionate to the value and complexity of individual cases—most cases to be covered by fixed fees or court-determined guidelines;
- Parties of limited financial means to be able to conduct litigation on a more equal footing—by increased access to advice services and by court intervention to prevent richer parties using their wealth to skew the system;
- Clear lines of judicial and administrative responsibility—designated judges would manage provision locally and nationally;
- Court structure and judicial deployment of judges designed to meet the needs of litigants—cases distributed according to their complexity, appeals to be more straightforward and electronic communication to be improved;
- Judges to be deployed effectively so they can manage litigation in accordance with the new rules and protocols—additional training in case management and enhanced administrative and technological support;
- Responsive to the needs of litigants—through better advice, information and monitoring.<sup>35</sup>

Within this context, it should be clear that the recent decline of trials in England is in no sense an inadvertent or unintended event. Although the Woolf reforms were launched on the back of a falling trend in the number of trials, their supporters would argue that a decline driven by access barriers has been replaced by a decline driven by more efficient and effective case management. The decline in trials is an indicator of a system that is performing well because disputes are being resolved elsewhere at less cost and with readier access. However, this is not so easy to reconcile with the evidence of the parallel decline in claims and the questions that have more recently emerged about whether England now has

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35. LORD HARRY WOOLF, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES, July 1996 (Eng.), *available at* <http://www.dca.gov.uk/civil/final/index.htm> (last visited Feb. 20, 2006).

enough litigation to supply a framework of certainty in case negotiations. Is lowering barriers really increasing access?

Re-reading Woolf's reports, it is not clear to what extent he envisaged claiming "going underground." His model appears to assume that claims will come forward at pretty much the same rate as always, if not at a rate increased by reduced barriers of cost and delay, but that they will settle more easily as a result of active case management, including early diversion to ADR, and better documentation. Trials will only occur in cases that have been filtered by judicial officers who have determined that there is indeed a triable dispute over law or facts. There is no indication that the volume of trials is expected to decline absolutely, although it may decline proportionately, if claim volumes increase.

In their comments on the Interim Report, Dingwall and Durkin pointed out that, if you ask a judge to write a report, you are likely to end up with a judge-centered analysis rather than a systemic one.<sup>36</sup> Woolf's approach places the court at the center of the civil justice system, while most law and society scholars would place it somewhere at the margin. It is the small part of the iceberg that is visible, while the processes of bargaining and negotiation continue below the waterline, or in the shadows as Mnookin and Kornhauser have it.<sup>37</sup> We must be careful not to assume that civil justice is achieved only by what happens in courts and trials, rather than in the process of settlement negotiation as lawyers work with the bargaining endowments that the system assigns to them. As Dingwall and Durkin pointed out, the changes in the court process and the expanded role of the judges change the incentives for other participants. In particular, they noted the well-documented preference of lawyers for avoiding trial in most types of civil litigation.<sup>38</sup> This preference is because of the way in which judges introduce uncertainty and remove control of the process from the parties, which would be allied to a procedure that required expensive work up front rather than at the approach of trial.<sup>39</sup> Dingwall and Durkin noted that lawyers tended to get claims in, not work them very actively until a trial date approached and then pull the evidence together and look to settle.<sup>40</sup> The introduction of pre-action protocols means that the case preparation now has to be done before a claim is filed. But if the case has to be fully documented at the outset, why would parties who were used to playing against each other bother to file a claim at all? Why not just exchange the papers and enter settlement discussions in much the same way as ever? In this way, the parties or, perhaps more precisely, their lawyers, retain control of the case and its processing. This also seems to apply to ADR. An example of this is the way the Department of Health's attempt to introduce mediation in medical negligence claims was undermined by the tendency of parties to settle prior to the scheduled hearing.<sup>41</sup>

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36. Robert Dingwall & Tom Durkin, *Time Management and Procedural Reform: Some Organizational Questions for Lord Woolf*, in REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' 371, 390 (A.A.S Zuckerman & Ross Cranston eds. 1995).

37. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

38. Dingwall & Durkin, *supra* note 36, at 387.

39. *Id.*

40. *Id.*

41. LINDA MULCAHY ET AL., *MEDIATING MEDICAL NEGLIGENCE CLAIMS: AN OPTION FOR THE FUTURE* (1999).

In practice there seems to be considerable enthusiasm for avoidance. Pre-action protocols, in particular, are popular with litigators, who see them as a valuable device for assessing cases on the basis of standardized information and achieving early settlement. This has not had much impact on lawyers' costs—because cases are now simply front-loaded rather than end-loaded by late settlement and trial.<sup>42</sup> However, it has had a major impact on court income. Having prepared a pre-action protocol, one way to cut costs is to avoid filing a claim and paying the associated fees, if settlement seems possible or the evidentiary base evaporates.

The creation of early settlement opportunities by the Woolf reforms coincides with two other important changes in the courts' environment—the switch from public legal aid to contingency-style funding of civil litigation and the planned elimination of public subsidy for the civil courts.

England does not have a pure contingency fee system in the sense that successful lawyers take an agreed percentage of whatever sums they recover for clients. Instead, since 1995, lawyers have been allowed to make “no win, no fee” arrangements with clients, where costs are still based on hours worked and sums actually disbursed, subject to court checks. Initially, lawyers were allowed to add a “success fee,” normally about 25 percent of the recovery, which was supposed to cover their expenditure on the cases they lost. However, since 2000, the loser has normally paid the success fee, in addition to the agreed sums in recovery or costs. Individual litigants bringing a claim under conditional fee arrangements are generally advised to purchase insurance against the risk of loss, since they remain liable for the defendants' costs even if they are not billed by their own lawyer. The insurance premium is also recoverable from the defendant if the case succeeds. Criminal and family cases are excluded from these arrangements but all other civil cases have been included since 1998.<sup>43</sup> Conditional arrangements have effectively replaced the means-tested public legal aid that used to be available for civil litigation. In the year ending March 31, 2005, the Legal Services Commission spent approximately twice as much funding criminal work as civil, and much of what is described as “civil” work actually refers to advice services for socially excluded groups on their particular legal problems and an element of support for family law cases rather than, for example, personal injury litigation. Lawyers in private practice are playing a decreasing role in this provision compared with not-for-profit advice agencies employing mainly lay staff.<sup>44</sup>

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42. See *supra* note 13. John Peysner & Mary Seneviratne, *DCA Research Series 9/2005: The Management of Civil Cases: The Courts and the Post-Woolf Landscape*, Department for Constitutional Affairs (Nov. 2005) (Eng.), available at [http://www.dca.gov.uk/research/2005/9\\_2005\\_full.pdf](http://www.dca.gov.uk/research/2005/9_2005_full.pdf) (last visited Feb. 20, 2006).

43. *Simplifying CFAs: A Consultation on the Conditional Fee Agreement Regime Including the: Conditional Fee Agreements, Collective Conditional Fee Agreements, Membership Organization Regulations*, Department for Constitutional Affairs (June 2003) (Eng.), available at <http://www.dca.gov.uk/consult/confees/cfa.htm> (last visited Feb. 20, 2006); Paul Fenn et al., *The Impact of Conditional Fees on the Selection, Handling and Outcomes of Personal Injury Cases*, Department for Constitutional Affairs (2002) (Eng.), available at <http://www.dca.gov.uk/research/2002/6-02es.htm> (last visited Feb. 20, 2006).

44. LEGAL SERVICES COMMISSION, ANNUAL REPORT 2004-05 (Eng.), available at [http://www.legalservices.gov.uk/docs/about\\_us\\_main/AR05.pdf](http://www.legalservices.gov.uk/docs/about_us_main/AR05.pdf) (last visited Feb. 20, 2006).

As yet, there is no firm evidence of the implications of conditional fees for access. It is unlikely to create the same disincentives to take on low value cases as in the U.S., because lawyers can continue to charge “reasonable costs” rather than relying on achieving an award sufficiently large for these to be covered by their percentage. However, the Woolf approach of encouraging courts to regulate costs roughly in proportion to the size of awards may have a similar effect.

The implications of the withdrawal of public funding for court costs have been more controversial, and the subject of sharp exchanges between Lord Woolf and government ministers. Lord Woolf’s position was expressed most clearly in a speech made at the Annual Judges Dinner, on July 17, 2002:<sup>45</sup>

I hope, but it is too early to be satisfied, that the public expenditure review offers some comfort so far as criminal justice is concerned. I am afraid, so far as civil and family justice is concerned, the position is otherwise. I recognize that the huge demands across the public service mean that the government must set priorities and all that I can ask is that the needs of the other aspects of justice besides the criminal are properly considered. Unfortunately, during current and previous reviews this has not happened as a result of a flawed approach on the part of the Treasury. The Treasury’s approach is based on the misconception that it is possible for the courts to provide the public with justice on a full cost recovery basis—that is for the cost to the courts of dealing with particular types of cases to be covered in full by the fees paid by the parties. The corollary of this is that no more should be spent on providing a system of civil justice than can be recovered from the litigants as court fees. I would have thought the policy is self evidently nonsense. Yet this policy was adopted in 1992 without Parliamentary scrutiny and has continued since, notwithstanding the protests of the judiciary. No other country of which I am aware has such a policy and when I mention it to colleagues abroad they are astonished. Its effects are pernicious and serious and mean that the funding review has been unfair.<sup>46</sup>

Essentially, successive U.K. governments have decided that, although civil justice may be a public service, it is not a public good in the sense that Lord Woolf asserted in his first report.<sup>47</sup> Although, as Lord Woolf notes, governments have been reluctant to defend the policy in public, their communications with the Civil Justice Council made it clear that they see the system as providing only private benefits for individuals rather than collective benefits for the society as a whole.<sup>48</sup> Again, Lord Woolf has articulated a contrary view, which can be found in the decision of the Court of Appeals in *Heil v. Rankin*.<sup>49</sup>

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45. Available at [http://www.judiciary.gov.uk/publications\\_media/speeches/pre\\_2004/lcj170702.htm](http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj170702.htm) (last visited June 6, 2006).

46. *Id.*

47. See *supra* note 20.

48. *Supra* note 44.

49. *Heil v. Rankin* (2001) Q.B. 272 (2;23), 294.

The assessment (of damages) requires the judge to make a value judgment. That value judgment has been increasingly constrained by the desire to achieve consistency between the decisions of different judges. Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements. The courts have become increasingly aware that this is in the interest of litigants and society as a whole.<sup>50</sup>

The creation of precedents and the creation of law, through the civil justice system, is not perceived by government as contributing to the general welfare in the same way as state-provided education or health care.<sup>51</sup> Following the logic of this reasoning, successive U.K. governments have, since the early 1980s, determined that the full costs of providing a civil justice system should be met by its users through court fees.<sup>52</sup> Initially, fees were set to cover the costs of court accommodation and support staff only,<sup>53</sup> but in 1992 were extended to include the cost of judicial salaries.<sup>54</sup> This policy appears to be unique among major developed countries, including the rest of Europe and the U.S.<sup>55</sup> It has been criticised by major stakeholders,<sup>56</sup> particularly for the lack of debate and transparency that has accompanied its introduction and development.<sup>57</sup> However, civil justice financing is not a matter that attracts wide political or public interest and the controversy has been contained within a fairly narrow policy community.

Some of the difficulties can be illustrated if we examine the accommodation charges. These are levied as a charge reflecting the imputed capital value of court buildings and the return that would be generated by renting them in the local market for commercial property. While this is a reasonable principle in encouraging public sector institutions to review their use of space and manage this with maximum efficiency, it has perverse effects in relation to buildings that are special purpose and may well have historic features that make them costly to maintain. The High Court's main base, the Royal Courts of Justice, for example, occupies a

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50. *Id.*

51. VICKI CHAPMAN & DISTRICT JUDGE CARLOS DABEZIES, CIVIL JUSTICE COUNCIL, FULL COST RECOVERY: A PAPER BY THE FEES SUB-COMMITTEE, 2002 (Eng.), available at [http://www.civiljusticecouncil.gov.uk/files/Full\\_Costs\\_Recovery\\_v1.3\\_Draft\\_to\\_CJC.pdf](http://www.civiljusticecouncil.gov.uk/files/Full_Costs_Recovery_v1.3_Draft_to_CJC.pdf). (last visited Feb. 20, 2006); LAW SOCIETY OF ENGLAND, CIVIL AND FAMILY COURT FEE INCREASES: LAW SOCIETY RESPONSE TO THE HM COURT SERVICE CONSULTATION, Nov. 18, 2005 (Eng.), available at <http://www.lawsociety.org.uk/secure/file/148417/d:/teamsitedeployed/documents/template%20data/internet%20Documents/nongovernment%20proposals/Documents/courtfeesincreasereponse181105.pdf> (last visited Feb. 20, 2006).

52. Until the beginning of 2006, family matters were an exception, with the government contributing about 30 percent of the costs from general tax revenues. Subsidy is now concentrated on individuals through discretionary fee remissions or the residue of the civil legal aid scheme.

53. The Government's Expenditure Plans, 1983-84 to 1985-86 (Vol. 2, p. 42). For Comments, see Chapman, *supra* note 51, at 2. For earlier governmental decisions maintaining accommodation and salaries as part of government funding, see the REPORT OF THE COMMITTEE TO CONSIDER COURT FEES, 1923, Cmd. 1856.

54. The Civil Justice Council highlights the lack of clarity with regard to the official adoption of this decision. See Chapman, *supra* note 51.

55. *Id.* at 13.

56. *Id.* at 2.

57. *Id.* at 5.

prime site in the center of London. This has a high value, reflected in the capital charge, although the historic nature of the building means that this is unlikely ever to be realizable. The historic construction also leads to particularly high operating and maintenance costs.<sup>58</sup>

In a rational economic world, the court would relocate to an anonymous office block in a less central location, in response to market signals about its cost base. In the real world, such a relocation is ruled out by other policy considerations about the preservation and use of historic buildings. However, the costs of these policy constraints are born by court users rather than by general taxation. As a result, court fees have been rising steadily across the system since the late 1980s. The volume of business at the Royal Courts of Justice is not sufficient to sustain the full costs of this location, and discriminatory pricing would simply drive more cases into the county court, generating a vicious circle of declining workloads and rising fees, so this places a significant additional charge (£20 million/ \$34.5 million) on all users. Although attempts have been made to generate some cross-subsidy,<sup>59</sup> the demand for trial is perceived as price-sensitive—there is anecdotal evidence of insurers agreeing to artificially low figures for disputes so that matters of fact or law can be tried cheaply and then used to resolve the real, and much higher, value of the claims. Consequently, fees have come to make up a relatively high proportion of recoveries, particularly for small claims. In 2002, the Civil Justice Council estimated that the issue fee alone represented about 27 percent of claims for £100, and 10.7 percent of a £750 claim.<sup>60</sup> Consequently, there has been a growing concern about the extent to which litigants are being priced out of the courts.<sup>61</sup>

### III. THE TRAJECTORY OF THE ENGLISH CIVIL COURTS

As in the U.S., there have been attempts to argue that the U.K. has seen the development of a “compensation culture” and a “litigation explosion.”<sup>62</sup> Although there has been less systematic research on these issues than in the U.S., the data presented in this paper and elsewhere does not suggest that these arguments have

58. See Lord Justice Mance, *Is Civil Justice a Poor Relation? The Royal Courts of Justice—Loss Leader or Bankrupt Building?*, Speech to the London Solicitor’s Litigation Association Conference, Oct. 30, 2003, (Eng.), available at <http://www.dca.gov.uk/judicial/speeches/ljm301003.htm> (last visited Feb. 20, 2006) (commenting on the issues raised by the use of the Royal Courts of Justice and their cost).

59. For details, see Chapman, *supra* note 51.

60. *Id.*

61. This risk is highlighted in response to a consultation on court fees. See DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CIVIL COURT FEES (Eng.), available at <http://www.dca.gov.uk/consult/civilcourt/sr1005.pdf> (last visited Feb. 20, 2006). Currently, the main answer that the government has provided in that respect has been to offer exemption or remission of court fees, although this is not currently perceived as sufficient to limit the potentially negative effects that increase of court fees can have on access to justice.

62. Jonathan Broughton, et al., *The Cost of Compensation Culture*, Institute of Actuaries (2002) (Eng.), available at <http://www.actuaries.org.uk/files/pdf/giro2002/lowe.pdf> (last visited Feb. 20, 2006) (discussing “compensation culture”). This claim is criticized by, for example, the *Better Routes to Redress*, Better Regulation Task Force (2004) (Eng.), available at <http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf> (last visited Feb. 20, 2006). FRANK FUREDI, *COURTING MISTRUST: THE HIDDEN GROWTH OF A CULTURE OF LITIGATION IN BRITAIN* (1999) (discussing “Litigation Explosion”).

any stronger basis in fact. Litigation has been declining fairly steadily in recent years, although, in contrast to Galanter, we would place more evidence on the degree to which the decline in trials has been driven by a decline in claims filed. It is, of course, possible that the decline in claim filings is the result of the development of pre-action protocols since 1999 and the growth of settlement before filing but additional data on, for example, the relationship between claims notified to liability insurers and claims filed with courts would be needed to test this. For the present, we can agree with Galanter that there seems to be firm evidence of a tendency to avoid bringing civil matters to the courts for resolution.

Unlike the U.S., however, this is a deliberate act of state policy as much as the unintended aggregate consequence of private decision making. It is probably fair to say that avoidance has gone further than state actors might have envisaged because of their failure to understand some of the implications of changing the balance of incentives in the system. This includes the possible emergence of difficulties in settlement negotiation because of a lack of precedents to define bargaining endowments. The encouragement of avoidance stems from the declining acceptance among policymakers that civil justice is a public good so much as a service provided by the state to facilitate the pursuit of private interests. Citizens may be advised or guided in this pursuit by state-funded agencies but will rarely receive direct financial aid for doing so. Civil justice is a resource that allows self-reliant citizens to mobilize the state in support of their justified claims, but entirely at their own expense and secondary to their perceptions of the costs and benefits of doing so.<sup>63</sup> The dilution of court engagement by case management simply seems to have replaced the declining number of small claims hearings in the workload of lower-level judicial officers. ADR has had a negligible impact, except in stimulating early settlement to avoid it.

If we turn to Galanter's five trajectories, the situation in England seems to be as follows:

- **Convergence:** There is a growth of paper-based processes in the form of the pre-action protocols and the dossiers that these generate—but these seem to be replacing court involvement more generally rather than becoming a basis for judicial decisions.
- **Displacement:** Most of the growth of court-like forums in the U.K. has been linked to the rise of the welfare state and its systems of social security and social protection. This process was mostly complete by 1980 and there have been relatively few new tribunals established since that time. There has been some significant growth of private arbitration fora, in relation to credit cards or travel agents' services, for example, but little is known about the operation of these schemes.
- **Assimilation:** There have been fewer studies in the U.K. about this, but may well be significant, particularly in relation to the moral panic about the perceived growth of a compensation culture. Most large organizations, whether public or private have, for example,

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63. There is an interesting paradox in that the U.S. tends to ration access to health care by price and access to justice by congestion, while the U.K. rations access to health care by congestion and now access to justice by price.

dealt with the increasing volume of anti-discrimination legislation by setting up internal compliance units and incorporating legal standards into standard operating procedures for managers and supervisors.

- Transformation: This has also received fewer studies in the U.K., although the distribution of incentives within the civil justice system and the growth of human rights litigation may have checked this to a greater extent than in the U.S.. Care needs to be taken to ensure that law as the outcome of a legitimate political process that reconciles the interests of diverse stakeholders is not confused with law as the legitimization of a perverted political process where the powerful stakeholders oppress the weaker ones.
- Evolution: This seems closer to the present situation in England, where the state is tending to withdraw and leave civil justice to the market. At most, the state's role is that of aiding the disadvantaged into that market to act on their own behalf rather than acting as a proxy for them.

In the absence of a degree of separation of powers comparable to that in the U.S., civil justice has always been a legitimate object of state policy. However, the reconceptualisation of the state's role that has occurred in the U.K. since 1979 has led to a progressive dilution of the state's interest in this, and in other areas. To the extent that access to justice is a dimension of public welfare, a marker of a civilised society in Lord Woolf's terms, the government is less concerned to provide this than to facilitate citizens in mobilizing it on their own behalf. As such, the system is vulnerable to desertion if citizens find other ways of dealing with their claims, grievances or disputes. The result may be to favor corporate interests in some cases, but it may be to favor individuals in others, if corporate parties consider that the costs of resisting small personal claims exceed those of settling with modest payments.

Although the statistical series suggest that the trends in the U.K. and the U.S. run in parallel, we should be wary of assuming that the causation is identical. Galanter's scenarios are not mutually exclusive and one might observe similar outcomes from quite different mixtures in different environments.