

**Some thoughts on the post-LASPO civil judge's role before and during trial**  
**Address to the Manchester Law Society and Northern Circuit Commercial**  
**Bar Association**

**Lord Neuberger**

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1. It is a great pleasure to be in Manchester. Since getting my present job, I have of course been a United Kingdom judge, rather than a member of the English and Welsh judiciary. So I have been keen to visit the judiciary in Edinburgh, Cardiff and Belfast, the capital cities of the other states which the Supreme Court serves. However, it is very easy to overlook the fact that the UK Supreme Court is just as much a Manchester, Birmingham and Newcastle Court – and indeed just as much a Glasgow, Swansea or Derry/Londonderry court. I sometimes wonder whether the political and economic devolution issues arise in part from the perceived dichotomy between London and the rest of the United Kingdom as from the three, or now increasingly four, different UK jurisdictions. Whether or not that is right, the truth is that the Supreme Court, like all UK institutions has to act in the interest of, and listen to the needs of, all parts of the United Kingdom – and be seen to do so. However, we are severely limited by the fact that there are only twelve Supreme Court Justices with our day jobs to do, and visits to out-of-London judiciaries have to be rationed. So it is a real treat to be back here, not least because it brings back memories of happy and instructive visits, and familiar faces.
2. I am to speak for about thirty minutes, but, as I have emphasised, I am very conscious that the Supreme Court serves, and lays the law down for, all parts of the UK. So, quite apart from my personal interest, I am really keen to listen as well as to talk, and I hope

that there will be time for everyone who wants to do so, to make any points and to ask any questions. Do not feel constrained by what I choose to talk about.

3. I have been asked to talk about the role of the trial judge. As I explained to David Waksman, I am slightly diffident about discussing some of the more specifically practical aspects for two reasons. First, sitting day in and day out in the Supreme Court, there is a real danger that one gets out of touch with what is going on at the sharp end: I was conscious of that risk when I was Master of the Rolls, but it is greater now. The Privy Council jurisdiction with its significant number of more practical or procedural issues is a valuable antidote against getting out of touch, but it can fairly be said that there is no real alternative to conducting a first instance hearing. Secondly, the responsibility for the courts and civil procedure in England lies with the Lord Chief Justice, the Master of the Rolls, the Heads of Division, the Presiders and the Designated Civil Judges and other senior circuit judges, not with members of the Supreme Court.
  
4. I recently referred to this aspect in an appeal which we decided late last year, *Abdulaziz v Apex* [2014] 1 WLR 4495. A defendant's defence had been struck out and judgment entered for the claimant, on the ground of the defendant's persistent failure to sign his disclosure statement in accordance with the court's initial direction. The Supreme Court affirmed the decision of the Court of Appeal, which had upheld a series of first instance orders from the initial direction to a refusal of relief from sanctions. At the end of my judgment I said this:

“I have expressed myself in some places in somewhat tentative terms .... This reflects the point that issues such as those raised by this appeal are primarily for the Court of Appeal to resolve. It would, of course, be wrong in principle for this court to refuse to entertain an appeal against a decision simply because it involved

case management and the application of the CPR. However, when it comes to case management and application of the CPR, just as the Court of Appeal is generally reluctant to interfere with trial judges' decisions so should the Supreme Court be very diffident about interfering with the guidance given or principles laid down by the Court of Appeal.

5. So, when it comes to case and trial management, as much as possible should be left to the trial judge, whose authority and confidence should be reinforced, not undermined or second-guessed, by appellate courts. Accordingly, the Court of Appeal should be very reluctant in principle to interfere with a trial judge's procedural ruling, and should only vary or reverse it, when the decision is plainly outside the wide range of reasonable choices which is normally open to a judge in such circumstances. And the Supreme Court should generally not get involved in such matters, which it is normally much less well qualified to deal with. This difference in responsibility inevitably brings to mind the famous dictum of Lord Asquith, a Law Lord in the early 1950s. He observed that the first instance judge should be quick courteous and wrong, which was not to say that the Court of Appeal should be slow rude and right, because that would be a usurpation of the function of the House of Lords. I hope that the Supreme Court is only slow to the extent that the difficulty or importance of a case justifies careful thought, that we are never rude (even about each other) and that we are always right (some hope).
6. More significantly, this difference in roles emphasises the importance in civil and family litigation in all the UK jurisdictions of the trial judge. When it comes to making findings of fact and to exercising discretion, or making decisions on costs, as well as when it comes to case management and other procedural decisions, common law trial judges almost always have, and should have, not only the first word, but also the last word. Unlike in

most European jurisdictions, where the first hearing is virtually a dress rehearsal for the appeal rehearing, litigants in the UK rarely get a second chance on an appeal on such issues. The relatively new requirement for leave to appeal to the Court of Appeal means that litigants don't even have an automatic right to one appeal, and a second appeal is, relatively speaking, very rare. Compare that with, say, Italy, where any decision can be appealed all the way to the Supreme Court – even, I assure you, an appeal against a parking ticket.

7. The importance of the first instance judgment, and therefore the significance of the trial judge, in our common law system when compared with almost all European legal systems is worth emphasising particularly so long as Europe is centripetally, rather than centrifugally, inclined. It may render our first instance cases more expensive and time-consuming, but it avoids the costs, delay and stress of automatic appeals, especially those many European appeals which are what we would characterise as rehearings.
8. And with the cost of litigation being as it is, a topic to which I shall return, most first instance decisions are not appealed anyway. In the Supreme Court, we have had two recent cases when we have overturned an appellate court for interfering with a trial judge's findings of fact, emphasising the importance of the role of the trial judge. (See *McGraddie v McGraddie* [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600. As it happens, they were both Scottish appeals, but we also emphasised the importance of the trial judge's assessment in the English family case *Re B (a child)* [2013] 1 WLR 1911). And the House of Lords emphasised its lack of expertise on costs and procedural issues when compared with the Court of Appeal in *Callery v Gray* [2002] 1 WLR 2000, paras 6 and 8.

9. Well, Lord Asquith might not be surprised at the suggestion that the role of the first instance judge is of paramount importance in our system, and the need for permission to appeal virtually every decision has only served to reinforce that importance, as has the increase in the cost of litigation. However, there are plenty of other features of 21<sup>st</sup> century civil and family justice in England which would surprise him. The sixty years since he died have seen an astonishing number of constitutional, institutional, social, technological, practical and procedural changes. So far as the judges and courts are concerned, the changes have been particularly marked in the past twenty years, and even more the past ten years. I don't propose to list the changes, but I should make one point. While of course there are exceptions, I cannot help remarking on how people regularly regard a proposed small change in their own world as representing the end of civilisation as they know it, while at the same time taking for granted a series of seismic changes almost as soon as they have been implemented. When it comes to changes in the law and the courts, judges are no exception to that approach, and, it should be added, I cannot claim to be different.
10. The changes I want to focus on today are those that impinge on the role of the first instance judge. The role of substantive law should not be overlooked in this connection. The enormous growth in public law, the influence of EU law, and, of course, the introduction of the Human Rights Convention into our law have had a very substantial effect – and not merely on the constituents of the judicial diet. It is interesting to note how the judiciary and the legislature have independently appreciated how the great growth in executive power after 1945 required increased judicial activism to ensure the rule of law – the judiciary acting gradually by developing judicial review from the 1960s, and the legislature acting later but, inevitably, more revolutionarily, by introducing the Human Rights Act 1998.

11. This political (in the sense of public policy not party politics) aspect of the judicial function has resulted in a substantial increase in three aspects of being a judge. First, an increase in the importance of judges in the UK's constitutional system, above all in ensuring the rule of law; secondly, an increase in the public focus on the role of judges, which is particularly significant in an era of the internet and a very vocal press; thirdly, an increase in the rewarding and challenging nature of the judge's job. In that connection, I believe that English law has learnt from studying decisions of the Luxembourg and Strasbourg courts and meeting the judges of those courts (and I hope and believe that they have learnt from us).
  
12. We have to preserve and to defend our common law systems and traditions, of which we have every right to be proud and whose value is plain from the volume of international contracts which are expressed to be subject to English law and pursuant to which disputes end up in English courts or arbitrations. However, the common law has survived and has led by learning partly by lifting good ideas from Europe – examples include the jury in the 11<sup>th</sup> century, the writ in the 12<sup>th</sup> century, disclosure in the 13<sup>th</sup> century and the *lex mercatoria* in the 18<sup>th</sup> century.
  
13. I referred a minute ago to the fact that the increasingly public role of the judiciary was initially due to a gradual and judge-driven development, which was followed by a more revolutionary development driven by the legislature. I believe that another field in which we are seeing this occurring is in terms of devolution from London. The notion that all commercial, Chancery or TCC cases of any significance should be tried in London started to be questioned in the 1980s, and now there is a well-developed and respected bar and

bench in those three areas in a number of large cities, and none is more successful than Manchester (and Birmingham and other cities, please note how I have put that). More recently, of course, there has been a substantial devolution of public law work from London, and that is entirely as it should be. While I may be wrong, I think that, after a very hesitant start following the 1997 Scottish and Welsh devolutions, I detect a genuine desire in many parts of Westminster to increase devolution within England.

14. A third aspect of modern life which is still being worked through is the need for specialisation. As life has got more complicated, the need for specialisation has increased, and this is no more true than in the legal profession. When I started at the bar, professional negligence was dealt with as a chapter in standard works on negligence. Shortly after, professional negligence was thought to be a subject worth a slim volume, but, with successive editions over the next ten years, it became a thick volume. The next development was a tome devoted simply to solicitors' negligence. And a few years ago, there was published quite a full book purely on solicitors' negligence in conveyancing. The days when it was thought that a judge could try a case on any subject have not quite gone, but with ticketing in crime, with specialist civil courts, and with the tribunals being brought into the judiciary, we are, I think, moving in that direction. It is a difficult question where we go from here on judicial specialisation, but I hope it is not too far. The law is already at risk of developing in silos, and a not-too-specialist judiciary has a great deal to offer in ensuring that there is cross-fertilisation between the silos – a highly desirable exercise in the legal world, but not perhaps in the agricultural world.

15. One further point which is worth mentioning before I turn to the more granular (as “nitty-gritty” seems to have morphed into) issues. That point arises from the three factors which I have just mentioned, namely the increases in judicial profile, in judicial devolution and

in judicial specialisation. That is the importance of judicial comity, judicial education, and mutual support and discussion between judges in different parts of the country, at different levels of the hierarchy and in different fields of activity. The Judicial College performs a vital public function in this connection. I may be out of date in my information, but I must confess to regret at the fact that the more senior judiciary do not attend the seminars as often as I believe that they should. It is very good for them, for us, to hear what is happening at the trial centres, out of London, or in the areas of law with which we may be less familiar: it makes us better judges. It is not only a question of improving judicial morale, although that is very important. Whether you are talking about judges at different levels, judges from different courts or judges with different expertises or experiences, they can learn from one another.

16. Let me turn now to the Woolf reforms and the Jackson reforms. They were, I suppose, ultimately motivated by economic factors. The aim was to contain the expense of litigation, by seeking to achieve two ends. First, to try and ensure that the cost to the parties, in terms of money and time, and indeed stress, was kept to a minimum and was proportionate; and, second, to try to keep the public cost, in terms of the court and judicial time and effort, to a reasonable minimum, both for the general public interest and in the light of the interests of other litigants. It is, I suggest, impossible to quarrel with the aim. After all, it is fundamental to the rule of law is that citizens, whether those with arguable claims or defences in private law or in public law, can get access to justice, and if court proceedings are disproportionately expensive or unduly delayed, that is inconsistent with access to justice and therefore with the rule of law. And while the provision of an accessible court system is a fundamental duty of government, it must represent value for money, in so far as that can properly be assessed.



17. Interestingly, the economic imperative which motivated the Woolf reforms, a judicial initiative in relation to civil litigation, once again also motivated a legislative change in the same field. That change was the 1999 Act, which, of course, severely cut back civil legal aid and introduced recoverable success fees. Like the Woolf reforms, the 1999 Act represented unfinished business, and Jackson, implemented through LASPO, took both initiatives forward. So far as the costs funding aspect is concerned, I understand that the number of issued cases since the LASPO regime replaced the 1999 Act regime suggest that the threatened collapse of claims has not occurred, but we are still in early days. As some of you may know, in the next couple of months, the Supreme Court is going to consider whether the 1999 Act regime, with its provision that the 100% costs uplift and ATE premium being fully recoverable by a successful claimant, is consistent with a defendant's article 6, access to court, rights.

18. The importance of proportionate costs cannot be overstated. If Mr Abramovitch and the late Mr Berezhovsky wished to spend millions of pounds on legal fees fighting about hundreds of millions of pounds' worth of assets, that's fine with me – although I may be a bit green eyed about the lawyers' fees and there is a serious argument to be had about the current level of court fees in that sort of case. The costs, though eye-watering to many, were proportionate and the parties could look after themselves. But if my builder wants to claim £30,000 for work done to my house, and I contend that his work was valueless and want to counterclaim for £20,000 for damage he allegedly caused, the costs of the resultant four day case with many witnesses of fact, expert evidence, disclosable documents, legal argument, means that we would both be mad to contemplate litigation. Litigation costs must be proportionate.

19. The philosophy behind Woolf and Jackson is that pre-trial procedures and hearings need to be controlled to achieve the end. This results in judges becoming more involved, becoming case managers both before and during the trial to minimise cost and delay. In cases with lawyers on both sides, it would be unrealistically optimistic to proceed on the basis that they would co-operate on this basis: their primary duty is to win and thwart the other side, albeit while keeping to court and professional rules. This side of paradise one cannot expect lions to lie down with lambs.
  
20. And the need for judicial involvement is now much greater than it was for another reason which I have already touched on, namely the virtual disappearance of legal aid for private civil and family claims, and the consequent rise in litigants in person. Where litigants in person are involved, judicial control is necessary for different reasons, not merely to help the litigant in person, but just as much to help the other party and indeed the interests of justice and the interests of other court users.
  
21. So judges are no longer detached umpires, who say nothing until the argument is over, except “is that a convenient moment?”, “speak up, please”, and “take your hands out of your pocket” – or, as the otherwise taciturn Judge Leslie said to me in 1976 in what was then the Bloomsbury and Marylebone County Court, “members of the Bar do not wear blue suits in my court”. Instead they should be closely involved in managing the case from the inception, a task which some judges inevitably find more congenial than others. And they have to manage the trial – perhaps especially where litigants in person are involved.
  
22. This has many implications for judges, as you will know far better than I do. Quite apart from issues directly involving costs, it has – or should have – a number of specific consequences. First, docketing, so there is judicial continuity on a case, which helps ensure

consistency and saving of time. Secondly, more time to read ahead of a hearing (do I hear hollow laughter?). Thirdly, specific items ahead of trial, such as costs management, control of disclosure, number of factual and expert witnesses, length of witness statements, relief from sanctions, tight but attainable timetables, and early fixing of hearings. Fourthly, control at trial, such as strict time-tables for cross-examination and speeches (very common in arbitration) and hot-tubbing of expert witnesses, which you in Manchester don't need me to tell you about. Fourthly, the promotion of ADR.

23. Of these topics, I would like to mention relief from sanctions, and then say a few words about ADR, and costs management, and I will then end by talking a bit about costs.

24. One aspect of pre-trial control which I should mention because it so topical, is relief from sanctions and the *Mitchell* and *Denton* cases (*Mitchell v. News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926). The nearest the Supreme Court has got to dealing with the topic is in the *Abdulaziz* case, where we made it clear that we were not in any way seeking to qualify or undermine those decisions. However, I referred to *Cropper v Smith* (1884) 26 Ch D 700, 710, where Bowen LJ had said that he knew of “no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party”. And then I added that “the approach laid down in *Cropper* has been overtaken by the CPR”. That does reflect another change in the judicial mindset.

25. Turning to ADR, mediation was hardly on the radar when I became a judge in 1996, but since then mediation has emerged to become a very significant way of resolving disputes, although it is perhaps not as ubiquitous as many of its proponents would like. The judicial relationship with ADR still has to be fully worked out on more than one level. First, to

what extent should judges push ADR at an early stage? It's a quick, flexible, cheap and unfrontational way of resolving a dispute – if it works. Sometimes, parties need a nudge from the judge, either because they will not accept their lawyers' views or because their lawyers are not advising them to mediate. But is it right in principle for a judge to force, or even to try and force, litigants into mediation if they want to litigate? And is it right in practice? Mediation can be a useful weapon for a rich litigant with time on his side to undermine a poorer opponent who is in a hurry. No doubt, judicial techniques can be developed with the benefit of dialogue and experience.

26. And, secondly how far should judges be mediating legal disputes themselves? There may be much to be said for the so-called early neutral evaluation by a judge, at least if the parties agree to it, but judicial continuity would, I think, be lost as, having expressed a view on the merits, the judge concerned could not then be involved in the case.

27. An interesting development in the ADR area is the Civil Justice Council's investigation into online dispute resolution, which I believe is shortly to result in a report. If one is looking for a cheap and quick way of resolving small disputes in the electronic age, it would be silly not at least to examine the possibility. ODR is the means by which many thousands, even tens of thousands, of eBay disputes are resolved successfully annually. If it works in the traditional litigation sphere, then who knows? It may start to appeal to litigants involved in substantial cases.

28. The recent introduction of costs management has emphasised the importance of the new judicial pre-trial role. Of course it's not perfect, but I suggest that it is well justified for two reasons. First, it enables the court (or the parties) to indulge in effective and targeted case management: it concentrates minds on specific management issues early on in the

procedure, which means much more effective case management. Secondly, elementary logic suggests that, in order to decide whether to fight or to settle a case, in order to decide how much time and effort to devote to a case, it's not enough to know the chances of success and the extent of the potential damages or other relief: a litigant also has to factor in the cost of winning or losing. Of course, as with many of the Woolf reforms, the ironic downside of costs management is front-end loading of costs – ironic because the whole purpose is to keep costs proportionate and to render litigation practicable. I know that there are those who say that costs management will fade away, and it would be arrogant to suggest that they are definitely wrong. But I hope and believe that they are wrong, although I accept that it will take some time for costs management to bed down fully into the system.

29. When I was Master of the Rolls, I said publicly on a couple of occasions that, if we could not achieve proportionate costs through our current systems, then we may have no alternative but to go over to fixed costs. Although they represent significantly rougher justice than the costs management route, they have the advantage of consistency across the system and no extra costs and time in preparing and considering costs budgets. Because of the importance of costs control and proportionality generally, fixed costs are generally desirable throughout the fast track. We are still waiting on the Ministry of Justice to achieve this, although it is fair to record that there is now a fixed costs system in place for fast track personal injury cases. Fixed costs throughout the fast track was one of Rupert Jackson's recommendations which was accepted more than four years ago. Particularly bearing in mind the Government's fundamental duty to enable access to justice and their swingeing cuts in civil legal aid, it is more than disappointing that after all this time, we still do not have fixed costs for all fast track cases. Indeed, I would hope that

fixed costs might be extended to the smaller multi-track cases, such as the example of the building case I gave earlier – if it could not be settled by ODR or early neutral evaluation.

30. I referred to Lord Asquith's likely surprise if he was alive to see how the judicial role has changed over the sixty years since he was a Law Lord. From having been a detached umpire who gave a view on the law and the facts at the end of a case and held the ring in the meantime, a judge is now a case manager, a time-tabler, a time-keeper, a rules enforcer, a mediation facilitator, a mediator, a chairman of a meeting, and a costs assessor before and after the event. First instance judges have been, if you like, converted from guard dogs, who sat on the sidelines and only barked occasionally to warn, into sheep dogs, who continually worry away at the parties to ensure that they fall into line. So I suppose that means that the Court of Appeal judges are the shepherds. I am not sure where that leaves the Supreme Court Justices, but, as our role should be very limited, perhaps that does not matter.

David Neuberger

Manchester, 22 January 2015