

REVIEW ARTICLE*

Civil Justice in Crisis: Comparative Perspectives of Civil Procedure edited by ADRIAN A S ZUCKERMAN, (United Kingdom: Oxford University Press, 1999) pp vi + 485. Recommended retail price \$ 140.00 (ISBN 0 19 829833 1).

The publication of this collection of essays entitled *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* is a timely reminder that concern about the operation of the civil justice system, and cost and delay in civil proceedings in particular, is not confined to Australia. The book arose out of national reports prepared for Adrian Zuckerman from University College, Oxford, and Sergio Chiarloni from the University of Turin, Italy; both were general reporters on the topic "Towards procedural economy: reduction of duration and costs of civil litigation" at the XI World Congress on Procedural Law, "Procedural Law on the Threshold of a New Millennium", organised by the International Association of Procedural Law and held at the University of Vienna, Austria, in August 1999.

The book begins with two introductory essays, the first discussing civil justice from a theoretical and comparative perspective, the second exploring civil procedure reform historically, followed by thirteen chapters outlining the civil justice systems of individual countries. In the first introductory chapter, the editor of the book, Adrian Zuckerman, reiterates his view¹ that justice embodies three dimensions, truth or the rectitude of decision, time, and cost, which sometimes "pull in different directions and [therefore] call for compromises".² Drawing on the theories of Bentham and Rawls, he argues that the ability of procedure to guarantee a decision, which is correct in fact and law and free from errors, is limited, but that procedure must aim towards achieving these goals. Measures that can be taken in this respect include the right to be heard, the right to an impartial tribunal, and the right of litigants to be treated equally.³ Regarding the

* Annette Marfording, LLB (Tüb Germ), LLB, DipHEd, Dip Asian Studies (UNSW), Senior Lecturer and Associate, European Law Centre, Faculty of Law, University of New South Wales.

1 Previously expressed for instance in AAS Zuckerman, "Quality and Economy in Civil Procedure – The Case for Commuting Correct Judgment for Timely Judgments" (1994) 14 OJLS 353; AAS Zuckerman, "A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice" (1995) 22 *Journal of Law & Society* 155; AAS Zuckerman, "Reform in the Shadow of Lawyers' Interests" in AAS Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (1995) 61.

2 AAS Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 3 at 3.

3 *Ibid* at 4-5.

passage of time, he points out the relationship between lengthy delays and potential error of decision, due to evidence disappearing or deteriorating. Conversely, a hurried decision without proper collection and consideration of evidence and argument may likewise induce error. Another issue is delay leading to injustice when a belated decision deprives the successful litigant of the practical utility of the judgment gained.⁴ The third dimension, cost, is also related to rectitude of decision, since the latter is "to some extent a function of the resources that we are prepared to invest in procedure".⁵ Unfortunately, Zuckerman limits the force of this truism by continuing: "[b]ut it is also legitimate to ask whether it is justified to require the taxpayer to invest vast sums of money in the administration of civil justice, when justice may be bought more cheaply, if a little less accurately".⁶ He does emphasise, though, that "[a]ccess to justice is... a fundamental civic or constitutional right recognized by all civilized societies"⁷ and that all citizens whose rights are infringed or threatened must therefore be able to enforce or defend these rights in the courts. Accordingly court fees, lawyers' fees and legal aid provision must not effectively deny access to the courts.⁸ Each system of civil justice may strike the balance between the three sometimes conflicting dimensions of justice differently.⁹

The middle part of Zuckerman's lengthy chapter provides a summary overview of the administration of civil justice and the legal aid system in each of the countries examined in the book. He concludes with a discussion of trends apparent in all the systems surveyed: the increase in litigation levels, the resulting delays, and the reform efforts undertaken. Noting that Germany, The Netherlands and Japan present exceptions to "the general picture of inefficiency", he suggests that "some beneficial lessons from the operation of these systems" may be derived.¹⁰ The legal profession and its economic interests are in his view a substantial factor impacting on both high costs and excessive delays, particularly in England. Consequently, the profession's monopoly must be weakened and incentives to protract and complicate proceedings must be reversed, if the civil justice system is to be improved.¹¹ Bemoaning the general failure of legal aid strategies to ensure access to the courts, he again singles out Germany and The Netherlands as the relative success stories.¹² The general trend towards increased judicial control of the pace of civil proceedings is interpreted as an expression of a new philosophy of proportionality and distributive justice, evident for instance in the new Civil Procedure Rules in England.¹³ Zuckerman concludes by observing rather pessimistically, but perhaps realistically that:

4 *Ibid* at 6-7.

5 *Ibid* at 7.

6 *Ibid* at 8.

7 *Ibid* at 9.

8 *Ibid* at 9-10.

9 *Ibid* at 11.

10 *Ibid* at 43.

11 *Ibid* at 44-5.

12 *Ibid* at 45-6.

13 *Ibid* at 47-8.

many of the essays echo the need for a change in the culture of litigation. But changes do not come about simply because they are advocated. They come about in response to social and economic incentives. The desire to bring about a cultural change is widespread, but the will to address the socio-economic factors that lie at the root of the present problems seems to be lacking.¹⁴

John Leubsdorf, in the second introductory chapter, examines civil procedure and its reform in England and the United States, suggesting that from a historical perspective, reforms in both systems "had little or no impact on the speed or cost of the average civil action".¹⁵ With regard to the countries he considers, that may well be true, although Leubsdorf himself acknowledges that he has little evidence to support this contention, but it is problematic as a general statement, as for instance the German experience with civil procedural reform demonstrates.¹⁶ More importantly, however, he issues the important reminder that the focus on making lawsuits more accurate, faster and cheaper, implied in Zuckerman's three dimensions of justice, is too narrow:

Ultimately, our judgement of a procedural system should go beyond its average speed, cheapness, and accuracy. We should think about what suits we want it to foster or discourage. We should think about how its procedures will affect litigants and others. We should recognize it as part of the governmental system, wielding powers that must be properly allocated and controlled... The most firmly implanted myth of procedural reform may be that we can talk usefully about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice.¹⁷

The individual country chapters, which follow these introductory essays, cover the civil justice systems of the United States, England and Australia representing the 'common law family', and Germany, Japan, Italy, France, Brazil, Greece, Spain, Portugal, The Netherlands and Switzerland representing the 'civil law family'. Editorial direction has resulted in most of these national reports examining the same topics: the court hierarchy, the legal profession, outline of civil proceedings and appeal systems, legal aid, statistical data, main problems of civil justice, reforms, and alternative dispute resolution, followed by a final assessment by the respective authors.

This collection of information about the operation of civil justice systems in thirteen countries makes the book an important resource for anyone concerned about access to justice, cost and delay, who is interested in civil procedural reform. There are at least four reasons why comparative education such as provided by this book¹⁸ is very useful indeed: First, it facilitates some insight into what potentially 'works' and what may not. Secondly, it elucidates the often overlooked relationship between delay and cost problems and factors of the legal system other than civil procedure, such as the structure of the courts, the legal

14 *Ibid* at 52.

15 J Leubsdorf, "The Myth of Civil Procedure Reform" in AAS Zuckerman (ed), note 2 *supra*, 53 at 63.

16 See P Gottwald, "Civil Justice Reform: Access, Cost, and Expedition. The German Perspective" in AAS Zuckerman (ed), note 2 *supra*, 207.

17 J Leubsdorf, note 15 *supra* at 67.

18 For another collection of country reports on civil justice see Symposium 'Civil Procedure in Comparative Context', held at New York University's Villa La Pietra in Florence, Italy, in May 1996, published in (1997) 45 *The American Journal of Comparative Law* 647.

profession, judicial training, disparate laws and rules of civil procedure, the form and content of substantive law, and the availability of alternative dispute resolution. Thirdly, an awareness of these connections enables the law reformer to broaden her focus from narrow issues of civil procedure to other aspects of her legal system. Fourthly, and from the perspective of a comparative scholar, law reformer and teacher most importantly, it illustrates the fallacy of approaching the world's legal systems as members of various 'legal families',¹⁹ such as the well known division into 'common law' and 'civil law' systems, which the structure of this book ironically maintains. Examples for each of these four points follow below.

With respect to the first, and for the Australian context potentially instructive, several countries have a mandatory pre-trial mechanism for the purpose of facilitating early settlement between the parties. The Spanish Civil Procedure Act, for instance, used to require that the parties make an attempt at resolving their dispute by way of judicial conciliation, before a civil claim could be instigated.²⁰ Similarly, Swiss civil procedure embodies a mandatory settlement conference before the local justice of the peace, before an action can be brought to court.²¹ In Spain, however, the judicial conciliation requirement was amended to an option in 1984, after it was found that "in the vast majority of cases, such attempts at conciliation were useless".²² In Switzerland, the institution of the mandatory settlement conference before the justice of the peace continues to be controversial, practising lawyers especially criticising it as a waste of time and money.²³ Similarly, a proposed amendment to the Greek Code of Civil Procedure to mandate an attempt by the parties at conciliation as a precondition for the case to receive a judicial hearing, has been delayed as a result of vigorous opposition from the legal profession, who point out "the practical difficulties that might arise".²⁴

Regarding the second aspect highlighted above – the relationship between delay and cost problems and aspects of the legal system in general – this is illustrated in most of the national reports. One example is several authors attributing cost and delay at least in part to the diversity of civil procedural laws and rules in their country, often due to the respective country's federal structure and the constitutional distribution of legislative power. This is the case for instance in the United States²⁵ and Switzerland.²⁶ The same is true for Australia,

19 See the author's extended argument to this effect in A Marfording, "The Fallacy of the Classification of Legal Systems: Japan Examined" in V Taylor (ed), *Asian Laws Through Australian Eyes* (1997) 65.

20 IDP Giménez, "Civil Justice in Spain: Present and Future. Access, Cost, and Duration" in AAS Zuckerman (ed), note 2 *supra*, 385 at 401.

21 I Meier, "Swiss Civil Justice: With an Emphasis on the Laws of the Canton of Zurich", in AAS Zuckerman (ed), note 2 *supra*, 464 at 466.

22 IDP Giménez, note 20 *supra* at 401.

23 I Meier, note 21 *supra* at 483.

24 KD Kerameus and S Koussoulis, "Civil Justice Reform: Access, Costs, and Delay. A Greek Perspective" in AAS Zuckerman (ed), note 2 *supra*, 363 at 367-8.

25 RL Marcus, "Malaise of the Litigation Superpower" in AAS Zuckerman (ed), note 2 *supra*, 71 at 73-4, 103-4.

26 I Meier, note 21 *supra* at 464-5, 472-4.

although the Australian contribution does not comment on this issue.²⁷ In Brazil, the problem is due not to a disparity of rules, since the Code of Civil Procedure applies uniformly throughout the country despite its federal nature, but to the divergence of social, economic and political circumstances in the different regions impacting on the practical administration of civil justice.²⁸ Spain, though not a federal state, has a "jungle of localized rules" as a result of *ad hoc* insertions of procedural rules into substantive laws in order to "escape" the "antiquity and archaism" of the Civil Procedure Act of 1881.²⁹

Another factor causing delay and cost, for instance in Brazil,³⁰ Portugal,³¹ and Switzerland,³² is the inadequacy of legal education and judicial training. In Switzerland this problem is not surprising, since, as Meier reports, legal study is not a requirement for judicial office and even intermediate courts such as district courts are staffed by judges, who, with the exception of the chief justices, are mostly not legally trained.³³

Japan³⁴ and The Netherlands,³⁵ two systems highlighted by Zuckerman as "performing better than others",³⁶ have developed alternative institutions for dispute resolution, which work faster and more effectively than the courts for people involved in legal disputes, resulting in a reduction of the litigation rate and consequently delay.

The link between procedure and substantive law is highlighted in Marcus' contribution on the United States, where 'tort reform' such as the introduction of caps on damages is designed to change and – so it is hoped – reduce tort litigation.³⁷ Whether such 'reforms' increase access to *justice* is of course questionable. Another example is the Dutch requirement for employers to obtain permission from the regional employment agency for any dismissal of a regular employee, which keeps many employment dismissal cases out of court.³⁸

27 GL Davies, "Civil Justice Reform in Australia" in AAS Zuckerman (ed), note 2 *supra*, 166. But see A Marfording, "Federalism and Judicial Review in Germany: Lessons for Australia?", (1998) 21 *UNSW Law Journal* 155 at 157-61. At the recent Australian Law Reform Commission Conference, *Managing Justice*, the Australian Attorney-General Daryl Williams bemoaned the constitutional restrictions on innovative legal reform and asked all stakeholders including the legal profession for a collaborative and holistic approach to resolving these problems.

28 S Bermudes, "Administration of Civil Justice in Brazil" in AAS Zuckerman (ed), note 2 *supra*, 347 at 347, 356-7.

29 IDP Giménez, note 20 *supra* at 388.

30 S Bermudes, note 28 *supra* at 358-9.

31 MML Marques, C Gomes, and J Pedrosa, "The Portuguese System of Civil Procedure", in AAS Zuckerman (ed), note 2 *supra* at 428-9.

32 I Meier, note 21 *supra* at 480.

33 *Ibid* at 467.

34 This is surprisingly not referred to by the Japanese contributor to this book Y Hasebe, "Civil Justice Reform: Access, Cost, and Expedition. The Japanese Experience", in AAS Zuckerman (ed), note 2 *supra*, 235. But see the Dutch contribution E Blankenburg, "Civil Justice: Access, Cost, and Expedition. The Netherlands", note 2 *supra*, 442 at 449-50; and T Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan" (1990) 24 *Law and Society Review* 651. For a critique of this strategy in the Japanese context see A Marfording, note 19 *supra* at 80-2.

35 E Blankenburg, note 34 *supra* at 460-3.

36 AAS Zuckerman, note 2 *supra* at 13-14.

37 RL Marcus, note 25 *supra* at 100.

38 E Blankenburg, note 34 *supra* at 462.

To the third point, that a recognition of such connections between delay and cost problems and the context of the legal system in general may broaden the vision and expand the options of law reformers: For instance, if the system is a federal one, embodying a diversity of procedural rules resulting from the constitutional distribution of legislative power, they can think about reforming those constitutional arrangements.³⁹ If constitutional amendment is unfeasible for political or other pragmatic reasons, reformers can contemplate alternative means to achieving a greater degree of uniformity of both procedural and substantive laws in their country.⁴⁰ A low level of legal skills among judges, lawyers and court officials, contributing to delays and costs, can be addressed by reforming legal education, improving the judicial selection process,⁴¹ and creating or expanding judicial training programmes.⁴² All of these are important to consider, when civil procedural reforms change the functions judges are expected to

39 See the author's argument to this effect in the Australian context in A Marfording, note 27 *supra*, and the comments made by the Australian Attorney-General Daryl Williams at the recent Australian Law Reform Commission Conference, *Managing Justice*, note 27 *supra*.

40 Such reforms towards uniform procedural rules in Australia have been proposed for consideration by the Law Council of Australia in Issues Paper 20, *Submission to the Australian Law Reform Commission, Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, 1997 at 72-3. Recommendation 86 of the Australian Law Reform Commission's report, *Managing Justice: A Review of the Federal Justice System*, Report No 89, 2000, reads: "The Council of Chief Justices should continue its efforts in further developing harmonised rules and originating process, where appropriate, for Federal Court and State and Territory Supreme Courts civil matters". See also D Williams, note 27 *supra*. According to the comment by a Swiss member of the audience at the session 'Harmonization or Globalization of civil procedure' of a recent Colloquium in Ghent, organised by the International Association of Procedural Law, there are now moves towards unification of procedural rules in Switzerland.

With regard to the uniformity of substantive law in Australia, it can be argued that the trend by the High Court in recent years to interpret federal legislative powers broadly is in recognition of pragmatic reasons in favour of uniformity: see A Marfording, note 27 *supra* at 159-60, and R Else-Mitchell, "Constitutional Review in the Australian Federation" in RL Mathews (ed), *Federalism in Australia and the Federal Republic of Germany* (1980) 164. In a case involving a conflict of laws issue, Mason, Deane, Wilson and Gaudron JJ all reasoned in favour of uniform rules, Wilson and Gaudron JJ stating: "The operation of the choice of law rules of private international law...allows for the possibility that tortious liability...in respect of actions occurring in Australia may be determined by reference to different substantive laws depending upon the location or venue of the court in which action is brought. The undesirability of that possibility is obvious...It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending on the location or venue of the court in which action is brought": *Beavington v Godleman and Others* (1987-1988) 169 CLR 41 at 88.

41 On this issue see A Marfording, "The Need for a Balanced Judiciary: The German Approach" (1997) 7 JJA 33.

42 To this effect, the Australian Law Reform Commission in its Report No 89 has proposed the establishment of an Australian Judicial College, with 'responsibility for meeting the education and training needs of judicial officers', note 40 *supra*, recommendation 8. This received strong support from the Chief Justice of the High Court, Murray Gleeson, in his keynote address at the recent Australian Law Reform Commission Conference, *Managing Justice*, who added that the College could also broaden the field from which judicial appointees are currently selected.

perform, such as expanding their roles in case management.⁴³ Other examples of legal system reforms with a potential impact on civil litigation problems include the introduction of alternative dispute resolution fora, such as in Japan and The Netherlands,⁴⁴ and substantive law reforms, which channel disputes into administrative processes, such as in Dutch employment law⁴⁵ or no-fault tort compensation schemes. By so broadening one's vision, the law reformer may also be more likely to focus not merely on accuracy, speed, and cost, but to consider ways in which to increase, or at least not decrease, procedural and social justice in the process of reform.⁴⁶

Fourthly, the individual country chapters facilitate an insight into the discrepancies between individual 'civil law' systems on the one hand and 'common law' systems on the other, illustrating the fallacy of the 'civil law' – 'common law' dichotomy. For instance, in contrast to the other 'civil law' countries described in the book, Spain has a divided legal profession, comparable to the English solicitor/barrister divide.⁴⁷ Contrary to Germany,⁴⁸ for example, lawyers' fees are not regulated by law in Brazil and in practice include substantial contingency fees, similar to the American system,⁴⁹ whereas contingency fees are prohibited by law in most other nations, including Portugal,⁵⁰ France,⁵¹ and Germany.⁵² In Switzerland, judges are elected, which of the systems covered is comparable only to the United States.⁵³ Differences between 'common law' systems include disparate civil procedural rules and complicated court structures in Australia and the United States due to their federal nature, which distinguishes them from unitary England; the American rule that the winning litigant does not recover his or her lawyer's fees from the losing party,⁵⁴ which does not exist in England⁵⁵ and Australia;⁵⁶ and the

43 This is suggested or happening throughout Australia: see GL Davies, note 27 *supra* at 195; for recent reforms to this effect in New South Wales see JJ Spigelman, "Just, quick and cheap: a new standard for civil procedure" (2000) 38 *Law Society Journal* 24. For this reason the former Chief Justice of the High Court, Sir Anthony Mason, in his comments during the plenary panel discussion concluding the *Managing Justice* conference, endorsed the proposal for an Australian Judicial College as essential for the future.

44 See text accompanying notes 34-6 *supra*.

45 See text accompanying note 38 *supra*.

46 See J Leubsdorf, text at note 17 *supra*. But note 'tort reforms' in the United States as a contrary example, see text accompanying note 37 *supra*.

47 IDP Giménez, note 20 *supra* at 390.

48 P Gottwald, note 16 *supra* at 220; for more detail on lawyers' fees in Germany see for instance D Coester-Waltjen and AAS Zuckerman, "The Role of Lawyers in German Civil Litigation" (1999) 18 *CJQ* 291; D Leipold, "Limiting Costs for Better Access to Justice – The German Experience" in AAS Zuckerman and R Cranston (eds), note 1 *supra*, 265.

49 S Bermudes, note 28 *supra* at 353.

50 MML Marques, C Gomes and J Pedroso, note 31 *supra* at 430.

51 L Cadiet, "Civil Justice Reform: Access, Cost, and Delay. The French Perspective" in AAS Zuckerman (ed), note 2 *supra*, 291 at 312.

52 D Coester-Waltjen and AAS Zuckerman, note 48 *supra* at 293.

53 I Meier, note 21 *supra* at 467-8.

54 RL Marcus, note 25 *supra* at 93.

55 P Michalik, "Justice in Crisis: England and Wales" in AAS Zuckerman (ed), note 2 *supra*, 117 at 134. But note that despite the general rule that the loser pays the winner's costs including lawyers' fees, the English judge has discretion to order otherwise, *ibid* at 136-7.

continued wide-spread use of juries in civil cases in the United States in contrast to Australia and England.⁵⁷

The importance of demonstrating the fallacy of the 'civil law' – 'common law' dichotomy lies in the division preventing a real understanding of foreign legal systems and restricting the vision of the law reformer. This is especially the case in the context of civil procedure. Armed with statements such as "a shift to the European model...requires an extraordinary act of faith. It would be contrary to our traditions and culture...",⁵⁸ "the adoption of some inquisitorial features into the Australian legal system may interfere with accepted notions of procedural fairness",⁵⁹ and "the distinguishing feature of the common law is its ability to develop the law by precedent",⁶⁰ 'civil law' systems can easily be dismissed as potential models for domestic law reform on the grounds of inferiority or great disparity.⁶¹ The dichotomy facilitates misunderstandings, especially since much of the existing literature on 'civil law' systems is based on its existence and much of it is written by eminent comparativists, who nevertheless fail to grasp the essence of how the system they describe actually works in practice, since they are either writing from an academic's point of view or from a foreign observer's perspective or both. A prominent example is Merryman's discussion of the judicial role in the German system:⁶²

The picture of the judicial process that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. He [*sic*] is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His [*sic*] function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union...The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows...The net image is of the judge as an operator of a machine designed and built by legislators. His [*sic*] function is a mechanical one.⁶³

It is not surprising then that later commentators believe that 'civil law' systems do not have an ability to develop the law and that the 'common law' system is therefore superior. As I have explained at length elsewhere,⁶⁴ this image of the 'civil law' is, however, fundamentally misconceived. The continental European Codes are written in general terms to enable them to withstand the test of time, and this means that judges have a very important role in interpreting the meaning

56 AAS Zuckerman, note 2 *supra* at 18.

57 *Ibid* at 20.

58 Sir A Mason, "The Future of Adversarial Justice" (2000) 27 *The Law Society of Western Australia Brief* 20 at 23.

59 Australian Law Reform Commission, note 40 *supra* at [1.143].

60 Chief Justice M Gleeson, address to law students at the Faculty of Law, University of New South Wales, 16 May 2000.

61 Although it should be noted that Sir A Mason does not do this; he in fact states: "In saying that I am far from denying that we can usefully take up some aspects of the European model", note 58 *supra* at 23.

62 JH Merryman, *The Civil Law Tradition*, Stanford University Press (1969) pp 35-9, extracted in FKH Maher, L Waller, DP Derham, *Legal Process: Commentary and Materials*, The Law Book Company Ltd (6th ed, 1994, by MDH Smith, KS Pose, T Bryant) pp 581-4.

63 *Ibid*, p 583.

64 A Marfording, note 19 *supra*.

of these broad terms. A good example is s 823(1) of the German Civil Code, the most important head of general tortious liability:

Anyone who intentionally or negligently injures life, body, health, freedom, property or any other right of another in a manner contrary to law shall be obliged to compensate the other for any damage arising therefrom.

This kind of legislative drafting is very different from Australian federal or state legislation, which is written in far more specific and detailed form. German judges have had to interpret the meaning of 'any other right', for instance, which now encompasses rights including industrial property rights, the right to an established and active business, and the right to personality including honour, integrity, image, name, privacy, and personal autonomy.⁶⁵ A nervous shock claim in a *Jaensch v Coffey*⁶⁶-type situation was first recognised by the *Reichsgericht*, then the highest court in the German court hierarchy, in 1931,⁶⁷ and a 1971 judgment on the issue by the German Federal Supreme Court grapples with some of the same issues as the Australian High Court in *Jaensch v Coffey*: the definition of nervous shock as a violent temperamental sudden reaction, and the distinction between that and mere grief, though the German court has no problem with the plaintiff merely hearing of her husband's accident.⁶⁸ In a fact situation comparable to the Australian *Hill v van Erp*⁶⁹ and the English *White v Jones*,⁷⁰ the German Federal Supreme Court in 1965 allowed the claim by the testator's daughter, using the judicially created doctrine of a contract with protective effect for third parties,⁷¹ a judgment that Lord Goff used extensively in his reasoning in *White v Jones*.⁷²

Another typical myth abounding about 'civil law' systems is the notion that their civil procedure is 'inquisitorial', that is, that the judge is investigating the facts on his or her own motion. This is not true even for France, where judicial powers are very strong.⁷³ In Germany, for instance, the litigants, not the court, select which facts to introduce and decide whether and which evidence to present, though they are obliged to be truthful in their pleadings.⁷⁴ The judge is only entitled to summon witnesses to court to give evidence, if they have been nominated as evidence by the party owing the burden of proof.⁷⁵ Civil procedural

65 W van Gerven *et al*, *Cases, Materials and Text on National, Supranational and International Tort Law: Scope of Protection*, Hart Publishing (1998) pp 37-9.

66 (1984) 155 CLR 549.

67 RGZ 133, 270, extracted in BS Markesinis, *The German Law of Obligations, Volume II, The Law of Torts: A Comparative Introduction*, Clarendon Press (3rd ed, 1997) pp 121-4.

68 BGHZ 56, 163, extracted in BS Markesinis, *ibid*, pp 109-14.

69 (1997) 188 CLR 159.

70 [1995] 2 AC 207.

71 BGH NJW 1965, 1955, discussed by W Lorenz, "Contracts and Third-Party Rights in German and English Law" in BS Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994) 65 at 69-71.

72 [1995] 2 AC 207 at 252-70.

73 L Cadiet, note 51 *supra* at 298, 316-17.

74 Code of Civil Procedure, s 138.

75 A Freckmann and T Wegerich, *The German Legal System*, Sweet & Maxwell (1999) p 141.

reforms have merely curtailed the parties' rights to control the *pace* of proceedings.⁷⁶

While the book under review has all the discussed benefits, it is by no means perfect. One disappointing aspect is the largely descriptive nature of most of the individual country chapters, though that criticism may be unfair, since the purpose of the project was description rather than evaluation.⁷⁷ As can be expected for any collection of essays, the contributions vary in quality, some providing only the most basic outline of the civil justice system discussed, others providing very clear and detailed explanations. Some authors raise questions, which they don't answer, others focus more on a critical evaluation of their system than a clear description of it. In addition, the lack of comparative awareness displayed in most of the national reports is a missed opportunity.⁷⁸ While the task for each author was to outline his or her civil justice system and comment on aspects such as access, cost and delay as well as reforms undertaken or proposed, it would have been easy to draw attention also to matters of special comparative interest, such as who appoints experts, the judicial role, if any, in facilitating settlement, and to expressly comment on whether the system is 'inquisitorial' in terms of fact finding. While the statistical information provided on aspects such as the number of judges, the length of delays and the cost of litigation is very useful, the availability of data varies greatly between countries, and the editor might have ensured consistency regarding statistics on the length of proceedings, rather than allowing some authors to measure duration in days,⁷⁹ and others in months.⁸⁰ But these are relatively minor flaws in a book of immense practical value.

76 P Gottwald, note 16 *supra*.

77 AAS Zuckerman, note 2 *supra* at 12.

78 E Blankenburg's contribution is an exception, note 34 *supra*.

79 For instance S Chiarloni, "Civil Justice and its Paradoxes: An Italian Perspective" in AAS Zuckerman (ed), note 2 *supra*, 263 at 268; MML Marques, C Gomes, and J Pedroso, note 31 *supra* at 426; E Blankenburg, note 34 *supra* at 452.

80 For instance GL Davies, note 27 *supra* at 173; P Gottwald, note 16 *supra* at 212; L Cadiet, note 51 *supra* at 342.