PROPORTIONALITY:
A MORE EFFECTIVE TOOL

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This paper was prepared for the Continuing Legal Education Society of B.C. conference entitled “Rule 68” held September 29, 2005.

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Proportionality: A More Effective Tool

By Craig P. Dennis*

1. Introduction

The Notice to the Profession introducing Rule 68 identifies proportionality as the guiding principle of the new rule[1]. Proportionality refers to the idea that the pursuit of a just determination on the merits should not be indifferent to the speed and expense of obtaining that determination. The existing *Rules of Court* speak to the objective of the just, speedy and inexpensive determination of every proceeding on its merits[2] but do so without specifying how to reconcile those sometimes conflicting values. In practice, the balancing of those aims of justice, speed and economy has tended to see the quest for justice prevail in circumstances where speed and economy clash with the merits[3]. Rule 68 adjusts that balance by giving emphasis to the interests of speed and expense in two ways: first, by creating a streamlined procedure for cases where the amount in issue does not exceed $100,000; and second, by requiring that in the course of an "expedited action"[4] the court hearing any application under Rule 68 consider "what is reasonable in relation to the amount in issue in the action"[5].

The explicit regard for proportionality that Rule 68 demands echoes the direction of civil justice reform in England over the past decade. Reforms introduced as a result of Lord Woolf's review of civil procedure require that proportionality have a "central role" in the resolution of civil litigation[6]. Other jurisdictions also have implemented reform measures aimed at ensuring that the cost of a case is proportionate to its size and complexity[7]. The underlying goal is to increase

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*I acknowledge with thanks the research assistance of Deborah Cumberford of Sugden, McFee & Roos, Vancouver and the provision of English materials by Siobhan Thomson of Lovells, London.

[1] Notice to the Profession Re: Rule 68, Expedited Litigation Project Rule, the Honourable Chief Justice Donald Brenner (30 March 2005).

[2] Rule 1(5).

[3] *Strata Plan LMS3851 v. Homer Street Developments Ltd. Partnership* (6 February 2003), New Westminster No. S0-76792, 2003 BCSC 2310 (Master) at para. 26.

[4] Rule 68(1) defines "expedited action" to mean an action to which Rule 68 applies under 68(2) or 68(3).

[5] Rule 68(13).

[6] *Lownds v. Secretary of State for the Home Department*, [2002] 1 W.L.R. 2450, 2453 (C.A.).

[7] See for example, the discussion of reforms in Queensland, Australia in the paper by the Honourable Geoffrey Davies, "Civil Justice Reform: Why We Need to Question Some Basic Assumptions", CLE June 2005.

access to justice by making litigation less expensive and by ensuring that litigants use no more of the system's resources than their case requires[8].

Proportionality as a guiding principle of civil procedure now has arrived in British Columbia in the form of Rule 68. It is therefore in the interests of litigators to understand what the principle means and how it will influence the conduct of expedited actions. The purpose of this paper is to assist in the development of that understanding. The next section of the paper, Part 2, expands on the meaning of proportionality in the civil justice context. Part 3 then presents a discussion of the English experience, in particular Lord Woolf's review and the introduction of the *Civil Procedure Rules 1998* which resulted from Lord Woolf's work. Part 4 examines the particular features of Rule 68 which reflect the principle of proportionality in operation. Finally, Part 5 draws on both the English experience and the text of Rule 68 to anticipate various issues which may arise in the course of expedited actions and offers suggestions as to their possible resolution in light of the mandatory principle of proportionality.

2. Proportionality: Justice at What Price?

Lord Woolf summed up the essence of proportionality in the following words: "The achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result"[9].

The concern for resolving disputes at a cost and pace proportionate to the magnitude of the dispute stems from the perception that high cost and delay are keeping would-be litigants out of court. The Chief Justice has commented on the declining number and increasing length of civil trials in the Supreme Court of British Columbia[10]. British Columbia's Justice Review Task Force issued a Green Paper, *The Foundations of Civil Justice Reform,* which documents what it describes as an access crisis. According to the Green Paper, "The B.C. civil justice system is becoming more complex and more expensive and, therefore, less accessible for the average

[8] Lord Woolf, Access to Justice, Final Report to the Lord Chancellor on the civil justice system in England and Wales (July 1996) ("Final Report"), ch. 2, paras. 17, 27.
[9] Lord Woolf, Interim Report on Access to Justice (June 1995) ("Interim Report") , ch. 4, para. 6.
[10] Brenner, "Trends in the Supreme Court of British Columbia", The Verdict, Issue 99 (December 2003), p. 58.

citizen"[11]. It cites anecdotal evidence suggesting that "many lawyers turn away clients on the basis that the cost of litigating a claim of up to $50,000 or $100,000, depending on the venue and type of case, will be disproportionate to the value of the claim"[12].

Available survey data highlight the particular difficulty of cost for lower value claims. A major study cited in Lord Woolf's interim report revealed that "disproportionate cost is most severe at the lower end of the scale where the costs for one side alone equal or exceed the value of the claim in half the cases looked at"[13]. Closer to home, the Ontario Civil Justice Review found similar results: "the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about ¾ of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained[14].

Those findings raise a concern about the functioning and accessibility of the civil justice system. For the system to be accessible it must be affordable. A rational person will be slow to access a system where the cost of so doing entirely or substantially erodes the value of the potential recovery. As Lord Woolf put it, "a system that in many smaller cases pays more to the litigator than it does in compensation to the litigant is unacceptable"[15]. It is also a system which puts itself out of reach of many litigants. In a public lecture given in 1970, Lord Devlin observed:

> The fallacy inherent in our High Court procedure of civil litigation is just that -- that where justice is concerned, time and money are no object. We think of British justice as an ideal into which such sordid considerations ought not to enter. We refuse to associate with it such homely maxims as that half a loaf is better than no bread. But is it right to cling to a system that offers perfection for the few and nothing at all for the many? Perhaps: if we could really be sure that our existing system was perfect. But of course it is not. We delude ourselves if we think that it always produces the right judgment. Every system contains a percentage of error; and if by slightly increasing the percentage of

[11] British Columbia Justice Review Task Force, Green Paper, *Foundations of Civil Justice Reform*, p. 2 (21 September 2004) ("Green Paper").
[12] Green Paper, p. 1.
[13] Lord Woolf Interim Report, ch. 3, para. 19.
[14] Ontario Civil Justice Review, 1st Report (March 1995), (ch. 11.4).
[15] Lord Woolf Interim Report, ch. 3, para. 21.

> error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt[16].

3. The English Experience

A comparison between key features of Rule 68 and the reforms which Lord Woolf's review precipitated in England reveals the influence of the English experience on the new procedure in British Columbia for expedited actions. For that reason an introduction to the ascendancy of proportionality in England is helpful to understanding Rule 68.

3.1 Lord Woolf's Review

In 1994 the Lord Chancellor appointed Lord Woolf to review the then current rules and procedures of the civil courts in England and Wales. One of the stated aims of Lord Woolf's review was to improve access to justice and reduce the cost of litigation[17].

Lord Woolf's conclusions about the English system mirror concerns expressed about the civil justice system in British Columbia. The system is "too expensive, too slow and too complex"[18]. Those features operate to the disadvantage of many litigants for whom expense, delay and complexity may discourage the bringing of a claim at all or force them to settle their claims on disadvantageous terms. Access to justice, a constitutional right, thereby is impaired[19].

Lord Woolf began by identifying the basic principles he regarded as necessary for a civil justice system to ensure appropriate access to justice. He identified those principles as follows:

- It should be *just* in the results it delivers.
- It should be *fair* and be seen to be so by:

[16] Talk for the BBC given in 1970 "What's Wrong With the Law" (ed. Zander 1970, pp. 75-77). Quoted by Lord Woolf Interim Report, s. 1, ch. 4, para. 5.
[17] Lord Woolf Interim Report, Introduction.
[18] Lord Woolf Interim Report, ch. 2, para. 1.
[19] Lord Woolf Interim Report, ch. 1, para. 2. As to the constitutional status of access to the courts in Canada, see *AG (BC) v. BCGEU*, [1998] 2 S.C.R. 214.

- ensuring that litigants have an equal opportunity, regardless of their resources, to assist or defend their legal rights;

- providing every litigant with an adequate opportunity to state his own case and answer his opponent's;

- treating like cases alike.

- Procedures and costs should be *proportionate* to the nature of the issues involved.

- It should deal with cases with reasonable *speed*.

- It should be *understandable* to those who use it.

- It should be *responsive* to the needs of those who use it.

- It should provide as much *certainty* as the nature of particular cases allows.

- It should be *effective*: adequately resourced and organized so as to give effect to the previous principles[20].

Lord Woolf's conclusion was that the system under review did not satisfy those principles. He placed responsibility for that on what he described as the "unrestrained adversarial culture of the present system"[21]. He summarized what he saw as the primary problems:

- The excesses of and the lack of control over the system of civil litigation;

- The inadequate attention which the system gives to the control of cost and delay and to the need to ensure equality between the parties;

- The complexity of the present system; and

- The absence of any satisfactory judicial responsibility for the effective use of resources within the civil system[22].

Lord Woolf's central recommendation in response to those problems was for the courts to assume substantial responsibility for the management of cases. He advocated a scheme of

[20] Lord Woolf Interim Report, ch. 1, para. 3.
[21] Lord Woolf Interim Report, ch. 4, para. 1.
[22] Lord Woolf Interim Report, ch. 4, para. 1.

proportional case management in which civil cases are allocated to one of three tracks: (1) small claims, (2) fast track, for cases in the main where the amount at issue is above the small claims threshold but below a fixed amount, and (3) multi-track, for all other cases.

Lord Woolf saw proportionality as the key to the fast track. He recognized that the "excessive and disproportionate cost" of cases dealt with by the "full panoply of civil procedure with all associated costs and delay" is a deterrent to access to justice[23]. In answer Lord Woolf proposed a fast track featuring a more limited, streamlined procedure. He sought to reduce the cost of cases on the fast track by limiting the amount of work that counsel can do on such a case. To achieve that goal he made recommendations for fast track cases aimed at removing or modifying use of what he regarded as potential sources of disproportionate cost, such as interlocutory hearings, discovery and expert evidence[24].

3.2 *Civil Procedures Rules 1998*

The result of Lord Woolf's review was the introduction in England and Wales of the *Civil Procedure Rules 1998 ("CPR")*, which came into force on April 26, 1999. The *CPR* heralded a comprehensive reform of the civil justice system based on the recommendations made by Lord Woolf. Proportionality is a central aim of the *CPR*, which give the courts "greater power to impose proportionality"[25].

The *CPR* make express reference to proportionality in stating their objective:

> **The overriding objective**
> 1.1 (1) These Rules are a new procedural code with the over-riding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable --
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate --
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and

[23] Lord Woolf Interim Report, ch. 6, para. 9.
[24] Lord Woolf Interim Report, ch. 5, para. 6.
[25] *McPhilemy v. Times Newspapers Ltd,* [1999] 3 All E.R. 775, 793 *per* Lord Woolf.

(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court to the overriding objective

1.2 The court must seek to give effect to the overriding objective when it --

(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

Duty of the parties

1.3 The parties are required to help the court to further the overriding objective.

The requirement as part of the overriding objective to deal with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party is not the *CPR*'s only reference to proportionality. The principle is enshrined in many other parts of the *CPR*[26]. Proportionality also furthers the attainment of other principles in the overriding objective, including ensuring that the parties are on an equal footing[27].

In keeping with Lord Woolf's recommendations, the creation of the fast track stands as a further means of achieving proportionality. The fast track aims to provide a speedy, simple and cost effective procedure for cases where the amount at issue does not exceed GBP 15000. The ordinary procedure established by the *CPR* for cases on the fast track features limitations on discovery, expert evidence and awards of costs[28]. A number of these elements are replicated in Rule 68, discussed in the next section.

[26] For example, rule 30.3 (criteria for transfer), rule 31.3 (right to inspection of a disclosed document), rule 31.7 (duty of search) and rule 44.4 (assessment of costs).
[27] *McPhilemy*, *supra,* p. 793.
[28] Part 28.

4. How Rule 68 Implements Proportionality

Rule 68 achieves proportionality in two senses. First (the macro), it creates a new set of streamlined procedures for cases where the amount in issue does not exceed $100000. Second (the micro), it requires, in areas where the rule permits variation in the nature and extent of procedure available, that decisions on such matters consider what is reasonable in relation to the amount at issue in the action. In an effort to prevent costs from eroding the value of the potential recovery, Rule 68 sets limits on the steps that a party can take and then, having regard to those defined limits, permits some tailored expansion or contraction based on the amount in issue in the case. In that way Rule 68 aims to allow claims not exceeding $100000 to be tried in court economically, at a cost that is not disproportionate to the magnitude of the claim.

The creation of the expedited action for claims where the amount in issue does not exceed $100000[29] is an important step in making the courts more accessible for individuals and small business. Rule 68 fits with the recommendation in the Canadian Bar Association's Systems of Civil Justice Task Force Report for "increased flexibility and proportionality in procedures through the creation of multiple tracks for dispute resolution"[30]. It also is in line with the *CPR*'s creation of the fast track for claims where the amount in issue makes the problem of disproportionate cost most acute. Among the measures to streamline the procedure applicable to

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[29]The precise definition is in Rule 68(2) (a) and (b):

> Subject to subrule (5), this rule applies to an action commenced in the Vancouver, Victoria, Prince George or Nelson registry after September 1, 2005 if
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> (a) the only claims in the action are for one or more of the following:
> (i) money;
> (ii) real property;
> (iii) personal property, and
> (b) the total of the following amounts is $100 000 or less, exclusive of interest and costs:
> (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
> (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
> (iii) the fair market value, as at the date the action is commenced, of all real property, all interests in real property, all personal property and all interests in personal property claimed in the action by the plaintiff.

[30] Canadian Bar Association, Systems of Civil Justice Task Force Report Executive Summary (1996).

expedited actions, Rule 68 limits discovery (documentary[31] and oral[32]), limits the use of expert evidence[33], prohibits interlocutory applications until after a mandatory case management conference[34], and prohibits interrogatories and examinations of witnesses[35].

Like the *CPR*, Rule 68 enshrines proportionality both in the general and in the specific. The general regard for proportionality appears in Rule 68(13) in the following terms:

> **Proportionality**
>
> (13) In considering any application under this rule, the court must consider what is reasonable in relation to the amount at issue in the action.

Under Rule 68(13) proportionality is to be assessed only by reference to the amount in issue. That is in contrast to the *CPR*, where the concern for proportionality extends beyond the amount of money involved to include also the importance of the case, the complexity of the issues and the financial position of each party[36]. A possible explanation for the difference is that Rule 68 concerns only one category of cases, defined by the amount in issue not exceeding $100000, whereas the *CPR* and the requirements of rule 1.1 apply to all categories of action. If the intent behind Rule 68 is to keep costs proportionate to the amount in issue, too much regard for matters of complexity or importance -- if more complex and more important means more procedure -- may undermine that objective. Still, it remains to be seen whether Rule 68(13)'s reference to "the amount at issue in the case" leaves room for considering the amount relative to the particular circumstances of the parties. The amount at issue may be of less significance to a large financial institution sued for $90000 than to an ordinary consumer sued for $45000.

In addition to the general regard for proportionality mandated by Rule 68(13), there are specific proportionality considerations built in to certain subjects addressed by Rule 68. For example, Rule 68 contains its own code for document disclosure, in place of Rule 26 and the broad standard of relevance applicable under Rule 26[37]. Under Rule 68 a party who believes that its

[31] Rule 68(18).
[32] Rule 68(27).
[33] Rule 68(33).
[34] Rule 68(10).
[35] Rule 68(23).
[36] *CPR*, rule 1.1(2).
[37] Rule 68(15), (16).

adversary has not provided the document disclosure required[38] may, after making a demand for the additional documents sought, apply for their production if there is not full compliance with that demand. The court in considering such an application must consider "the difficulty or cost of finding and producing the documents"[39]. Even with a standard of relevance that is higher than the ordinary standard under Rule 26, a party may be relieved of the obligation to disclose such relevant documents if the cost of finding or producing them is disproportionate to the amount in issue. Similarly, Rule 68(30) directs the court, on hearing an application for leave to conduct examination for discovery, or additional examination for discovery, to take into account when exercising its discretion the "total amount of the plaintiffs' claims"[40].

5. The Road Ahead: *Life in the Fast Lane*

Having seen the influence of the principle of proportionality on the creation of Rule 68, it remains to consider what in practice it means, for example, to require a court to take account on applications under Rule 68 of "what is reasonable in relation to the amount at issue in the action". Rule 68 in operation will give rise to a variety of procedural questions. When will a court order examination for discovery, or additional expert evidence? In what circumstances will a court order that Rule 68 ceases to apply to an action? How will considerations of proportionality -- the amount in issue -- shape the court's decisions on those and other procedural issues?

The purpose of this final section of the paper is to identify several procedural questions likely to arise in the life of Rule 68 and to offer some tentative suggestions as to how the court might approach such issues. The regard for proportionality mandated by the *CPR* suggests that English cases may be a source of guidance. For that reason the discussion which follows draws on English authorities to the extent helpful. Owing to the advent of the *CPR*, a self-contained code,

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[38] Rule 68(16)(a):

(i) all documents referred to in the party's pleading,
(ii) all documents to which the party intends to refer at trial, and
(iii) all documents in the party's control that could be used by any party at trial to prove or disprove a material fact.

[39] Rule 68(22).

[40] Rule 68(30)(e).

the position in England is that earlier authorities "are no longer generally of any relevance"[41]. If British Columbia courts take the same approach to Rule 68, which likewise is a self-contained code stated to prevail over any other rule in the event of conflict, English authorities may in the early stages of Rule 68's development be even more germane than British Columbia decisions decided prior to Rule 68's creation.

5.1 Can You Ever Leave?: *Welcome to the Hotel California*

Rule 68(7) provides that Rule 68 ceases to apply to an action if the court, on its own motion or on the application of any party, so orders. The flexibility afforded the court by Rule 68 suggests that the circumstances which will lead a court to order an action out of Rule 68 will be rare[42].

As Lord Woolf recognized in his proposal for the fast track, the benefits which he attributed to the fast track would be undermined by frequent attempts to remove cases from the fast track, which attempts would occur with even greater frequency if early efforts were to succeed. In his final report, Lord Woolf stated:

> There is a final point to which I attach great importance. It is vital that solicitors should feel able to welcome the fast track system as a new facility which they can commend to their clients as providing access to justice with certainty and economy. Constant pressure to take cases out of the fast track will undermine certainty and increase costs[43].

For Rule 68 to achieve its aims, the court will have to be firm in its resolve not to exempt cases as a matter of routine. Apart from a situation of multiple actions or claims, discussed in the next section, the circumstances which would justify removing an action from Rule 68 are not immediately apparent. Under Rule 68, the court has the flexibility to afford a party most of the commonly-employed procedural tools available in an action not governed by Rule 68. If, for example, a party argues that limiting it to the procedures available under Rule 68 would be unjust because the case puts in issue the reputation of a professional, or has wide precedential value,

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[41] *Biguzzi v. Rank Leisure PLC*, [1991] 1 W.L.R. 1926, 1935 *per* Lord Woolf M.R. (C.A.).
[42] Leaving aside the situation of multiple actions or claims, which is the subject of the next section.
[43] Lord Woolf Final Report, ch. 2, para. 29.

then the court might well consider it a preferable alternative to exempting the case from Rule 68 altogether to relax some of the restrictions on examination for discovery and expert evidence, if that is warranted. The routine exempting of cases from Rule 68 seems unnecessary in most such circumstances and potentially detrimental to the objects of the rule.

5.2 Multiple Actions, Claims: *Heartache Tonight*

One of the bigger challenges which Rule 68 presents involves dealing with an expedited action that spawns additional claims or is one of several related actions. The problem of multiple claims and multiple actions is likely to test the court's commitment to Rule 68 and may require creativity on the part of the court to preserve Rule 68's aims.

One way in which an expedited action could give rise to an additional claim is if a defendant counterclaimed. Is a counterclaim in excess of the monetary limit on an expedited action a basis to remove the action from Rule 68? For Lord Woolf, the answer was no. He maintained that the existence of a counterclaim whose value exceeded the normal financial limit for the fast track was not, of itself, a basis to remove the case from the fast track[44]. The wording of Rule 68 supports that approach. In Rule 68(2) the threshold of $100,000 refers expressly to the amount "claimed in the action by the plaintiff". On the wording of Rule 68(2)(b), the existence of a counterclaim which, either on its own or in combination with the amount claimed by the plaintiff, puts the amount in issue over $100,000 should not automatically be a basis for removing an action from Rule 68. As Lord Woolf observed, while in some cases it may prove necessary to try a claim and counterclaim separately, the virtue of restraint is that it "should reduce the scope for tactical counterclaims"[45].

The complexity increases when moving from a scenario involving a single counterclaim to scenarios involving multiple third party claims or multiple related actions. As the number of parties and the number of claims increase, the ability to retain the proportionality which Rule 68 aims to achieve becomes more severely tested. But such expansion of an otherwise

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[44] Lord Woolf Final Report, ch. 3, para. 11.
[45] Lord Woolf Final Report, ch. 3, para. 11.

straightforward claim is a large source of disproportionate cost, and there is room for the court to be creative.

For instance, in a scenario where a single event -- say a train derailment -- gives rise to multiple actions, the court may well face claims falling under Rule 68 together with much larger claims. As an alternative simply to ordering the smaller claims out of Rule 68 altogether, the court may opt to try to preserve some of the benefits of Rule 68 for the smaller claims by ordering a trial in all related actions of a common issue -- likely the issue of liability in the train derailment example. The court could consider accompanying an order for the trial of the common issue with directions, at least for the expedited actions, informed by Rule 68's requirement to consider proportionality. That approach may not work in every instance, but the point is that there is opportunity for the court to address its mind, in the interest of proportionality, to alternatives that stop short of releasing an expedited action to the full panoply of procedures available to actions not governed by Rule 68.

5.3 Pleadings -- Amendments and Particulars: *Learn to Be Still*

With the possible exception of an expired limitation period, generally there are few hurdles in the way of obtaining leave to amend a pleading: amendments are allowed absent a demonstration of actual prejudice which cannot be compensated for in costs or that the amendment would be useless[46]. Rule 68 introduces a new hurdle, proportionality, which may stand in the way of an amendment raising an issue the examination of which would be disproportionate to its importance to the real issues in the case.

In *Flynn v. Robin Thompson & Partners*[47], the Court of Appeal invoked proportionality as a basis to refuse to allow a plea of vicarious liability to stand. The plaintiff, alleging that he was assaulted on two occasions by a partner of a law firm, sought to implead the partnership. The problem for the plaintiff was that only the first of the two assaults gave rise to any possibility of vicarious liability, but only the second of the assaults gave rise to any claim of serious injury. Accordingly the court, relying on the reference to proportionality in *CPR* rule 1.1(2)(c), held that

[46] *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145, 153 (C.A.).
[47] [2000] E.W.J. No. 353.

it would be "totally disproportionate to allow the matter [of the partnership's vicarious liability] to proceed simply to establish what would be a wholly technical trespass"[48].

A more general statement of principle is found in *McPhilemy v. Times Newspapers Ltd.*[49]. In *McPhilemy* the court did permit an amendment to the defence in a libel action which put in issue the truth or falsity of the central thesis of a television documentary. Proportionality could not deny to the defendant "a legitimate substantial defence" where, the court observed, the truth of the documentary's main thesis was "part of the plaintiff's own original battleground"[50]. But the court did caution that considerations of proportionality required exclusion of "all peripheral material … not essential to the just determination of the real issues between the parties, and whose examination would be disproportionate to its importance to those issues"[51].

The challenge under Rule 68 will be for the court to identify a proposed plea which raises an issue not essential to the just determination of the "real issues" and whose examination would be disproportionate in importance to those real issues. A court may be reluctant to deny a defendant the ability to advance a plea which may substantially reduce or negate its liability -- a legitimate substantial defence -- or to deny a plaintiff the ability to advance a plea which may entitle it to compensation. Still, Rule 68(13) requires the court to consider proportionality. Before allowing an amendment that will take an otherwise straightforward action into a new issue requiring prolonged investigation -- a new plea of cause in a wrongful dismissal case, for example, or opening up a psychiatric inquiry in a personal injury claim -- the court might well, in the name of proportionality, require the party seeking the amendment to demonstrate some "air of reality" or substantial basis for the new plea. Similarly, the court may make it a condition of allowing the amendment that, if the new plea fails, the party seeking the amendment will be required to pay costs in relation to that issue in any event of the cause, perhaps even on a full indemnity basis. In some instances, as in the *Flynn* case, the court may refuse to allow a plea to stand altogether on the basis of proportionality.

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[48] Para 23, *per* Lord Justice Mance.
[49] *Supra.*
[50] p. 790 *per* May L.J.
[51] p. 790, *per* May L.J.

More generally, Rule 68's requirement for early delivery of the documents that a party intends to refer to at trial[52], and a list and written summary of the evidence of the party's witnesses[53], may ease the burden that pleadings, and particulars of pleadings, sometimes are expected to carry. Given that an application for particulars likely cannot even be brought until the case management conference contemplated by Rule 68(34)[54], the necessity of particulars may fade in light of the delivery of documents and the impending delivery of witness summaries. In *McPhilemy*, Lord Woolf M.R. saw a reduced need for particulars under the *CPR* in light of the requirements for document disclosure and witness statements.

> The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. …
>
> As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest. … Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged[55].

5.4 Expert Evidence: *Get Over It*

Unless the court orders otherwise, Rule 68(33) restricts a party to an expedited action to one expert witness (plus one more to respond to the other party's expert if the party's first expert lacks the expertise to do so). Given the cost of experts, the restriction on experts is an important element in the proportionality which Rule 68 aims to achieve. It is unlikely that the court will lift the restriction simply as a matter of routine.

The English case of *Mann v. Chetty & Patel*[56] suggests a method of analysis that might find favour with courts in British Columbia when considering whether to allow a party to an expedited action an additional expert witness. The court in *Mann* advocated a three-stage inquiry:

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[52] Within 15 days after the close of pleadings or within 15 days after the action becomes an expedited action, whichever is later: Rule 68(16).
[53] Within 60 days after the close of pleadings or within 60 days after the action becomes an expedited action, whichever is later: Rule 68(31).
[54] Subject to Rule 68(12).
[55] *McPhilemy, supra, per* Lord Woolf, pp. 791-792.
[56] [2000] E.W.J. No. 5686 (C.A.).

> Clearly, therefore, the court has to make a judgment on at least three matters: (a) how cogent the proposed expert evidence will be; (b) how helpful it will be in resolving any of the issues in the case and (c) how much it will cost and the relationship of that cost to the sums at stake[57].

Consistent with that approach, a party to an expedited action seeking relief from the restriction in Rule 68(33) should be expected to provide the court with more than merely a general assertion. The court needs the information outlined in *Mann* in order to choose wisely among the possible dispositions available to it. In addition to allowing one or more of the parties to call two or more experts[58], the court can require that the evidence on any one or more issues be given by one jointly-instructed expert only[59]. The court's more general authority under Rule 68(41)[60] may also provide the court with authority to follow the course in *Mann*, in which the court granted leave to adduce expert evidence on an issue but set a limit on the time and expense involved[61].

5.5 Examination for Discovery: *Take It Easy*

Unless the parties to the action consent or the court otherwise orders, no party to an expedited action may conduct examinations for discovery[62]. Unlike the restriction on expert evidence, the restriction on examination for discovery may be overcome on consent of the parties. But where there is no agreement and it is necessary to apply for leave to conduct examination for discovery, the court, as with the restriction on expert evidence, may be reluctant to grant leave as a matter of automatic course so as to avoid undermining the purpose behind Rule 68.

Rule 68(30) specifies the considerations which the court must take into account in addressing an application for leave to conduct examination for discovery (or for leave to extend the time allowed for examination for discovery). Rule 68(30) provides:

> (30) Without limiting subrule (13), in exercising its discretion under subrule (27) or (29), the court must take into account:

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[57] Para 17, *per* Hale L.J.
[58] Rule 68(41)(k).
[59] Rule 68(41)(j).
[60] Rule 68(41)(s) and (t).
[61] *Mann, supra*, para. 33.
[62] Rule 68(27).

(a) the issues identified in the pleadings,

(b) the number and nature of the documents disclosed by the parties,

(c) the subject areas to be canvassed,

(d) the parties' estimates of the time that will be required to complete the examination,

(e) the total amount of the plaintiffs' claims, and

(f) any other circumstances relevant to the fair resolution of the dispute on its merits.

Those considerations bear similarity to the matters identified in *Mann* as relevant to whether the court should permit expert evidence on an issue: the cogency of the evidence, how helpful it will be in resolving any of the issues in the case, and how much it will cost relative to the amount in issue.

There undoubtedly will be straightforward cases where credibility is not in issue and the facts are not much in dispute where the court may regard examination for discovery as an unnecessary extravagance in light of the identification of the documents to be relied upon at trial and the provision of witness summaries. But the court's more common response may be to allow time-limited examination for discovery, subject to requiring, for example, that the parties first attend mediation or settle a statement of agreed facts so as to identify areas which need not be the subject of examination.

Consistent with the aim of avoiding disproportionate cost, the court's approach to examination for discovery is likely to be flexible and sensitive to the circumstances of each individual case. That may mean no examination for discovery in a case of relatively modest value where it is unlikely that examination for discovery will add much to the information already disclosed through document disclosure and witness statements. It may mean examination for discovery will quite readily be allowed in cases where the amount in issue justifies the cost and where a just resolution may depend upon determinations of credibility. Finally, it may also mean that examination for discovery will be deferred until the parties attempt other, perhaps less costly, means of resolving or narrowing their dispute.

5.6 Severing Liability and Quantum: *Wasted Time*

Proportionality might also prompt a more liberal approach to severing the trial of liability and quantum[63]. The experience with the fast track in England has seen an increase in the frequency of split trials, where liability is determined separately from and before quantum[64]. The potential for costs savings is clear: if no liability is found, the expense of trying quantum is spared whereas if liability is found, that often can spur settlement on quantum without need for further trial. But that potential for savings assumes that trying the issue of quantum entails significant costs in its own right. As one English court observed, in rather pointed language, a split trial may be a source of, rather than the antidote to, disproportionate cost in a straightforward case of modest value where quantum is unlikely to require prolonged independent examination[65].

5.7 Costs: *Out of Control*

Rule 68 is silent with respect to the costs of an expedited action. That represents one difference from the fast track under the *CPR*. Under the *CPR*, the fast track has a fixed costs regime for the trial itself[66], and Lord Woolf recommended a fixed costs regime for the entirety of an action on the fast track. Proportionality thereby is relevant to awards of costs under the *CPR*.

While Rule 68 does not expressly address costs, there is a possible basis for the court to take account of proportionality when allowing costs in an expedited action. Rule 68(6) provides that the rules that apply to actions generally apply to an expedited action except that, in the event of a conflict between Rule 68 and any other rule, Rule 68 applies. The result is that while Rule 57, the general rule on costs, applies to an expedited action, the application of Rule 57 to an expedited action may have to take account of the requirement of proportionality in Rule 68(13). On that interpretation, the requirement of proportionality may entitle a court to limit an award of costs to a successful party in an expedited action.

[63] See generally *Nguyen v. Bains* (2001), 11 C.P.C. (5th), 177 (B.C.S.C.).
[64] Civil Procedure (The White Book) (London: Sweet & Maxwell, 2004), p. 669.
[65] *D.H.L. Air Limited v. Wells*, [2003] E.W.C.A. Civ. 1743, para. 29.
[66] *CPR*, Part 46.

Under the *CPR* the requirement for proportionality in costs places counsel "under a heavy duty to conduct … litigation in as economic a manner as possible"[67]. Counsel are expected to consider proportionality from an action's earliest stages.

> In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost[68].

The approach under the *CPR* is to allow recovery only for those costs which would have been recoverable had the litigation been conducted with appropriate regard for proportionality.

> In other words what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having regard to the particular considerations which CPR r. 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.
>
> The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately[69].

[67] *Jefferson v. National Freight Carriers PLC*, [2001] E.W.J. No. 6328, para. 38 *per* Lord Woolf C.J.
[68] Quoted with approval in *Jefferson, supra*, para. 39.
[69] *Lownds, supra,* p. 2457, *per* Lord Woolf C.J.

If the court follows that approach under Rule 68, then not only must fees and disbursements presented on a bill of costs be proper or reasonably necessary to the conduct of the expedited action, but the total must not be disproportionate to the amount at issue in the action. If it is, then the court will have to consider whether the disproportionality is a result of the failure to conduct the proceeding in a proportionate manner, in which case the bill of costs is liable to be reduced.

6. Conclusion

Rule 68 introduces into the British Columbia *Rules of Court* the principle of proportionality. Actions where the amount in issue does not exceed $100000 are now subject to a streamlined procedure, in relation to which the court must decide applications by considering the amount in issue. The court's task will not be easy. As one English court observed, "It is no easy matter for a judge to assess proportionality without prejudging the claimant's prospects of success"[70]. Counsel, by understanding and embracing the spirit of proportionality, will play an important role in easing the court's task and in ensuring that Rule 68 fulfills its objective of ensuring access to justice. The incentive for counsel is obvious: as Lord Woolf observed, "the resulting improvement in access to justice should mean more business for practitioners"[71].

[70] *Mann*, *supra*, para. 24 *per* Hale L.J.
[71] Woolf Interim Report, ch. 7, para. 24.