All hail the CPR!

'DDJ Goodliffe' of the Brexeter County Court fires a warning shot against recalcitrant lawyers & experts

The Civil Procedure Rules (CPR) are a comparable development to the laws of Hammurabi and Justinian, Magna Carta and the Napoleonic Code. All English lawyers who practise litigation in the 21st century should contribute to the advancement of the reforms. Resistance to this progress must be crushed.

The most important aspect of the rules is the emphasis on making wasted costs orders against recalcitrant lawyers. Many solicitors who conduct litigation in this country are either over-aggressive, over-greedy, incompetent or lazy. Lawyers have grown fat over the last 50 years from legal aid and the generosity of the Court Taxing Office. If lawyers witness the humiliation and ruin of those who incur the displeasure of the judiciary, they may start to shape up. Experience has proved that appeals to the higher instincts of people like this merely fall on deaf ears.

There is, however, an increasing realisation that wasted costs orders may in certain circumstances be an insufficiently Draconian remedy. Liability for wasted costs may be covered by the solicitor's insurance. Consideration needs to be given to the question of whether such cover may be against public policy, since it allows lawyers against whom orders are made to avoid the full consequences of the punishment meted out to them by the judges. If such cover is not against public policy at common law, it may be necessary to declare it to be so under the Civil Procedure Act 1997.

In any event, judges need to disgrace and mortify inflated egos. Options include requiring the guilty to perform community service by working on the preparation of further sets of amendments to the CPR. Only 93 sets of such amendments have been published since the reforms. Managing the rules is like managing tax legislation. One needs to stay one step ahead of avoidance techniques developed by the legal profession.

Another concern is that it is not only lawyers against whom wasted costs orders may need to be targeted. The attitude of expert witnesses often leaves a great deal to be desired. Lord Justice Staughton pointed out in *New Hampshire Insurance v MGN*, 15 June 1995: 'Everybody now thinks that they have to have an expert because the rules of the court make provision for exchanging copies of reports, and that makes people think they have to have some to exchange.'

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'Professional experts' seem to assume that their evidence ought to determine the outcome of litigation (what do they think the judges are there to do, one wonders?) and wield considerable power. This is a worrying fact since many of them clearly feel that their primary loyalty is owed to those who pay their bill. Their reports are often carefully crafted by counsel and make particularly excruciating reading.

Beyond privilege

Medcalf v Mardell [2002] UKHL 27 illustrates a serious problem. A wasted costs order was made against barristers. They wanted to rely on matters which could not be disclosed because their client insisted on relying on legal professional privilege. They argued that it was unfair for the court to draw inferences against them. This was rejected by the Court of Appeal. The House of Lords went mad and reversed the judgment.

Medcalf does, however, highlight the problems which are raised by privilege in its various guises for the exercise by judges of their full panoply of powers. Sir Richard Scott described litigation privilege (which allows lawyers to withhold from the judge communications, such as dealings with experts and other witnesses, which are made for the purpose of use in litigation) as a 'sacred cow'. Dealings between lawyers and witnesses will often need to be dissected when applications for wasted costs orders are made against lawyers who put pressure on experts and witnesses of fact to say what they (the lawyers) want them to say.

The privilege against self-incrimination, described by Lord Templeman as 'an archaic and unjustifiable survival from the past' in *AT&T Istel Ltd v Tully* [1993] AC 45, has, I am pleased to say, steadily been eroded over the last ten years by statutory provisions requiring people to answer questions as to whether they like it or not.

As to 'legal advice privilege' this prevents judges from seeing communications between lawyers and their clients in obtaining and giving legal advice. Theory has it that lawyers and clients would not communicate freely if their dealings were open to subsequent examination. However, English judges are widely recognised as the best in the world (unlike the lawyers who appear before them). Litigants whose cases have merit should recognise that they have nothing to fear if they give full disclosure including their dealings with their own lawyers to the court.

The prospect of their opinions being exposed to analysis in court may encourage lawyers to give better advice than they seem to be giving at present. A more pragmatic approach to privilege may also, hopefully, help to reduce the never-ending series of articles on this abstruse subject.

With these points in mind I have been asked to chair an informal group of judges. It is meeting every month over a bottle of claret to discuss how the law of privilege can be pared down by negative interpretation in the cases. Progress has already been achieved (see *SFO v ENRC* [2017] EWHC 1017 (QB)).

Moreover, although there is no reason why a court should not, in appropriate circumstances, draw inferences, when entertaining an application for a wasted costs order, it may be better that the court should be in possession of the full facts. This will help to ensure more focused targeting of wasted costs orders and avoid the need in some cases to give lawyers the benefit of the doubt (they don't deserve it). **NLJ**

In his spare time **Jonathan Goodliffe** is also a consultant in legal stress management (*contact@jgoodliffe.co.uk*).