

THE REPUBLIC OF
TRINIDAD AND TOBAGO



JUDICIARY
JUDICIAL EDUCATION
INSTITUTE
TRINIDAD AND TOBAGO

**EXPLORING THE ROLE
OF THE CPR JUDGE**

Justice Peter Jamadar JA
Kamla Jo Braithwaite

A publication of the Judicial Education
Institute of Trinidad and Tobago

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Written by Justice Peter Jamadar JA and Kamla Jo Braithwaite.¹

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INTRODUCTION

I, _____, ... do swear ... that I will bear true faith and allegiance to Trinidad and Tobago and will uphold the Constitution and the law, that I will conscientiously, impartially and to the best of my knowledge, judgment and ability discharge the functions of my office and do right to all manner of people after the laws and usages of Trinidad and Tobago without fear or favour, affection or ill-will.

—*Judge’s Oath of Office*²

‘Every civilised society needs mechanisms for the peaceable resolution of disputes which are fair and respected and which enhance the dignity of individuals.’

—*Foreword to the Civil Proceedings Rules, 1998*³

This publication is a companion booklet to the **Consolidated Civil Proceedings Rules 2016**⁴ published by the Judicial Education Institute of Trinidad and Tobago (JEITT). It explores the fundamental underpinnings of the role of the Civil Proceedings Rules 1998 (CPR) Judge,⁵ as well as the role of the CPR Judge at different stages of the civil Supreme Court process and in different circumstances. This publication also contains suggested guidelines for best practices. As such, it functions as a quasi-bench book in relation to those circumstances. In a sense this exploration is both responsive to a decade of adjudication under the CPR, as well as suggestive of imperatives that must be pursued, if the CPR is to truly mark ‘an important milestone in the development of our jurisprudential history’.⁶

The Judiciary of the Republic of Trinidad and Tobago (the Judiciary), as the third Branch of State under the doctrine of the Separation of Powers, has one main governing function—the due Administration of Justice. This function is discharged in part through the independent, fair, impartial, effective and efficient delivery of Justice through the courts of law in Trinidad and Tobago. Judges, through the determination of facts and the interpretation of the law and its application to the matters that come before the courts, determine the rights, obligations, and entitlements of people in Trinidad and Tobago. This central role of the courts may be considered to be the Judiciary’s core function.

However, the Administration of Justice involves much more than just the fulfilment of this core function. Court matters involve individuals with lives that extend beyond the parameters of the facts and issues placed before the court. Indeed, individuals interact with the Judiciary long before their matters ever reach the courthouse or a courtroom.

The first point of contact with the Administration of Justice usually begins even before a matter is filed. A perception of the courts and the court process is held by the general public whether or not they ever have to enter a courtroom or be involved in litigation. In every society, there are prevailing cultural perceptions of how the Judiciary administers Justice, and these perceptions impact on the degree of public trust and confidence in the Judiciary. These perceptions may be based on what is thought to prevail locally from experience and/or from second-hand reports and/or what is or what is thought to be the norm in other countries. As a result, shaping, managing and responding to these perceptions is also an important role and function of the Judiciary. Judges, Administrators and Judiciary Staff are the face of the Judiciary. They all play an important role in how the Administration of Justice is perceived.

The role of the CPR Judge is therefore of critical importance, because how Judges are perceived and experienced impacts not only on actual matters before the courts, but also on the degree of public trust and confidence in the general Administration of Justice.

Public confidence depends upon Judges doing our jobs well and efficiently. It also depends upon judicial officers being sensitive to the communities which we serve and upon our ability to effectively communicate to these communities, what we do and why. It depends on us being sensitive to the social context in which we perform our duties and it requires us to perform them in a way which is relevant to the communities which we serve. If we do all that, we will enhance the public confidence of the community in the judiciary and that is ultimately the vital protection of our [judicial] independence.

—The Honourable Wayne Martin, as Chair of the National Judicial College of Australia⁷



FOUNDATIONAL PRINCIPLES

For the law to be properly administered, there must be a framework within which fact finding and the interpretation and application of the law can take place. This framework has its primary foundation in the **1976 Constitution of the Republic of Trinidad and Tobago**, because it is the ‘supreme law’ of the land.⁸ It is also underpinned by ethical values— core values that the Judiciary of Trinidad and Tobago has subscribed to and undertaken to be held accountable for. These ethical foundations are set out in the Judiciary’s **Statements of Principle and Guidelines for Judicial Conduct**.⁹

The Preamble to the Constitution recognises ‘that men and institutions remain free only when freedom is founded upon respect for the ... rule of law’ and that Trinidad and Tobago ‘is founded upon principles that acknowledge ... the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed ...’.

It is in this context that Chapter 1 of the Constitution recognises and protects certain ‘fundamental human rights and freedoms’. Section 4 states (in part):

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by **due process of law**;
- (b) the right of the individual to **equality before the law** and the **protection of the law**;¹⁰

Section 5 of the Constitution also declares that every person is entitled to a **fair hearing** in accordance with the principles of fundamental justice¹¹ by ‘an independent and impartial tribunal’.¹²

1. DUE PROCESS

In **Thomas v Baptiste and Others**¹³ the Privy Council explained the principle of due process as follows:

The due process clause requires the process to be judicial; but it also requires it to be 'due'. In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law: see the illuminating judgment of Phillips J.A. in *Lassalle v. Attorney-General* (1971) 18 W.I.R. 379 from which their Lordships have derived much assistance.

The clause thus gives constitutional protection to the concept of procedural fairness. Their Lordships respectfully adopt the observation of Holmes J. in *Frank v. Mangum* (1915) 237 U.S. 309, 347: 'Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard.

Ensuring procedural fairness is therefore fundamental to the due Administration of Justice and is a core obligation of the CPR Judge. The entitlement to a fair hearing and to fundamental justice requires comprehensive procedural fairness if there is to be due process.

2. EQUALITY

The Constitution itself tells us that equality involves treatment without discrimination by reason of at least the following factors:¹⁴

1. Race;
2. Origin;
3. Colour;
4. Religion; or
5. Sex.

The Judiciary, in its **Guidelines for Judicial Conduct**, states in relation to the Principle of Equality of Treatment:

Ensuring equality of treatment to all before the courts is essential to the due performance of the duties of judicial office. Judges should conduct themselves and proceedings before them so as to assure equality according to law.¹⁵



 FOUNDATIONAL PRINCIPLES

In the Commentary on the Guidelines that follows this Statement of Principle, it is stated:¹⁶

1. The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection of the law without discrimination. This is not a commitment to identical treatment but, rather, treatment reflecting equal worth and human dignity. Discrimination is concerned not only with one's intentions, but also the effects of the alleged actions.
2. Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. All persons are to be treated with due regard and respect, recognizing the dignity of everyone.

Under the Principle of Equality of Treatment, the Guidelines further state:¹⁷

5.1 A judge should strive to be aware of and understand differences arising from various sources, including but not limited to gender, race, colour, religious conviction, culture, national origin, ethnic background, sexual orientation, disability, age, marital status, social, political and economic status ...

Thus, the application of the law has wider considerations than just the literal statement of the black letter of the law.¹⁸ The Judiciary must constantly seek to achieve the noble aim of equality of treatment. This entitlement to equality is both negative and positive. It includes an entitlement not to be discriminated against, as well as an entitlement to be placed on equal terms in comparable situations and/or to enjoy special considerations if that is what is required to achieve equality of treatment. In relation to special considerations, to be justifiable, differential treatment ought to have both a legitimate aim and reasonable proportionality between the means employed and the aim intended to be achieved.¹⁹

Judges therefore have to be 'mindful'²⁰ in the exercise of their function. While equal treatment is required in the interpretation of the law,²¹ substantive equality, which factors in equitable treatment and takes into account these wider considerations, is also necessary in the application of the law.

‘The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.’

—*Anatole France*²²

3. PROTECTION OF THE LAW

The entitlement to protection of the law means that every person has a fundamental right to all of the procedural safeguards that are a part of the legal process. In addition, it includes the right to access to justice and therefore access to the courts. In two recent cases, protection of the law has been given the fullness of recognition that it is intended to encompass.

In 2006, the Caribbean Court of Justice (CCJ) in **The Attorney General and Others v Jeffrey Joseph and Lennox Ricardo Boyce** opined as follows: ‘... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed’.²³

Then, in 2015 the CCJ went even further, stating in **The Maya Leaders Alliance v The Attorney General of Belize**:

... The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. **However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.’ The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.** In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen’s rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.²⁴



FOUNDATIONAL PRINCIPLES

Thus the protection of the law can require, in appropriate situations, the positive and continuing duty to take action ‘to secure and ensure the enjoyment of basic constitutional rights’.²⁵ What is significant, is the shift from the protection of rights per se to the insistence on the performance of obligations in service of the fulfilment and enjoyment of rights. It is a shift to a focus on both rights and responsibilities.

As a result, these core Constitutional values of due process, equality, fairness, fundamental justice, respect for all, and the protection of the law underpin the Administration of Justice in Trinidad and Tobago and help define the parameters for the Role of the CPR Judge in Trinidad and Tobago.



APPEARANCES MATTER

It is, however, not enough to simply establish principles and put systems in place for the proper Administration of Justice:

‘... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’²⁶

The basis of this assertion is in the Constitution, the law and in subscribed-to ethical principles, and goes to the very heart of the role of the CPR Judge. Judges therefore have to be ‘mindful’ in the exercise of their function to ensure that their interactions and behaviour manifest the core imperatives identified above. Substantive equality, which factors in equitable treatment and takes into account the wider considerations alluded to, is necessary in both the application of the law and in the Administration of Justice generally. Judges have both the duty and the responsibility to uphold these high ideals at all times and everywhere.

As the ultimate decision-makers and as the most obvious ‘faces’ of the courts, Judges may hold the most singularly important role in the entire process—from the viewpoint of litigants and the public generally. The Judge also leads a team of staff that interacts directly with court users both in court and in connection with any matter before the courts. As such, the Judge can also directly influence conduct of staff within the Judiciary. Judges therefore have a leadership responsibility, not only to exemplify the highest standards of judicial behaviour, but also to inspire others to do so and indeed to ensure that these standards are met throughout the Judiciary.

Put another way, the Constitutional imperative to make sure that these standards ‘should manifestly and undoubtedly be seen’ and experienced throughout the Judiciary, extends to all who do the work of the Administration of Justice, and is a particular imperative of Judges— who exercise great influence in the Judiciary and in society generally.



SIX CORE PRINCIPLES

The **Guidelines for Judicial Conduct** mandate that the Core Principles to guide judicial conduct in Trinidad and Tobago are: Independence, Impartiality, Integrity, Propriety, Equality of Treatment, and Competence and Diligence. These six principles are the foundational ethical underpinnings of the role of the CPR Judge.

Therefore the ideal Judge in their conduct of proceedings must demonstrate, inter alia, the following qualities:

1. **Independence:** making decisions and always acting in a manner free from and seen and experienced to be free from influence and interference;
2. **Impartiality:** treating all persons respectfully, equally and with fairness; acting without bias or pre-judgment;
3. **Integrity:** conducting themselves in ways that are above reproach in the view of reasonable, fair-minded and informed persons; acting ethically, ensuring that behaviour in and out of court is in alignment with constitutional and ethical mandates;
4. **Competence:** acting on the latest legal developments and performing duties and responsibilities relevant to the judicial function and the court's operations with excellence, including the just and fair management of cases, litigants, attorneys, Judiciary staff and the public.
5. **Efficiency:** managing cases in a timely and expeditious fashion and within established performance standards; maximizing the economic use of available court resources; and
6. **Effectiveness:** managing cases in ways that are proportionate to the matters in issue and time and resources devoted to the case; making decisions that are clear, coherent and enforceable and that further the objectives of the CPR, including the overriding objective of dealing with cases justly; making decisions that reflect the fact that the Administration of Justice involves real people involved in real-life situations; CPR Judges should, to the extent consistent with their special role, remain closely in touch with the society, because an out of touch Judge is less likely to be effective.²⁷

Indeed, these standards should be upheld by all staff of the Judiciary. And the public is entitled to expect and demand them of the Administration of Justice, and to hold Judges and Judiciary Staff accountable for achieving them. Attorneys and parties are also required to help the Judiciary achieve these objectives in so far as they fall within the mandate of the overriding objective.²⁸

THE CPR

The CPR introduce a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system ... It is underpinned by the Overriding Objective in Part 1 which imposes an obligation on the courts to ‘deal with all cases justly’ and which embodies the principles of equality, economy, proportionality, expedition and procedural fairness, all of which are fundamental to an effective contemporary system of justice.

—*Foreword to the CPR*²⁹

There can be no justice without dealing justly with all cases in the civil justice system. As self-evident as this may appear to be, realizing the objective of the mandate to ‘deal with cases justly’³⁰ has proven at times to be quite a challenge over the decade since the CPR was introduced in Trinidad and Tobago.

In part, this has been because Judges and attorneys alike have been somewhat resistant to the fact that the CPR is ‘a new procedural code’ that ‘is a radical departure’ from what obtained under the previous Rules of the Supreme Court 1975 (RSC).³¹

Unless and until a ‘clean break’ is recognised and respected, the noble objectives of the CPR, to ‘bring with them a new litigation culture—a paradigm shift in the administration of civil justice’,³² will remain an elusive dream; and the much touted effectiveness and efficiency that is the promise of the CPR will forever be a frustrated expectation.

In the specific context of the CPR, this publication seeks to explore the role of the CPR Judge and to reflect on the areas listed below, which are considered integral to fulfilling the mandate to deal with all cases justly.

The areas that will be considered are:

1. The Overriding Objective;
2. Dealing Justly;
3. Substantive Justice;
4. Alternative Dispute Resolution;
5. Procedural Justice;
6. The ‘New’ Role of the CPR Judge;
7. Procedural Fairness; and



THE CPR

8. Performance Standards

(A) Stages of Activity

- I. Pre-Filing/Pleadings;
- II. Active Judicial Case Management;
- III. Pre-Trial Review; and
- IV. Trial/Hearing/Disposition;

(B) Quantitative Performance Standards: Setting Timelines; and

(C) Qualitative Performance Standards: Requirements.

I. THE OVERRIDING OBJECTIVE: GETTING TO THE HEART OF THE MATTER

“Justice” is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.’

—*Nuremberg Declaration on Peace and Justice*³³

It is becoming more apparent that at the heart of the CPR is the overriding objective— and the mandate to deal with cases justly.³⁴ It is the overriding objective that gives life to and is the lifeblood of the CPR. It infuses meaning and purpose into every aspect of the CPR, while at the same time never supplants any specific provisions of the CPR.³⁵

Most recently the Court of Appeal has unanimously stated: ‘The CPR provide that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the rules’.³⁶ This is indeed exactly what CPR 1.2(1) specifically mandates. However, CPR 1.2(2) goes even further. Not only must a court seek to give effect to the overriding objective when it exercises any discretion, it must also do so when it interprets the meaning of any rule in the CPR.³⁷

The overriding objective therefore mandates both interpretative and executory functions. The rules of the CPR must be both interpreted and applied so as to deal with cases justly.

Thus, while case flow management and active judicial case management are central to the CPR, the discretion to be exercised in giving effect to these two judicial management powers, requires both the interpretative and executory application of the overriding objective.³⁸

2. DEALING JUSTLY

Dealing justly with a case is not limited to the explicit statement as to what that includes, as set out in CPR 1.1(2).³⁹ Dealing justly with a case is ultimately a matter of judicial discretion and can be one of the most challenging tasks that the CPR Judge has to perform.⁴⁰

First and foremost, it is important to distinguish between substantive justice and procedural justice, at least for the purposes of understanding and applying the procedural rules of court.

The **Foreword to the CPR** explains this distinction as follows:

Rules of court must be distinguished from substantive law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Substantive law therefore permeates into every facet of social infrastructure. Intrinsicly, it governs the establishment of the institutions, processes, laws and personnel that provide the apparatus through which law works.

On the other hand, rules of court are a source of procedural law the function of which is to prescribe and regulate the machinery or manner in which legal rights or status and legal duties may be enforced or recognised by a court of law. Since they are procedural in character and effect, they cannot confer, take away, alter or diminish any existing jurisdiction, rights or duties created or conferred by substantive law: Everett v Griffiths (1924) 1 K.B. @ p. 957. Being made under powers given by statute, however, rules of court have themselves the force of statute: Donald Campbell & Co. v Pollak (1927) A.C. @ p. 804.

The two branches are complementary and interdependent, and the interplay between them often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into the substantive law, gives it its effectiveness and brings it into being. Rules of court, therefore, are of fundamental importance to the good administration of justice and must accord with the cultural climate pervading society at any particular time.⁴¹



THE CPR

3. SUBSTANTIVE JUSTICE

It is, therefore, worth remembering that there is but one ultimate objective of the civil legal process: to facilitate the just resolution of civil disputes on their merits by courts, and to do so in accordance with the relevant law and in conformity with Constitutional values when necessary.

In this process, the rights and entitlements of litigants are determined and the means by which they can be given effect to are prescribed, so as to render them enforceable. This is often referred to as doing justice on the merits (substantive justice).

However, as stated in **Bernard v Seebalack**: ‘... under the CPR ... it is no longer right to say that the court’s function is to do substantive justice on the merits and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources’.⁴² Indeed, under the CPR the courts’ function is even broader.

4. ALTERNATIVE DISPUTE RESOLUTION

In so far as the just resolution of civil disputes includes disposition by consensual means, including by Alternative Dispute Resolution (ADR)⁴³ (whether within or outside of the formal court process), the idea of dealing justly with cases has to be expanded to include this aspect of the civil legal process.

This aspect is explained in the **Foreword to the CPR** in the following ways:

- (A) ‘The CPR are founded on a system of caseflow management with active judicial case management: [Parts 25 and 26]. This new procedural code is buttressed by a plethora of rules which create several in-built mechanisms to foster settlement at the earliest and every stage of the proceedings: [Part 25.1(c), (d) and (e)]’;⁴⁴
- (B) ‘The concept of early court intervention reflects the court’s objective to resolve matters as early in the process as is reasonable by negotiated settlement and to reduce costs in litigation’;⁴⁵ and
- (C) ‘The CPR bring with them a new litigation culture— a paradigm shift in the administration of civil justice ... This new approach propagates the expectation that a large percentage of cases would now be settled very early in the process which would otherwise have gone to full trial’.⁴⁶

In fact, the CPR aspires to the goal that ‘litigation should be a last resort’.⁴⁷

To this end, Pre-Action Protocols are prescribed ‘to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings’.⁴⁸ And, the CPR state as a primary objective the court’s duty to manage cases, ‘which may include... (e) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party’.⁴⁹

Over the last decade, can it be said that a large percentage of cases are being settled at a very early stage in the civil litigation process? Are Judges and attorneys pro-actively conducting their business and are parties willingly cooperating so as to achieve this objective of the CPR?⁵⁰

Using the available statistics for the last four years of the RSC,⁵¹ average percentages have been calculated and categorised into pre- and post-trial categories.⁵²

The available statistical evidence suggests that for the four year period 2001-2005 under the RSC, the average annual percentage of:

- (A) **matters settled before trial** was 8.1% of the total matters determined. This means that a very small percentage of cases were settled before trial. With the removal of the figures for 2004-2005 (to account for the special backlog reduction project) the figure remains small, at 8.3%;
- (B) **matters determined before trial generally** was 61.1%. When the settled matters are removed from this figure, the percentage is just above half, at 53.0%. As the graph below shows, there is a small improvement when the 2004-2005 figures are removed— 63.9% and 55.6% less settled matters; and
- (C) **matters determined after trial** was 39.1%. This number drops slightly to 36.2% without the 2004-2005 figures.

For the CPR, statistics were used for the two most recent years.⁵³ It should be noted that the data is now categorised by method as opposed to stage of disposition and it is therefore not possible to do a direct comparison of the data. However, the statistics do show the following:⁵⁴

On the assumption that the category of cases determined by ‘Order by Consent (other than ‘at trial’)’ and ‘Default Judgment’ can be considered to be matters settled pre-trial, the average over the two year period is 31.5%. Therefore, almost 32% of matters in the last two years are being settled before trial, including by ADR. Comparing the earlier figures under the RSC with these most recent figures under the CPR, it is possible to suggest that under the CPR (without mandatory ADR) settlement before trial has almost quadrupled.

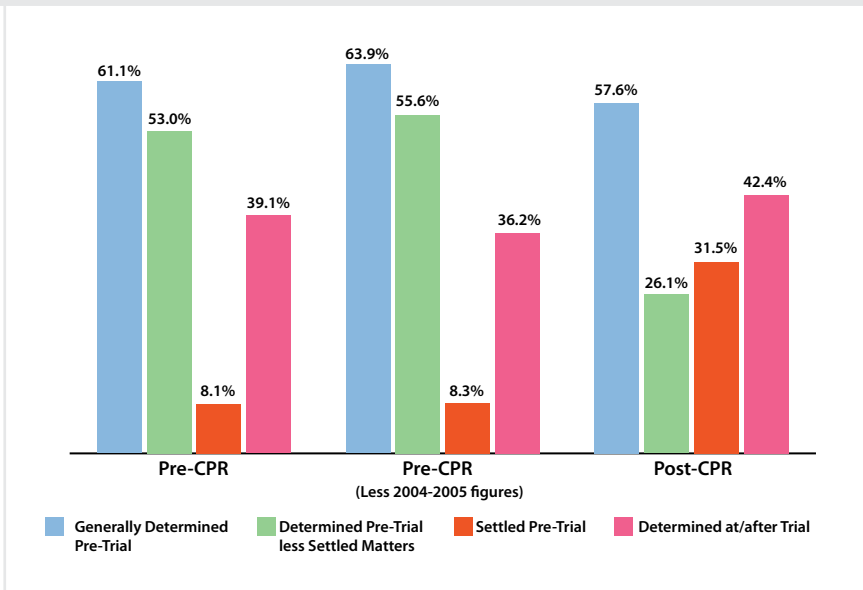


THE CPR

Unlike with the statistics under the RSC, the data is too vague to allow for a pronouncement on the number of matters generally determined before trial under the CPR. As for the matters determined at trial, using the figures for ‘Order by Consent (at Trial)’ and ‘Judgment/Final Order’ as matters determined at trial— **the statistics reveal that 42.4% of matters under the CPR reach the trial stage before they are determined.**⁵⁵ Using this figure allows for an inference that 57.6% of matters are generally determined before trial which is a drop under the CPR, although there has been a vast increase in pre-trial settlement.

In the last two years of the CPR therefore, the following comparison can be suggested:

Graph 1: Pre- and Post-CPR Comparison of the Stage at which Matters are Determined (Average %)



The extent to which the objective of the CPR of early disposition is not being fully met demands of all stakeholders, including court users, an inquiry as to why this is so. Is it due to design flaws in the CPR, or is it because of failures to fully understand, implement and enforce the provisions of the CPR? Is there a need for court-annexed ADR? Should ADR be mandatory as a built-in aspect of the CPR, or court-directed as currently occurs in Jamaica⁵⁶ and Guyana?⁵⁷ If this is done, care should be taken to ensure that access to the

courts and, as such, access to justice is not eroded.⁵⁸ We highly recommend research- (evidence-) based interventions, some foundations for which have already been laid.

In Trinidad and Tobago, a court-annexed mediation pilot project was implemented, which showed promising results. As such, a one year Alternative Dispute Resolution Pilot Project was run from 23 January 2013 to 22 January 2014. The Pilot referred matters to either mediation or settlement conference on a voluntary basis. With regard to mediation, the Pilot covered all types of matters and the matters were randomly selected (i.e. every fifth matter) from the pool of matters in which the first case management conference was about to be fixed. A total of 435 matters were selected, with 228 being referred for mediation. There was consolidation of some matters so the total number actually referred was 222. Mediation was completed in 180 of these matters.

Using this figure of 180, the results of the Pilot show that 67.0% of cases were settled (wholly or partially)⁵⁹ at an early stage of litigation. This is consistent with the rationale for the effectiveness and efficiency of the CPR (referred to above) and the expectation ‘that a large percentage of cases would now be settled very early in the process which would otherwise have gone to full trial’.⁶⁰

The CPR are premised on the philosophical and policy determination that ‘justice on the merits’— substantive justice determined at a trial— is not the singular aim of the civil justice system in Trinidad and Tobago. Indeed, that it is not even the most desirable aim. What is sought is the just disposition of all matters brought before the civil courts. This includes an emphasis, aim, and expectation of early resolution by settlement of a ‘large percentage of cases’.

It is therefore imperative that CPR Judges actively encourage and assist parties to settle their cases, and to do so in the most timely and economic ways possible, and on terms that are fair and just to all.

5. PROCEDURAL JUSTICE

Underpinning the goals of early settlement and just resolution, the CPR mandates— by virtue of the overriding objective— that substantive justice must now also be delivered according to the procedural values of equality, fairness, efficiency, cost effectiveness, expedition, and proportionality in relation to both particular cases and the general use of court resources.⁶¹



THE CPR

Indeed, the Court of Appeal has unanimously observed that: **‘Under the CPR, justice, therefore, is not distinct or superior to the overriding objective. Doing justice under the CPR is to enable a case to be dealt with justly in accordance with the overriding objective ...’**⁶²

Judges and attorneys who overemphasise justice on the merits and interpret and apply the CPR so as to focus exclusively on achieving a determination on the merits of matters for which they have responsibility, need to reflect on whether this approach is in keeping with the mandate under the CPR to deal with cases justly.⁶³ Often, what is simply required is a rebalancing of priorities and a greater integration of the CPR vision of what dealing with cases justly really means.

Indeed, there is a sense in which it may not even be useful to speak differentially of substantive and procedural justice in the context of dealing with cases justly. With the CPR, there is **only** just dealing, and this happens when there is the fair and just application of both the procedural and substantive law, culminating in just disposition.

6. THE ‘NEW’ ROLE OF THE CPR JUDGE

The CPR clearly brought about changes in how civil litigation in Trinidad and Tobago is to be conducted.⁶⁴ The breadth of these changes has not always been fully appreciated. As stated in **Her Worship Magistrate Marcia Ayers-Caesar and The Attorney General of Trinidad and Tobago v BS**:⁶⁵

30. While it is accepted that in adversarial litigation judges must be cautious to always preserve the core judicial values of independence and impartiality, it is equally clear that the role of the judge under the Civil Proceedings Rules, 1998 is significantly different from what previously obtained. This is apparent from the overriding objective and the provisions of the CPR itself..

32. The CPR, 1998 have brought about a seismic shift in the roles, responsibilities and powers of the court to manage and shape litigation, and to control its unfolding in terms of issues and timing.

There was thus ‘a fundamental ideological shift: from a “lawyer-driven court” to a “Judge-controlled court”’.⁶⁶

This means that CPR Judges have more power over the control and shape of litigation and greater consequential freedom to exercise their discretionary powers and functions.⁶⁷ As a result of this increased freedom, and to ensure that the value of impartiality is maintained, CPR Judges need to be ever more mindful of the principles of judicial conduct discussed in this exploration of the role of the CPR Judge.

7. PROCEDURAL FAIRNESS

As set out above in **Thomas v Baptiste**, the concept of ‘due process’ incorporates procedural fairness. Traditionally and in the context of procedural law, this has meant the entitlement to: access to justice, natural justice, equality of treatment, fundamental fairness, a fair and just trial and to the availability of procedural systems and rules that facilitate all of these elements.

However, the term ‘procedural fairness’ has expanded and developed over time and now has application outside of the courtroom as well as in it— it also applies to Judiciary staff and not just to Judges.

The first clause of the Preamble to the Constitution explains that a core constitutional value in Trinidad and Tobago is respect for the inherent dignity of every human person and their inalienable entitlement to equality. In **Nankissoon Boodram v Attorney-General and Another**, Sharma JA had this to say about this constitutional mandate: ‘Above all, [the Constitution] must be even-handed with its citizens, treating the lowliest of them with the same dignity and fairness as the most upright, for only then would it be faithful to its preamble ...’.⁶⁸ It is for the Judges and for the entire Staff of the Judiciary of Trinidad and Tobago to fulfil this mandate.

In **BS**⁶⁹ the Court of Appeal explained this expanded understanding of procedural fairness as follows:

37. It is important to also point out, that post-CPR, 1998 and consistent with the constitutional values of equality, fairness, respect and dignity,⁷⁰ the new role of the judge mandated by the imperative to ‘deal with cases justly,’⁷¹ includes keen attention to procedural fairness. **Thus, respect, equality of treatment and fairness must now colour all aspects of judicial behaviour both in court and throughout the management and hearing of all aspects of a matter.** In concrete terms, there are four cardinal principles to be adhered to: (i) judges must be fair and experienced as such in all aspects of interaction with litigants and their attorneys; (ii) judges must treat all litigants



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and their witnesses (including attorneys and court staff) with utmost respect, having regard to their inviolable human dignity; (iii) judges are obligated to take care to ensure that parties clearly understand both what is to be expected, as well as what is actually happening in court proceedings, and all orders, directions and decisions must be carefully explained so that parties fully understand them and appreciate their consequences; and (iv) judges must permit parties to have a voice, that is to say, a meaningful chance to actually participate in their matter at all stages of the proceedings.⁷²

Although the term, as expanded, includes behaviour and proceedings outside of the formal setting of a courtroom and applies to staff as well as Judges, the principles involved are not new. Indeed, in relation to Judges, these guidelines are incorporated in the **Guidelines for Judicial Conduct**.

In addition to this duty to conduct oneself and proceedings so as to ensure procedural fairness in this expanded way, Judges also have to ensure that all of the objectives of the CPR are fulfilled by all members of the Judiciary. In particular, to ensure that the six judicial standards listed above (Independence, Impartiality, Integrity, Competence, Efficiency, and Effectiveness) are always maintained. In so doing, the Judge exemplifies judicial leadership and exercises judicial governance.

In the **Guidelines for Judicial Conduct** (under the Principle of Competence and Diligence) it is stated under the heading Administrative Responsibilities:⁷³

6.12 A judge shall diligently discharge administrative responsibilities, maintain professional competence in judicial administration as it pertains to the management of his caseload and facilitate the performance of administrative responsibilities of other judges and court staff.

6.13 A judge shall require court staff and other persons subject to his influence, direction or control to observe the standards of fidelity and diligence.

8. PERFORMANCE STANDARDS

(A) Stages of Activity

Integral to the qualities of efficiency and effectiveness is the setting and meeting of performance standards.

Performance standards exist in two categories: qualitative and quantitative. For example, Judges should have clear general qualitative general guidelines and clear quantitative maximum timelines, for the carrying out and completion of the various judicial tasks. To facilitate this, it is helpful to understand the system that is being operated under the CPR in terms of discrete events.⁷⁴

It can be said that the non-bifurcated docket system, which places a matter from filing to finish under the care and control of a single Judge, has given ultimate management powers and control to Judges over court proceedings— subject of course to the procedural provisions of the CPR, the law and the Constitution.⁷⁵

In this context, a matter may be seen as moving through several stages of activity. Each of these stages can consist of more than one judicial event (sphere of activity), but each has specific and distinct objectives. For the purposes of this exploration of the role of the CPR Judge, the first four of these stages will be considered:⁷⁶

- I. Pre-Filing/Pleadings
- II. Active Judicial Case Management
- III. Pre-Trial Review
- IV. Trial/Hearing/Disposition

I. Pre-Filing/Pleadings

The first stage is what may be called the pre-filing/pleadings sphere. During this phase, the primary obligations are on the attorneys and the parties to articulate their respective positions on the issues between them— with full disclosure. The intention of the CPR, as provided for in both the Pre-Action Protocols and CPR I.3,⁷⁷ is to facilitate the early identification of genuine issues and to facilitate negotiated settlement prior to the commencement of formal litigation.⁷⁸

Pleadings set out the case to be answered and the response to that case and must meet the detailed criteria set out in the CPR.⁷⁹ They follow a specified process, in that a claim may only be issued after pre-action communications, as mandated by the relevant Practice Direction are complied with.⁸⁰ Significantly,



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the CPR also provides for the times at which changes to pleadings may be made and what is required for this to be done at different stages in the process.⁸¹

It would appear that on the basis of anecdotal evidence and the statistics above in particular on the basis of seemingly widespread failure to fully comply with the pre-action protocol regime prescribed by the CPR (which is not to be measured by mere formal compliance), that this sphere of intent is not realizing its fullest potential. One wonders— how many matters are settled as a result of the pre-action disclosure of information and articulation of issues?

II. Active Judicial Case Management

The second stage is what may be called the active judicial case management sphere of proceedings.⁸² Generally, pursuant to the CPR this stage is triggered, in the instance of ordinary claims by the operation of CPR 27.3 and in the instance of fixed date claims, by the operation of CPR 27.2(1) and (2)— subject to CPR 27.4 and 27.8. In the context of the overriding objective to deal with cases justly, there are several balls that the case management Judge has to juggle, in balancing the considerations that inform dealing with cases justly.⁸³

Two preliminary and necessary tasks are:

- (a) identifying and simplifying the issues in the case;⁸⁴ and
- (b) facilitating so far as is possible a negotiated settlement of some or all of the issues.⁸⁵

It is almost self-evident, that to the extent that the Pre-Action Protocols have been properly fulfilled and the facts material to the competing cases stated (and relevant documents disclosed),⁸⁶ it is possible at the very first case management conference to identify and articulate the issues in a particular matter; and having done so, to invite exploration of negotiated settlement. Dealing with these two tasks requires time and management of resources, as well as the exercise of judicial discretion. Concerns about amendments, changes to a party's case, and of disclosure are ideally dealt with at the earliest opportunity, as these also have a direct influence on the identification of relevant issues and on the likelihood of early settlement.

In the event that settlement of all of the issues is not possible, the next task is actively managing the case preparation (which can also usefully be thought of as 'issues preparation') for trial. This often requires clear and specific directions/orders (with consequences for default as necessary— CPR 26.1(2) and (3)). The possible orders that should, at minimum, be considered are set

out in CPR 27.6. These serve as a handy checklist for the CPR Judge. Many things need to be considered, including:

- whether there are witnesses;
- witness statements;
- documentary evidence;
- disclosure;
- requests for information;
- amendments;
- expert evidence; and
- costs.

Where necessary, preliminary issues and ancillary issues may have to be identified and dealt with. As well, interlocutory and interim applications may have to be considered and disposed of.⁸⁷

In a sense, it is at this stage of actively managing a case in preparation for trial that the greatest demands on a case management Judge's skills and the impact of the overriding objective to deal with cases justly in the context of the CPR come into play.

It may be that the greatest challenges lie in achieving the right balance around the principles of equality, proportionality, efficiency and effectiveness. Every decision that involves an exercise of discretion must be filtered through the five CPR 1.1(2) criteria for dealing with cases justly; also bearing in mind that these considerations are not exhaustive and further, that weighing and balancing competing prejudice (if any) is integral to dealing with cases justly.⁸⁸

Fairness is always an underpinning touchstone. However, an effective and efficient CPR Judge must also embody the twin capacities of firmness and flexibility.⁸⁹ What helps, is to have overall goals in mind; the essential three have been specified above (addressing issues, settlement and preparation for trial). Thus every hearing and every order or direction given should advance some or all three of these aims, in the larger context of a just resolution of the entire matter.

If this judicial task was not in and of itself demanding, the case management Judge, particularly because the parties are present in court (CPR 27.5), must also be conscious of and ensure compliance with the expanded requirements of procedural fairness as explained above.

One of the particular challenges of the CPR, is the determination of when the first case management conference ends. This is because, upon its conclusion,



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significant consequences can arise. For example, permission of the court is required in order to make changes to a statement of case after the first case management conference ends and certain criteria have to be satisfied to do so.⁹⁰ References to the first case management conference are also to be found at CPR 18.4 (in relation to ancillary claims) and Rule 67.8(2) (in relation to a costs budget). However, it is in relation to CPR 20.1(3) and (3A) that the greatest controversy has arisen as to determining when the first case management conference ends.

This issue has directly engaged the attention of the Court of Appeal,⁹¹ and it has been determined by a majority that the first case management conference ends once there has in fact been the occurrence (whether by orders, directions or otherwise) of a single act of active judicial case management (in any of its myriad aspects as provided for by the CPR) by a Judge at a court hearing specifically designated to deal with case management.⁹² And unless it is specifically stated and ordered/directed that the first case management conference has been adjourned, it is to be taken to have ended with such an occurrence.

In all of this the court's case management powers are wide (CPR 26.1(1)(w)),⁹³ although not without limits. And, to ensure that cases are dealt with justly and that form does not trump substance, the CPR also gives the CPR Judge wide (though again not unlimited) powers to rectify errors of procedure (CPR 26.8).⁹⁴

At the end of the process of active judicial case management:

- ✓ A matter should be either settled (entirely or in part), or well prepared for trial. Settlement should have been actively explored and, where possible, effected;⁹⁵
- ✓ Issues should be clearly identified, articulated and understood;
- ✓ Full disclosure should have occurred;
- ✓ All of the relevant testimony and evidence, including documentary and expert evidence, should have been considered and dealt with;
- ✓ Ideally, all procedural applications ought to have been made and dealt with, and whatever directions are necessary 'to ensure that the trial of the case proceeds quickly and efficiently' duly ordered;
- ✓ Costs consequences for all parties ought to have been explored and made known to the parties; and
- ✓ A trial date should be fixed.⁹⁶

In a sense, the defining event that demarks this sphere of activity is the fixing of the trial date,⁹⁷ with the objective of trial date certainty.

The very idea of active judicial case management mandates the responsibility and duty to manage, as well as an active involvement in the management process. This is a deliberate feature of the CPR, because one of the shortcomings of the RSC was the experience that passive court involvement in the civil litigation process led to significant mismanagement of court proceedings, delay and loss of confidence in the civil justice system. Active judicial case management removes control of the process from the parties (whose ‘management’ was experienced under the RSC to generally be self-serving), and places it under the court office and the CPR Judge, with the intention of achieving a fair, timely and just resolution of all matters that come before the civil courts.⁹⁸ This approach further facilitates increased public trust and confidence, as CPR Judges are encouraged to discover the real issues in dispute and bring them to a fair and just resolution.

III. Pre-Trial Review

The next stage of activity is the pre-trial review. Of the orders that can be made at the stage of active judicial case management (CPR 27.6), the only one that is stated as being mandatory is the fixing of a pre-trial review (unless the case may be dealt with justly without one).⁹⁹ CPR Part 39 explains that this stage is to take place shortly before the trial. The plethora of powers and duties (including discretion and responsibilities) that existed at the case management conference stage are also available (CPR 39.3).¹⁰⁰ The placement of the Pre-Trial Review in the process and the available powers of the court are significant, and intended to further advance the overriding objective of dealing with cases justly.

The core task at this stage is the giving of directions ‘in order to ensure the fair, expeditious and economic trial of the issues.’¹⁰¹

The power to give certain specific directions to achieve these three core objectives is stated,¹⁰² and it is important to remind ourselves that the overriding objective and its criteria for dealing with cases justly apply no less at this stage than at the earlier stages.

The three principles of fairness, expedition, and economy lie at the heart of the overriding objective and all three are equally relevant to dealing with cases justly. It may be that Judges can do more at a pre-trial review than is currently



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the case, and in so doing reflect the court's directions and orders in clear and easily understandable terms, with necessary and proportionate consequences for non-compliance.

At the end of the pre-trial review sphere—

- ✓ A case should be fully and completely prepared for trial;
- ✓ There should be a clear, agreed-upon and articulated plan for the hearing of a trial (including time allocations for particular events);
- ✓ Every relevant detail should have been considered, addressed and decided— so as to ensure fairness, expedition, and economy;
- ✓ All parties should understand fully what is expected of them at the trial; and
- ✓ Costs consequences revisited and made known to the parties.

At the pre-trial review stage, the CPR Judge should also be alert to the possibility of settlement and should encourage such explorations if reasonably feasible, always bearing in mind the sacrosanct nature of trial date certainty.

IV. Trial/Hearing/Disposition

The next main stage is that of the trial. A well-prepared and managed case should hold few surprises at trial and should run according to the plan established at the pre-trial review.¹⁰³

Part 40, which deals with the trial, identifies the preparation of a bundle of documents to be used at the trial as being of singular importance. The principles of efficiency, effectiveness, and economy are at play. Well-prepared bundles of documents facilitate the effective and efficient running of a trial.

CPR 40.6 identifies specifically the power of a trial Judge to summon any person to attend the trial, and to have a party produce 'documents or things' at the trial, and to question any party or witness at the trial. This specifically stated role of the CPR Judge puts to rest any idea that the CPR Judge is to be a mere referee or umpire at the hearing of a trial (and reveals an underlying general policy in relation to the role of the CPR Judge). It should be noted that the boundaries of intervention are always case specific and the standards of Independence, Impartiality, and Integrity are non-negotiable.¹⁰⁴ However, the powers of a CPR Judge at trial are also to be exercised through the lens of

the overriding objective— to meet the demands of equality, fairness and just dealing and to ensure just disposition of the matter at hand.

Dealing with cases justly requires Judges to be involved in the process, not to take it over or compromise their impartiality, but, in the full exercise of judicial Independence, to act so that cases are dealt with justly.¹⁰⁵

The trial sphere is generally the stage of substantive judicial determination of the issues. Every matter to be decided must be decided by way of a reasoned judgment (unless otherwise compromised). A hearing is not completed until a reasoned judgment (oral or written) is delivered. And, again in this sphere, the principles of efficiency, expedition, economy, and fairness apply.¹⁰⁶ Justice is justice according to law and for the benefit of people and society.¹⁰⁷ Fostering and maintaining public trust and confidence in the civil justice system demands no less of the CPR Judge.

Additional Stages

The stages discussed are the first four of many, including others such as enforcement and appeal. The principles of case management apply to all stages and matters under the CPR, from initial applications to trial,¹⁰⁸ enforcement and execution of orders, and at all levels— from first instance to appeal. As such, they affect all categories of Judges i.e. Registrars, Masters and Judges of the Supreme Court.

(B) Quantitative Performance Standards: Setting Timelines

In the face of a mandate to manage a non-bifurcated docket, general caseflow and to actively manage each individual case (including encouraging and facilitating settlement), it is easy to become overwhelmed with the multi-dimensional role that a CPR Judge must now master. To meet the standards of Independence, Impartiality, Effectiveness, and Efficiency, a Judge must be both Judge and manager— of people (their staff as well as parties to matters, attorneys and witnesses) and of time. Time management is a necessary and essential skill. As indeed, is people management. Competence is no longer measured merely by one's knowledge and application of the law after due determination of relevant facts. Managerial skill is now a part of what constitutes judicial competence in the CPR era.¹⁰⁹



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In addition, because the CPR has very distinct stages in which particular events occur, institutional and personal performance standards are also necessary. These are general standards within which certain events ought to be completed. For example, how long should a simple (one day), a standard (less than four day), or a complex (more than four day) civil case take from filing to disposition (i.e. to delivery of a reasoned judgment)?

Within such general and overarching performance standards in relation to the time for disposition, there are several intermediate stages that can also be the subject of performance standards. For example, there should be performance standards for the time from the first case management conference to the pre-trial review; and for the time within this stage for settling pleadings, determining issues, exploring settlement, permitting ADR, achieving disclosure, filing of witness statements etc.

There must also be performance standards for the delivery of judgments and time standards from the close of the trial to the delivery of a decision (and of a reasoned judgment— be it oral or written).

Under the Principle of Competence and Diligence, the **Guidelines for Judicial Conduct** point out: ‘6.6 A judge shall dispose promptly of the business of the court and in particular render judgments and reasons orally or in writing efficiently, fairly and with reasonable promptness’.¹¹⁰

There are also, of course, other performance standards necessary to achieve efficiency and effectiveness under the CPR. Once a matter is appealed, for example, performance standards must also apply, such as the time for making transcripts available, for cause listing appeals, for hearing appeals and for the delivery of reasoned judgments following the hearing of an appeal.

It is self-evident that the setting of quantitative performance standards depends on several considerations. Typically, some of these factors include:

- I. the type of case;¹¹¹
- II. the complexity of the case (e.g. the number of issues, novelty of issues and nature of evidence); and
- III. the level of the court (e.g. first instance, appellate, apex).

The setting and measuring/reporting of performance standards also permit the following:

- I. the verification of accurate information pertaining to timelines involved in case management;
- II. the identification of ‘problem areas’ in the case management process; and

III. evidence based innovations and initiatives to promote efficiency and effectiveness in both case flow management and active judicial case management.

Standards, having been set, must always be tracked and measured. Once measured, these standards should also be published.

The setting of performance standards is intended to operate functionally as guidelines; recognising that each case has to be managed and determined according to the particular circumstances of that individual case. The greatest value of setting, measuring, maintaining, and publishing quantitative performance standards, may be in the effect they could have on increasing public trust and confidence in the administration of civil justice.

Ideally, these performance standards should be arrived at collaboratively, thus ensuring that there is both agreement and ownership. The setting and meeting of performance standards is a whole-system exercise, because all participants in the judicial process, Judges, Judiciary staff, attorneys, litigants, and all departments of the Judiciary have interlocking roles to play. Transparency and accountability also demand that some of the main performance standards be made public, so as to set expectations and hold the Judiciary accountable for its performance in the delivery of justice in Trinidad and Tobago.

(C) Qualitative Performance Standards: Requirements

It is not enough to meet quantitative performance standards in order to satisfy the requirements of efficiency and effectiveness. Competence is imperative. A Judge who is meeting all of the performance standard timelines, but delivering flawed decisions and/or defective or unreasoned judgments is an incompetent Judge, because there has been no just disposition of the matter. The Statement of Principle on Competence and Diligence in the **Guidelines for Judicial Conduct** says: 'Competence and diligence are prerequisites to the due performance of judicial office'. In the Guidelines for this Principle, it is further stated under the heading 'Adjudicative Duties':¹¹²



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6.3 A judge shall be faithful to the law and maintain professional competence in it ...

6.4 A judge shall take all reasonable steps to maintain and enhance his knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage, for this purpose, of the training and other facilities which should be made available, under judicial control, to judges.

6.5 A judge shall keep informed about relevant developments of local and international law ...

The Commentary on this Principle states that:¹³ ‘1. Diligence is not solely concerned with expedition, but in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness’.

What is clear is that dealing justly with a case does not equate to simply disposing of matters in a timely fashion— as important as expedition may be. The performance standard of competence includes a qualitative dimension, which encompasses the jurisprudential quality of both decision and reasoning. This qualitative aspect is so integral to the judicial function that without it there is no real judging.

Other qualitative standards apply to both the management and judging roles of the CPR Judge. Some of these include:

- fairness and equality of treatment throughout the process;
- coherence, clarity and understanding of all decisions and orders;
- respect for all court users and people who work in the Judiciary; and
- facilitating the meaningful inclusion and participation of parties throughout the process.

In addition, there are qualitative performance standards of a more institutional nature; for example, adequate infrastructural amenities and facilities. And, of a more systemic nature; for example, the fullest possible access to courts and to justice¹⁴ and the timely availability of all relevant and accurate information.

SPECIAL CONCERNS

From 2015-2017, the JEITT conducted several surveys on the public's views and experiences of the judicial process in Trinidad and Tobago. The aim of the research was to get honest feedback from people in Trinidad and Tobago about the Administration of Justice. It also conducted ethnographic research with a similar objective. The results of this research inform our observations and recommendations in this section on Special Concerns, namely:

- Impartiality;
- Self-Represented and Under-Represented Litigants;
- Social Context Training;
- Effective Communication; and
- People who are Vulnerable and People who are Differently Able.

1. JEITT RESEARCH

The JEITT Survey for the Public (administered in-person and completed online) focused on the public's views of the judicial system, and how users are treated. The responses revealed the following demographic data:

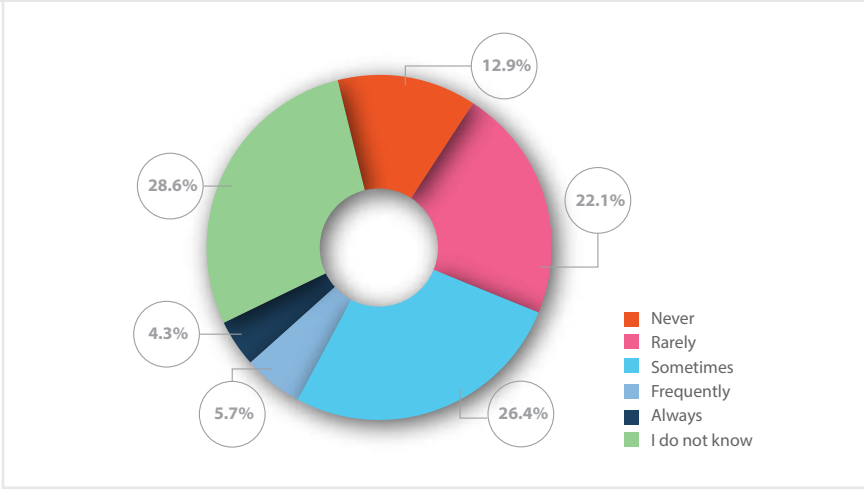
Approximately 28.5% of the sample¹¹⁵ selected secondary education as their highest level of education attained and 61.4% selected tertiary (including postgraduate) education. The sample predominantly came from Trinidad,¹¹⁶ spread throughout the Island. Ethnically,¹¹⁷ 37.9% identified as African, 21.6% as Indian and 33.3% as mixed (5.2% identified as Caucasian and 2% as Chinese). 58.6% of the sample¹¹⁸ was below 40 years of age with 36.1% between 40 to 65 years old (and 5.2% over 65 years old). 62.6% of the sample¹¹⁹ had visited a courthouse in Trinidad and Tobago and about 53% did so in order to deal with court matters.¹²⁰

From this sample the following information was gathered and is considered both relevant and revealing in the context of the Special Concerns being explained:

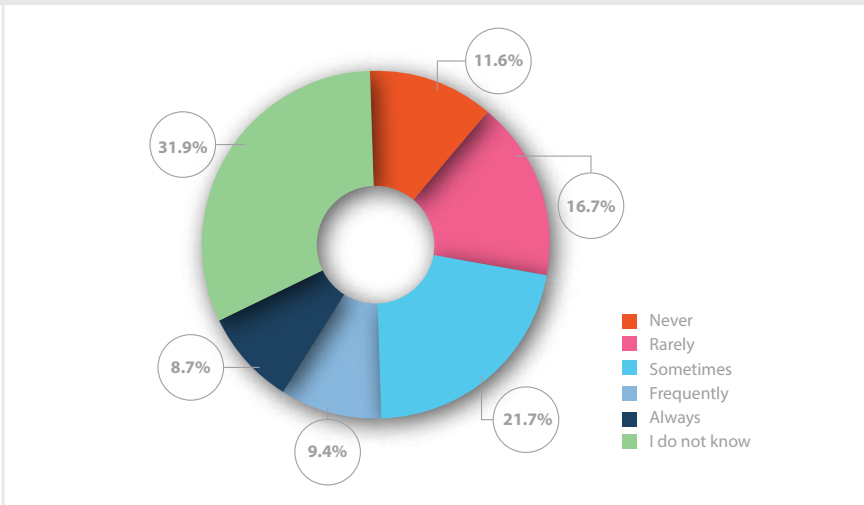
(A) When asked about their views of the experiences of individuals who appear before the courts in Trinidad and Tobago, responses to the undermentioned inquiries were as follows:

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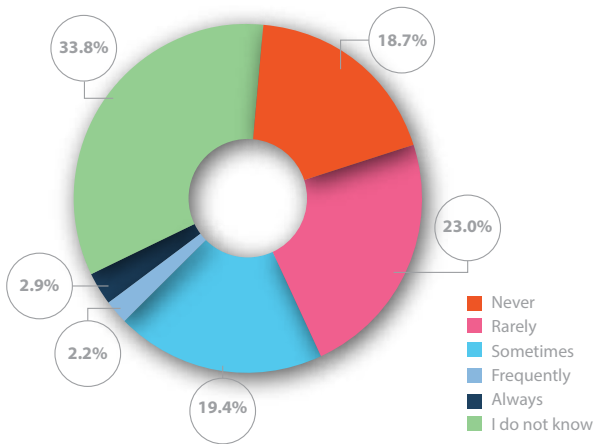
I. **Were they invited to express their views?:**¹²¹ 26.4% indicated that they thought that individuals were only ‘sometimes’ asked to express their views in court; and 35.0% were never or rarely asked to do so. (Only 10.0% thought this was frequently and/or always done.)



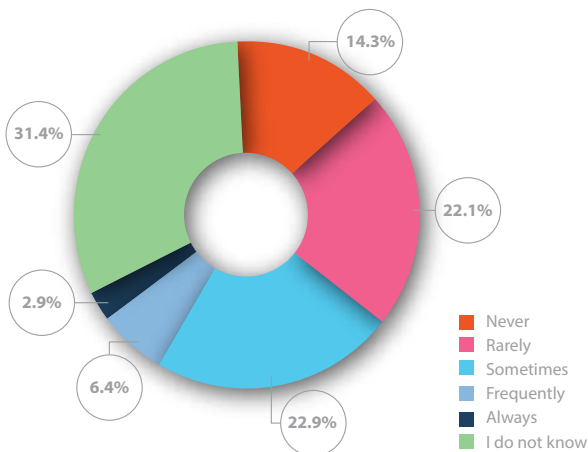
II. **Were proceedings explained at the start in non-legal language?:**¹²² 21.7% indicated that they thought that individuals ‘sometimes’ had proceedings explained to them in non-legal language; and 28.3% thought this was never or rarely done. (Only 18.1% thought that individuals frequently or always had this experience.)



III. Were they encouraged to ask questions?:¹²³ 19.4% indicated that they felt that individuals were ‘sometimes’ encouraged to ask questions; and 41.7% thought individuals were never or rarely encouraged to do so. (5.1% thought that individuals frequently and/or always felt encouraged to ask questions in court.)



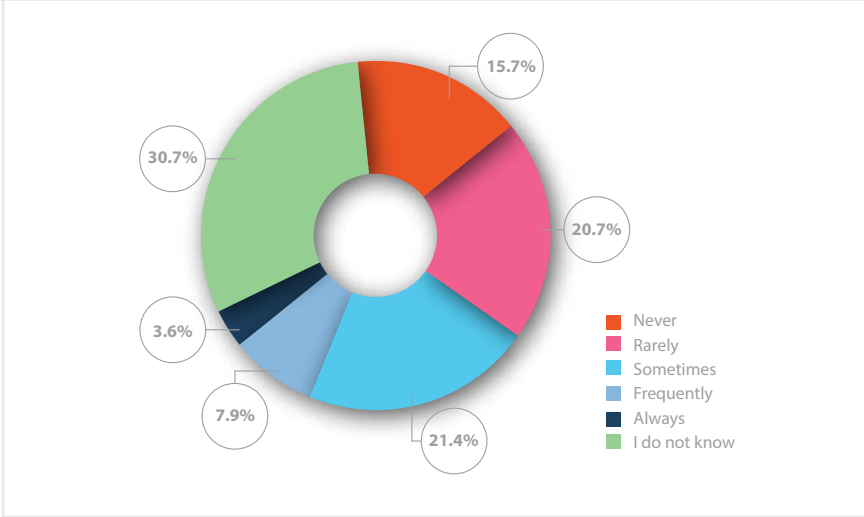
IV. Were delays explained?:¹²⁴ 22.9% indicated that they ‘sometimes’ thought that individuals had delays explained to them; and 36.4% thought that individuals never or rarely had delays explained. (9.3% thought that individuals frequently or always had delays explained.)



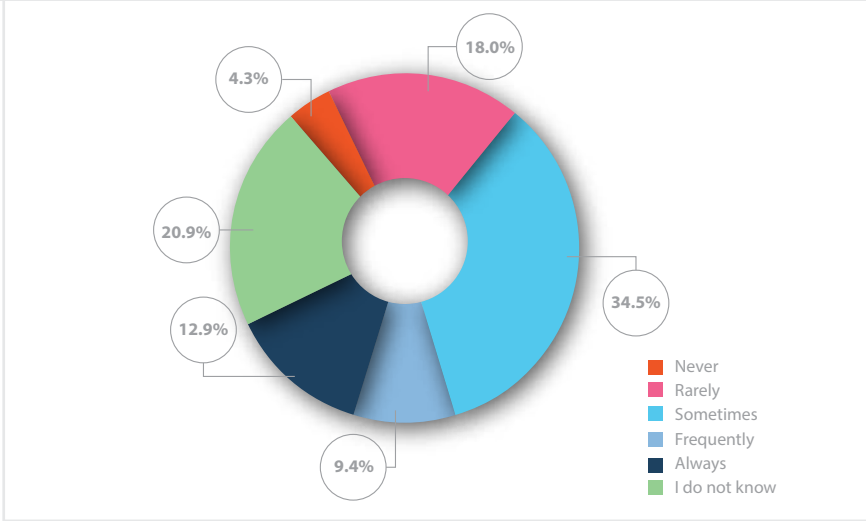


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V. Were decisions throughout the proceedings explained by the judge/judicial officer in non-legal language?:¹²⁵ 21.4% indicated that they thought that individuals ‘sometimes’ had decisions explained in nonlegal language. 36.4% thought individuals never or rarely had this done. (11.5% thought individuals frequently or always had decisions explained.)



VI. Were they treated with Respect and Dignity?:¹²⁶ 34.5% indicated that they thought that individuals ‘sometimes’ experienced being treated with respect and dignity, and 22.3% thought individuals never or rarely had that experience. (22.3% thought individuals frequently or always had the experience of being treated with respect and dignity.)

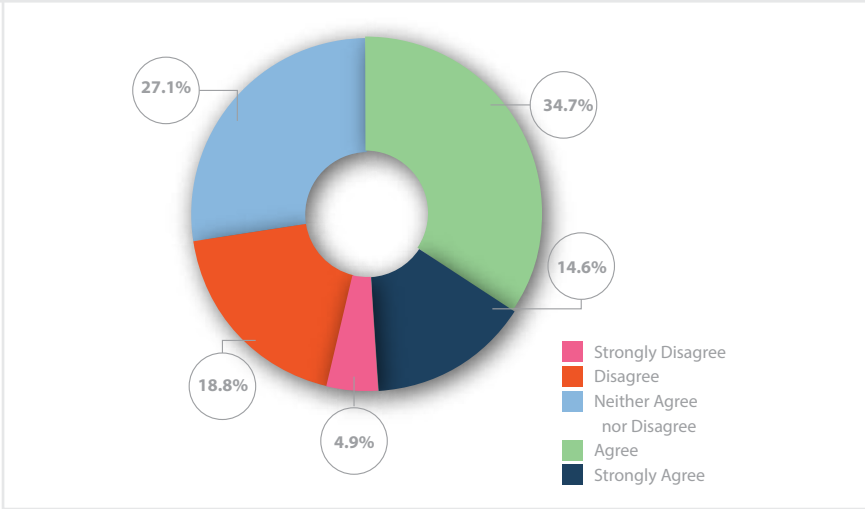


(B) When asked about the extent to which they agreed with statements in respect of the following factors (as they relate to the treatment of individuals in the Judiciary of Trinidad and Tobago) the responses were as follows:

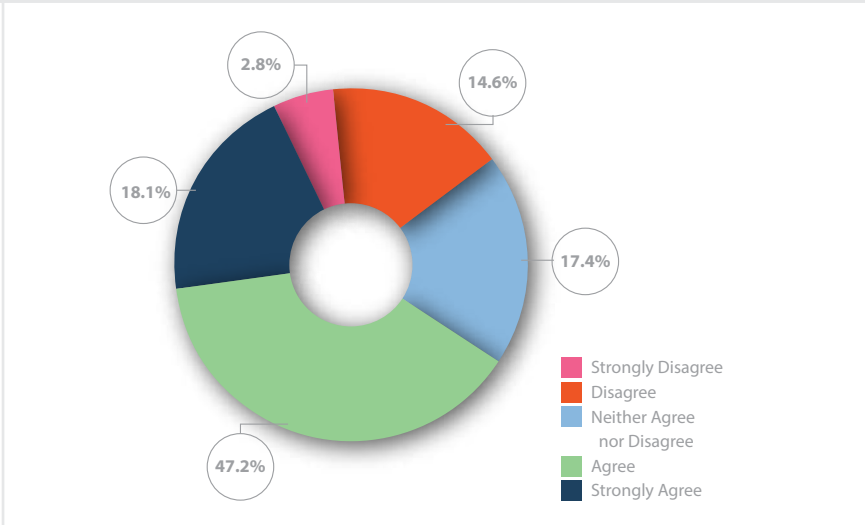


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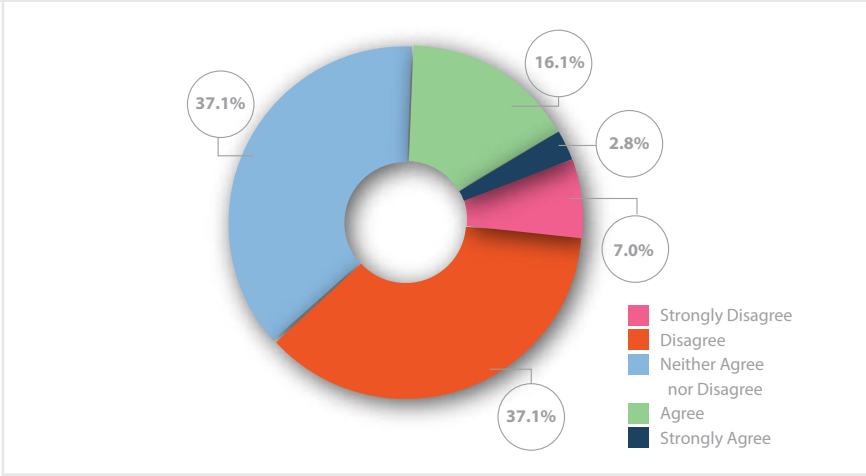
I. **Skin colour:**¹²⁷ 49.3% of court users agreed or strongly agreed that a person of light skin colour is more likely to receive favourable treatment than a person of dark skin colour.



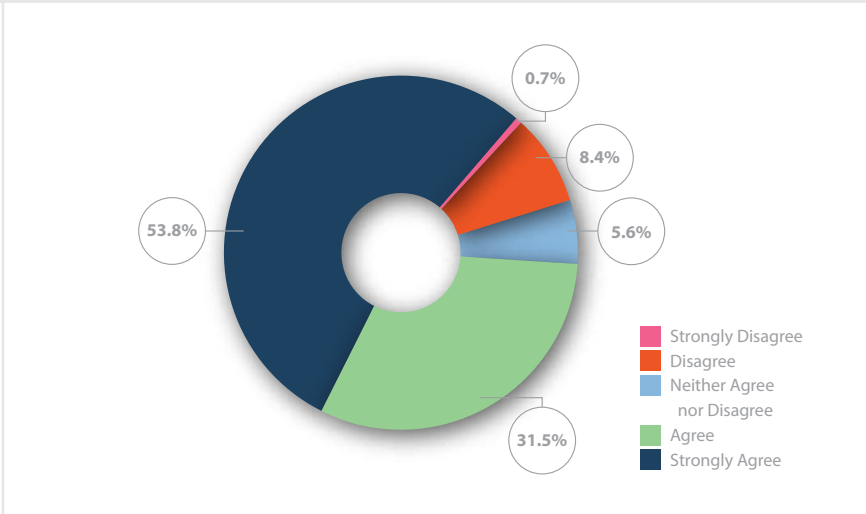
II. **'Proper English':**¹²⁸ 65.3% of court users agreed or strongly agreed that a person who speaks 'proper English' are more likely to receive favourable treatment than a person who speaks heavy dialect.



III. Religious Garb:¹²⁹ 18.9% of court users agreed or strongly agreed that a person wearing religious or ethnic garb is more likely to receive favourable treatment than a person wearing non-religious/ethnic clothing; 44.1% disagreed or strongly disagreed.



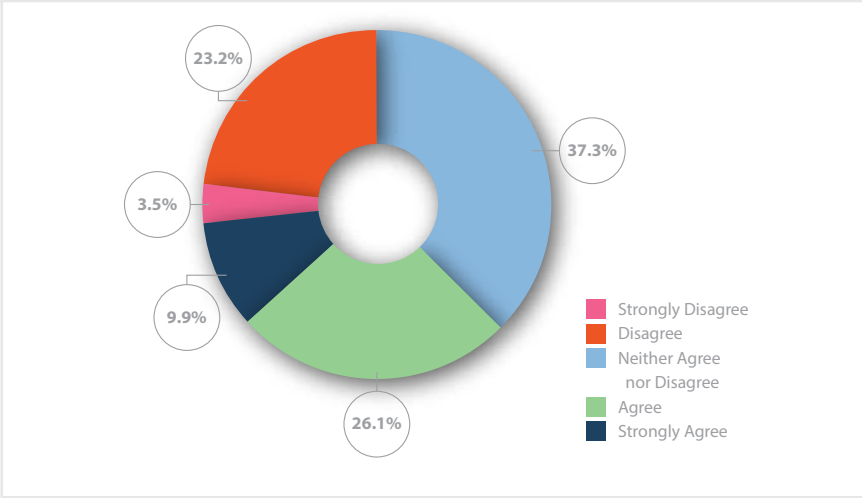
IV. High Status:¹³⁰ 85.3% of court users agreed or strongly agreed that a person of high status in society is more likely to receive favourable treatment than a person who is not of high status.



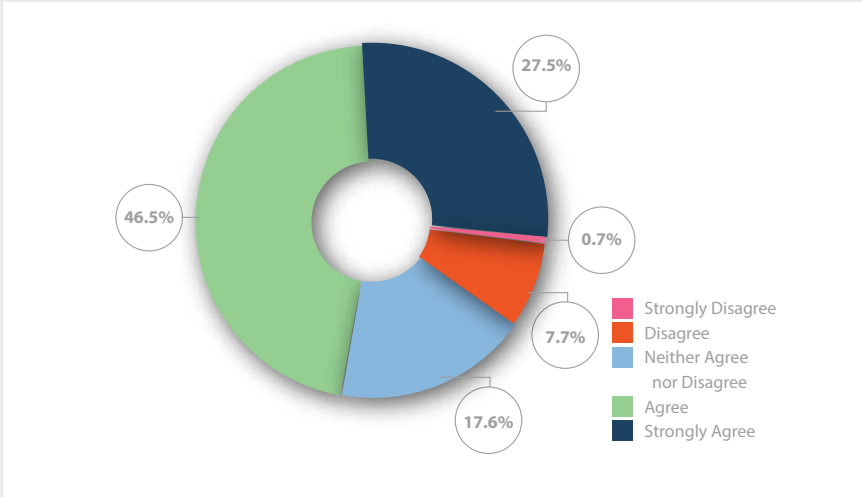


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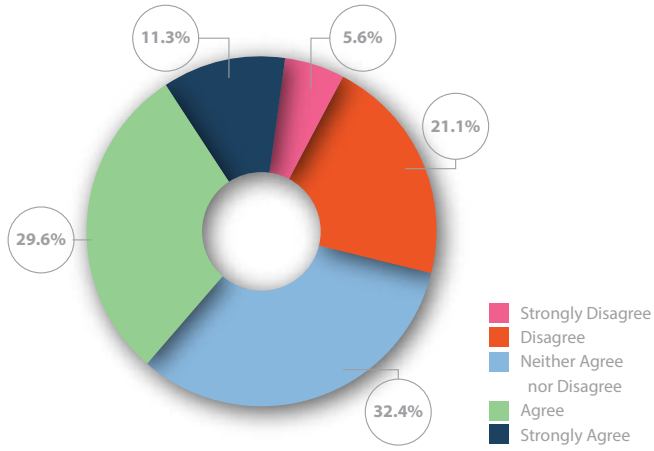
V. **Gender:**¹³¹ 36.0% of court users agreed or strongly agreed that a female is more likely to receive favourable treatment than a male; and 26.7% disagreed or strongly disagreed.



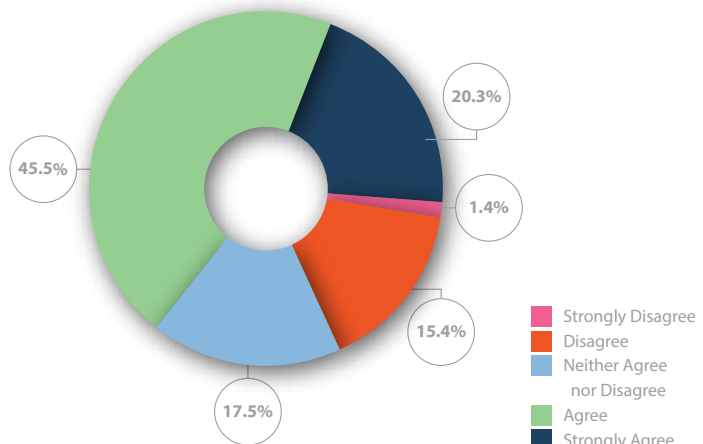
VI. **Seniority of Lawyers:**¹³² 74.0% of court users agreed or strongly agreed that a senior attorney is more likely to receive favourable treatment than a more junior attorney.



VII. Heterosexuality:¹³³ 40.9% of court users agreed or strongly agreed that a person who ‘appears to be’ or is known to be heterosexual is more likely to receive favourable treatment than a person who ‘appears to be’ or is known to be lesbian, gay, bi-sexual or transgender.



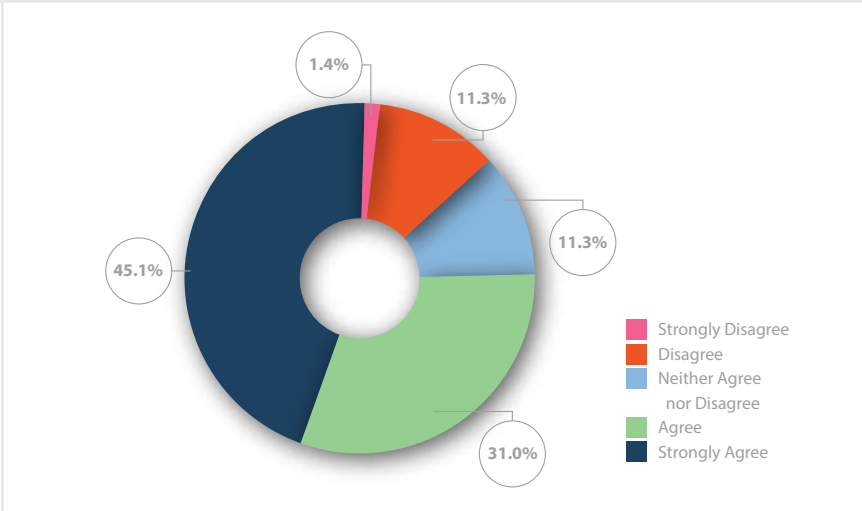
VIII. Education:¹³⁴ 65.8% of court users agreed or strongly agreed that a person who appears to be highly educated is more likely to receive favourable treatment than a person who appears to be less educated.





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IX. Wealth:³⁵ 76.1% of court users agreed or strongly agreed that a person who appears to be wealthy is more likely to receive favourable treatment than a person who appears to be under the poverty line.

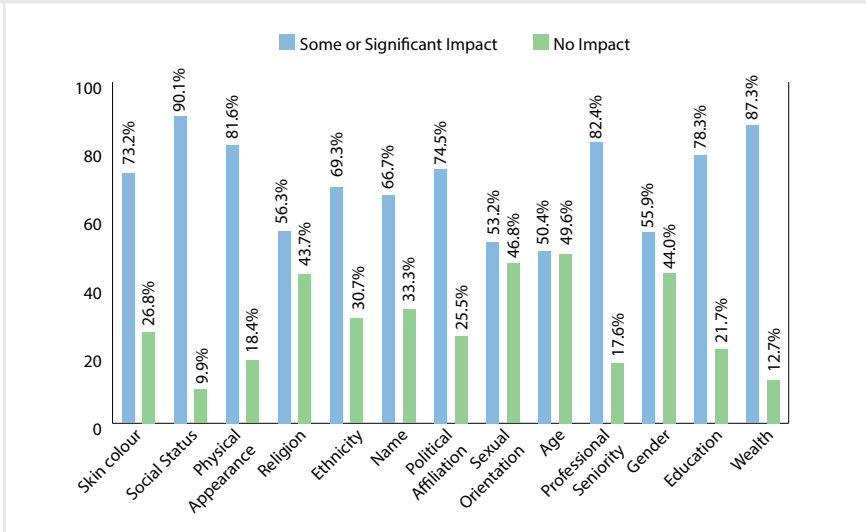


(C) When asked about what impact they believed the following factors would have on the outcome of court matters, the responses were as follows:

Similar trends were revealed in relation to beliefs and experiences about factors that influence the outcome of matters.

The factors considered were skin colour, social status, physical appearance, ethnicity, name, political affiliation, sexual orientation, age, professional seniority, gender, education, and wealth.³⁶ Graph 2 shows that between 50.4% and 90.1% of responders thought that each of these factors had some or significant impact.

Graph 2: Impact of Certain Factors on the Outcome of Court Matters

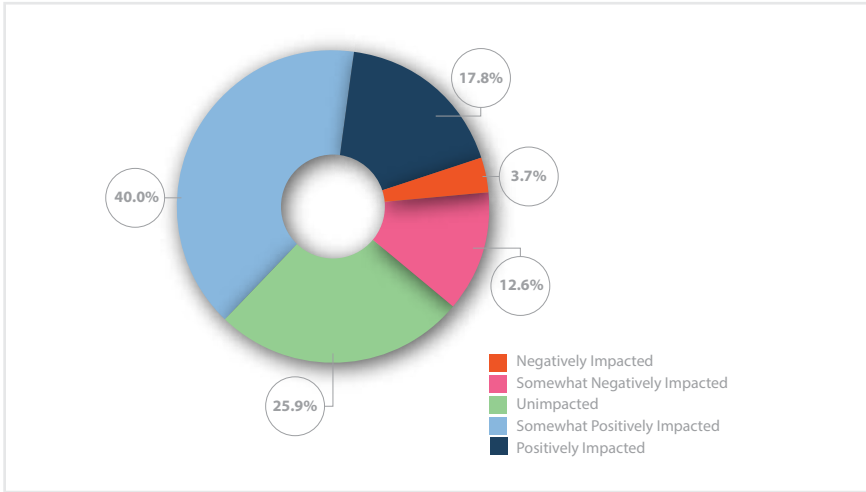


(D) When asked about the impact on their trust and confidence in the Judiciary in the following circumstances, the responses were as follows:

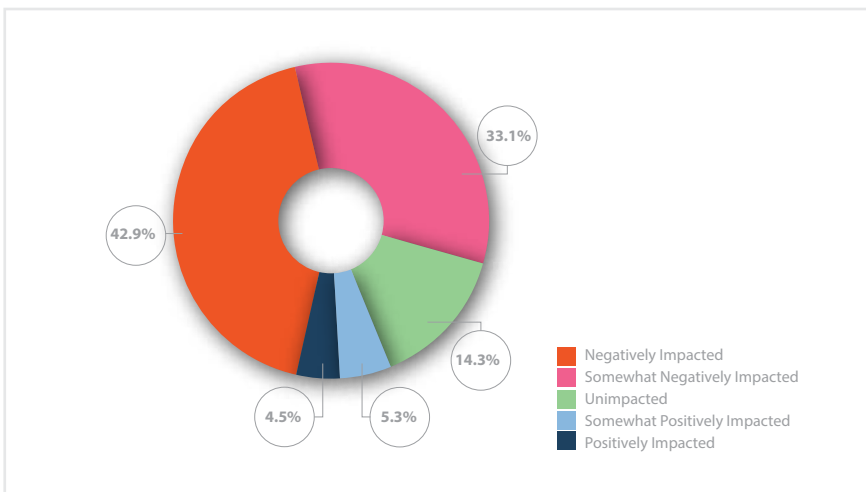
It is said that Judiciaries have control of neither armies nor treasuries, and so must rely on public trust and confidence for their legitimacy in society. Moreover, in the context of enforcement of court orders against the State, courts ultimately rely on public pressure to uphold the rule of law as a core democratic value, in order to compel the State to respect and uphold (enforce) court orders against State authorities. Public support for the Judiciary in turn depends on their degree of trust and confidence in the judicial system. Polled as how court users’ perceptions of trust and confidence would be affected by fair treatment, the following information was revealed.

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Court users were overwhelmingly of the opinion that if they were unsuccessful in a matter, but experienced the proceedings as being fair, their trust and confidence in the Judiciary would be positively or somewhat positively impacted (57.8%). The responses to this question were as follows:¹³⁷



Conversely, 76.0% of the sample¹³⁸ said that if they were successful in a matter but experienced proceedings as being unfair, their trust and confidence would be negatively or somewhat negatively impacted. The responses were as follows:



This mirrors international thinking on the topic of procedural fairness i.e. that the experience of fairness in the process has the biggest impact on trust and confidence in the Judiciary.¹³⁹

(E) When asked about desired courtroom protocols, a clear majority of the sample was in favour of the following:

- **judicial officers introducing themselves by name at the start of every case;**
- **judicial officers actively encouraging parties to express their views in court;**
- **judicial officers explaining court proceedings in non-legal language; and**
- **judicial officers explaining to parties how and why they arrived at their decisions throughout the course of court proceedings.**

When these preferences are compared with court users' experiences in relation to some of these matters (above), it is clear that there is a gap between expectation/preference and perceived experience.

What this research also shows is that an expanded notion of procedural fairness (that includes voice, respectful treatment, neutrality and trustworthiness) and that cultivates inclusivity, accountability and understanding; and access to information and availability of amenities, is what court users desire and what will build public trust and confidence in the Administration of Justice.

(F) Ethnographic Research: The Imperative for Procedural Fairness¹⁴⁰

The research further shows that there are significant public perceptions about the likelihood of favourable (discriminatory) treatment and bias (even if only unconscious) being meted out in the judicial system: whether by Judges, Judiciary staff or otherwise. The research shows that these perceptions and experiences are concentrated around specific identifiable areas that appear to be deeply embedded in the culture of the society.

These conclusions are supported by qualitative data gleaned from ethnographic interviews conducted with court users in Trinidad and Tobago. The aim of the interviews was to find out court users' experiences with regard to procedural fairness and whether the need for the four criteria of procedural fairness (voice, respectful treatment, neutrality, and trustworthiness) exists locally.

JEITT staff were trained in the conduct of rapid ethnographic assessment and conducted the interviews in two- and three-person teams with court users across Trinidad and Tobago (in person and by telephone), in the Magistrates' and High Courts and Court of Appeal. Arising out of that project, it was found



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that locally, there are in fact nine primary elements which impact Procedural Fairness in Trinidad and Tobago i.e. five in addition to the ‘international standard’¹⁴¹ four. Working definitions (constructed out of the research conducted) for these nine elements as they exist in Trinidad and Tobago are as follows:

THE NINE ELEMENTS OF PROCEDURAL FAIRNESS

Procedural Fairness: International Standards¹⁴²

Voice:

The ability to meaningfully participate in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and having them valued and duly considered (“heard”) before decisions are made.

Respectful Treatment:

The treatment of all persons with dignity and respect, with full protection for the plenitude of their rights, ensuring that they experience their concerns and problems as being considered seriously and sincerely, and having due regard for the value of their time and commitments.

Neutrality:

The independent, fair, and consistent application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel, without discrimination.

Trustworthy Authorities:

Decision makers, judicial personnel, and court systems that have earned legitimacy by demonstrating that they are competent, and capable of duly fulfilling their functions, responsibilities and duties in an efficient, effective, timely, fair, and transparent manner; and by demonstrating to all court users compassion, caring, and a willingness to sincerely attend to their justifiable needs and to assist them throughout the court process.

Procedural Fairness: Additional Local Standards

Accountability:

The need for decision makers and judicial personnel to fulfil their duties, to reasonably justify and explain their actions and inactions, decisions, and judgments and to be held responsible and accountable for them, particularly in relation to decisions, delays, and poor service.

Understanding:

The need to have explained clearly, carefully, and in plain language, court protocols, procedures, decisions, directions given, and actions taken by decision makers and judicial personnel, ensuring that there is full understanding and comprehension.

Access to Information:

The timely availability of all relevant and accurate information, adequately and effectively communicated in clear, coherent language, through open, receptive, courteous, and easily accessible decision makers, judicial personnel and systems, particularly in relation to each stage of court proceedings.

Availability of Amenities:

The need for all court buildings to be equipped with the necessary infrastructure (both structural and systemic) to enable court users full and free access to court buildings, efficient information systems, relevant operational systems, and the enjoyment of functionally and culturally adequate amenities.

Inclusivity:

The need for court users to feel that they are, and experience themselves as, an important part of the entire court process, rather than outside of or peripheral to it; non-alienation, by being made to feel welcomed and included in court proceedings and to actively, easily, and effectively participate throughout the process.

This information is critical to the role of a Judge under the CPR, where Judges have much broader responsibilities and consequential interaction with court users and where they are now permitted to be more pro-active. Ensuring procedural fairness in its broadest sense and taking steps to mitigate societal perceptions and experiences of bias are matters for urgent attention, if there is to be increasing public trust and confidence in the civil justice system in Trinidad and Tobago.



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2. IMPARTIALITY

‘Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.’

—*Benjamin N Cardozo, The Nature of the Judicial Process (1921)*¹⁴³

There can be little debate that impartiality is the *sine qua non* of fair decision making.¹⁴⁴ Impartiality can, however, be a very illusive quality to claim as guaranteed. To be impartial (as a Judge) one must be independent;¹⁴⁵ but one can be independent and not impartial (although the two principles are interrelated).¹⁴⁶ This is because impartiality is an inner state (of mind).

Thus, whereas the obvious threats to judicial independence come from outside; the threats to impartiality often come from within— from the biases that we all have, the stereotypes that we have been conditioned into believing, the judgments that we rush into and the systemic and cultural assumptions that are presumptively discriminatory.

The judicial test for unconscious or implicit bias is as set out by the Court of Appeal in **Terrence Roy v Nalini Singh**.¹⁴⁷

4. The test for unconscious bias as stated in **Porter v Magill**¹⁴⁸ ... is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

The standard is an objective one, that is contextual and fact specific. It is also the standard of a ‘fair minded and informed observer’, an ordinary citizen of Trinidad and Tobago, and not that of a legal or judicial mind.¹⁴⁹ The danger is that unconscious bias can be present and tainting both the process and decision making, yet never discerned, discovered or revealed.

The results of the JEITT Survey for the Public (as discussed above) establish that there are very serious concerns about the impartiality of the Judges in Trinidad and Tobago.

For our purposes, bias may be defined as: ‘Inclination or prejudice for or against one person or group, especially in a way considered to be unfair’.¹⁵⁰

Bias may operate in favour of or against a person and this favouritism or prejudice can be based on any number of factors, including those set out in the Constitution, i.e. race, origin, colour, religion and sex; or more broadly in the **Guidelines for Judicial Conduct**, i.e. ‘including but not limited to gender,

race, colour, religious conviction, culture, national origin, ethnic background, sexual orientation, disability, age, marital status, social, political and economic status ...'.¹⁵¹

Bias can be personal, but it can also be institutional (structural). Both of these forms of bias may be influenced and created by historical, sociological and cultural ideas and experiences and resulting assumptions. They may also be the product of explicit and/or implicit power structures that enable power, status and class divisions and oppressive and exploitative systems.

While some Judges and Judiciary staff may say that bias is the least of their concerns, the research conducted by the JEITT suggests that the perception of bias is in fact one of the significant problems that faces the Judiciary of Trinidad and Tobago. Of course, bias need not always be conscious, nor does it have to be actual— it can be unconscious and also institutional.

Institutional Bias

Institutional bias in the Judiciary occurs when the procedures, practices, institutional mechanisms and attitudes which exist within the system inherently work in favour of or against particular groups based on irrelevant or discriminatory considerations.

The Judiciary, as the arbiter of law and guardian of the Constitutional values of equality and fairness, has to demonstrate leadership in dealing with inequalities and biases which exist in its institutional systems. Public trust and confidence in the Administration of Justice is enhanced when there is the consistent experience by court users of institutional impartiality and equality of treatment.

Personal Bias

Personal bias affects how information is perceived, processed and interpreted, and how the adjudicative process is administered and decisions are made. These biases may be explicit and known, but they may also not be readily noticed and may even be unknown to the individual decision maker, i.e. they may be unconscious or implicit. Unconscious or implicit bias can have an even bigger impact on impartiality than explicit bias, because the decision maker is unaware of it while decisions are tainted by it.

Dr. Dylan Kerrigan,¹⁵² corroborating the research conducted by the JEITT explains the existence of bias in Trinidad and Tobago as follows:



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Biases within our society include: Race, Gender, Class, Religion, Ethnicity, Location, Profession, Sexuality, Language and Appearance, Education, Disability, Age and Nationality.

The dominant list of these biases (i.e. those perceived with most power in our society are): White, Male, Wealthy, Christian/Catholic/Hindu, Light Skinned, North/POS, Elite Profession, Heterosexual, Standard English, Professional Dress, Tertiary Educated, Ableism/Ableist, Middle-aged, and Euro-American.¹⁵³

There is therefore a clear problem in Trinidad and Tobago, with the perception of unfair treatment being presumed in several of the stated categories. These perceptions are not Judiciary specific, as demonstrated by Dr Kerrigan's findings, and seem to be more deeply embedded in the national culture. Despite this, it is the responsibility of the Judiciary to take positive steps to ameliorate these presumptive perceptions of inequality of treatment in the Administration of Justice.

The good news is that with awareness and training, Judges can be in a position to play their role while consciously ensuring that the areas of perceived societal bias are addressed and other deficits in achieving procedural fairness are ameliorated.

3. SELF-REPRESENTED AND UNDER-REPRESENTED LITIGANTS

Both self- and under-represented litigants are a growing occurrence in Trinidad and Tobago. Both create special concerns for the civil justice system.

Judges and the court system assume legal representation and rely on it to achieve desirable standards of effectiveness and efficiency, as well as to meet institutional and personal performance standards. Pride in one's work and zealotness to perform at high levels of excellence often result in emotional reactivity towards both self- and under-represented litigants. Judges often experience a sense of frustration, anxiety and even anger. Being aware of one's emotional reactivity is important, because what is really at stake are the core judicial values of equality and fairness and the constitutional prerogative of access to justice.¹⁵⁴

Both self- and under-represented litigants must be treated no differently from all other litigants, in that they must be the beneficiaries of an objective standard of fairness. They are equally entitled to have their matters dealt with justly and certain accommodations may be necessary in order to do so.

Self-Representation

It is useful to remember social context when dealing with self-represented litigants. Who is this person? Why are they self-represented? They may lack resources, be suspicious of and lack trust in the judicial system, and may belong to vulnerable groups in the society— such as people who are under the poverty line, women, children, people with learning challenges. In addition, some people also think that it is easy to represent themselves and that they can do ‘as good a job as any attorney’. And, some are simply ‘vexatious’ litigants. All of these categories (among others) create special challenges for Judges, and all are entitled to equality of treatment and fundamental fairness. Indeed, it may be that, given the new pro-active role of the CPR Judge and in order to achieve fairness and equality, the self-represented litigant may even be entitled to a form of judicial ‘affirmative action’.

The obvious challenges in dealing with self-represented litigants include the following:

First, Language. Self-represented litigants simply do not write or speak in ‘legalese’. They may also not write or speak English (or standard English). The consequence is that their capacity to understand what is happening and to meaningfully participate in the process, as well as to feel included (and not alienated) are all severely compromised.

Second, most are quite unaware of or unpractised in relation to both procedural and substantive law. The lack of knowledge of practice and procedure as well as the rules of evidence makes for innumerable challenges for Judges in both case management and at a substantive hearing. And, create a real disadvantage for these litigants.

Third, there may be very real resource and power imbalances between self-represented litigants and the other parties.

These can all be barriers to access to justice. As well, all of these factors can create great challenges to dealing with a case justly, as demanded by the overriding objective of the CPR and as discussed above.



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Under-Representation

In the case of under-representation, the challenges often pose even greater challenges for the CPR Judge.

Under-representation raises the issues of attorney competency and the adequacy of representation, and therefore of the limits of judicial reticence and intervention.

Issues include:

- I. How far can a Judge go in pursuit of fairness; or in explaining procedure, law and decisions before they compromise the core value of Impartiality?
- II. Where does Independence end and partiality begin?
- III. What are the limits of a Judge's duty where there is under-representation?

In general terms, fairness is the most important guideline.¹⁵⁵ Tactfulness and care are required, as is attention to even-handed communication. If procedure or law is being explained, explanations ought to be directed to all parties. Explanations must also be communicated in clear non-legal language, ensuring that there is understanding. Care must also be taken to give all parties equal voice. Respect is non-negotiable.

Ultimately, courts are courts of justice, not of law or procedure. Courts are called upon to do what is right and fair— what is just; and Judges are also expected to and should be civil, respectful, courteous and helpful to all those that they dispense Justice to.

In the CPR era, the new role of the Judge is demanding and extends beyond what have been the common practices and expectations of the past. It has already been suggested that fairness is generally an important touchstone. With both self- and under-represented litigants, another vital consideration is the distinction between 'information' and 'advice'. This distinction can at times be a fine line, but Judges in the CPR era are permitted, in the exercise of their Independence, to share information, including information about procedure and law with all parties; what is not generally permitted is to give advice.

The following very general guidelines are offered as a starting point for managing cases involving self- and under-represented litigants (though the guidelines may also be of general use):

- ✓ Begin by introducing yourself, and explaining the court's protocols and expectations (be case specific);
- ✓ Be cordial and courteous at all times, even when being firm and decisive;¹⁵⁶
- ✓ Ensure equal treatment of all parties; even in the simplest things, such as the way parties, witnesses and attorneys are addressed. As discussed throughout this publication, equality of treatment depends on the individuals involved and does not mean that everyone receives the same treatment;
- ✓ Pay attention to courtroom communication: written, verbal and non-verbal. It should be clear, easily understood by all parties and unbiased; Confirm whether English is a first language or sufficiently understood. If not, find an effective means of communication;
- ✓ Quality focused and clear and decisive pre-trial management will facilitate the adequacy of case management and pre-trial explanations;
- ✓ Information should be given in small amounts at a time. Too much information can result in information overload. Clarification about understanding should constantly be sought;
- ✓ Practice active listening.¹⁵⁷ Avoid the excessive use of legalese, and explain all legal jargon. Check to confirm that there is understanding;
- ✓ Take the time to explain the procedure for each discrete event throughout the entire process;
- ✓ Take the time to explain the purpose of the process; doing so for each discrete event throughout the process;
- ✓ Be clear in explaining what the issues are, explaining what is required to prove and disprove each issue;



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- ✓ Explain the necessity for proof and the types of proof that are permissible (e.g. oral testimony, documentary evidence, expert evidence), including what evidence is admissible and inadmissible. Also, explain the difference between facts and opinions and when the latter are of probative value. Do this before disclosure and witness statements/summaries are ordered;
- ✓ Explain before the trial begins what are the relevant protocols and procedures, and the kinds of questions that can be asked (giving examples of what is and is not permissible);
- ✓ Explain the burden of proof and standard of proof in clear and understandable language. Check to confirm that there is understanding;
- ✓ Be astute to the possibility of a lack of or impaired mental capacity for the purposes of conducting litigation (a general threshold being the ability to be able to understand what is happening and to meaningfully participate in the proceedings); and
- ✓ Give an assurance (and follow through on it) that throughout the proceedings there will be explanations given and the permission that questions can be asked as and when the need arises.

4. SOCIAL CONTEXT TRAINING

For the CPR Judge to assume their role in its fullest potential, it is both necessary and essential that they avail themselves of social context training. This is even more urgent in diverse communities, such as the multi-ethnic, multi-religious, plural society that is Trinidad and Tobago. The diversity in Trinidad and Tobago includes the existence of discrete sub-cultures with their own idiosyncrasies.

Social context training is premised on the insight that truly impartial decision making arises out of a genuine appreciation for the social contexts of parties, witnesses and the matter before the court. CPR Judges are called upon to be interpreters of difference.¹⁵⁸

The first step in social content training is awareness; awareness of one's own social, economic and cultural differences and one's own often unconscious biases towards and sometimes conscious stereotypes about those perceived

as ‘other’. There are many resources available that can help one become self-aware, including self-tests.¹⁵⁹ Taking self-tests is encouraged, because awareness alone is not enough. Acceptance of the fact of one’s biases is also necessary. As stated above, bias can result in favourable treatment as well as unfavourable treatment. Therefore, there also has to be awareness of the impacts of our biases.

We all suffer from what may be called ‘cultural myopia’, which is based on the wrong assumption that the way we see things is the way they are, and that all others see things in similar ways. This results in a lack of interest in being open to learning about cultural differences, or in being able to appreciate what is of value in other cultures. Cultural myopia is reinforced by the fact that generally we tend to associate with the same or similar groups, and so there is a self and group reinforcing feedback pattern that we experience as confirmatory of our world views and value systems. Of course, our cherished values and considered views are simply not the whole truth. ‘Truth’ and belief are after all very subjective and always perspectival; though in their partiality there are often elements of commonality and shared insights that can be discovered between different perspectives.

The issue of privilege must also be considered. Culturally, certain groups are afforded unearned benefits, e.g. respect based on wealth or social status.¹⁶⁰ This therefore affects how these groups are treated, but it also affects the members of these groups’ outlooks. In addition, privilege (and cultural myopia) may also mean that we simply are not aware of some issues. Issues that may be of great importance to some members of society may not even register with others.

Through training, awareness and acceptance, Judges and Judicial staff can continuously engage practices to ameliorate bias and skewed perceptions—which is the content of social context training.

Some very broad and practical interventions that facilitate social context awareness include the following:

- (A) Being exposed to media by authors of diverse backgrounds (including but not limited to cultural, religious, ethnic and socio-economic differences);**
- (B) Interacting with an intention to learn with and from groups that are different— in culture, religion, ethnicity and socio-economic standing;**
- (C) Becoming self-aware of when your emotional ‘triggers’ are being set off, and inquiring into root causes, searching for stereotyping assumptions and/or elements (often unconscious) of bias;**



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- (D) Immersing oneself periodically in different and diverse cultural, religious, ethnic and socio-economic experiences; and
- (E) Being aware of the concept and impact on court matters of intersectionality⁶¹ and adapting one's approach to achieve equality of treatment sensitive to the overlapping and interdependent discrimination and/or disadvantages that the individual (or group) before the court may be facing.

5. EFFECTIVE COMMUNICATION

Effective communication is central to dealing with cases justly. When we say that justice must not only be done, but also be seen to be done, we mean that court users must subjectively and reasonably experience justice as being done. It thus is 'seen' to be done.

Communication is central, because all persons involved in legal proceedings must understand what is taking place and why it is being done that way. In addition, care must be taken to ensure that everyone involved in the process is properly understood.

Understanding is, therefore, critical to the legitimacy of the legal process, and a core responsibility of the CPR Judge. It is the Judge's duty to ensure in an open court system, that attorneys, parties, witnesses (and even the public) understand the essential elements of court processes, events and decisions. Care must therefore be taken to explain matters and check for understanding at all times.

Inclusivity is also central to effective communication. Parties, witnesses, attorneys and court staff who feel alienated, left out or excluded from (or by) the process, experience it as unfair and discriminatory; ultimately, as unjust. Therefore, every effort must be made to ensure that there is meaningful participation throughout the court process. Again, respect is non-negotiable.

Some useful guidelines to aid effective communication are as follows:

- ✓ At the beginning of and throughout proceedings, communicate so as to put participants in the process at ease, creating a safe and trustworthy environment. Use simple language and give clear and concise explanations;
- ✓ Always monitor and confirm understanding;

- ✓ Do not assume that silence indicates understanding;
- ✓ If in doubt, test for understanding by inquiring of the attorney, party or witness, or court staff if they understand or, if they mean what they appear to have said;
- ✓ Be aware that cultural context shapes and informs communication. Words and phrases can mean entirely different things to different people;
- ✓ Be aware that a perception of partiality or unfairness can be the result of inappropriate language or conduct. Take care to be conscious of both verbal and non-verbal ‘messages’ that tone, expression, posture and interaction can convey;
- ✓ Demonstrate fairness at all times and in everything that is said and done. Fairness does not require treating everyone in the identical way. Fairness is contextual. Treat like alike. It is fair to treat a self-represented litigant differently from an attorney; equality of treatment permits differential treatment for different situations;
- ✓ Be alive to situations of disadvantage. It is permissible to take steps to address such situations provided no unnecessary prejudice is caused to another party; and
- ✓ Actively listen to attorneys, parties and witnesses. Effective communication is a two-way experience. Active listening requires the listener hear what the speaker is saying with an open, receptive and non-judgmental attitude (i.e. without pre-judgment) and not merely to wait for a chance to speak/respond. Active listening is premised on the willingness to discover truth, and the genuine desire to understand and appreciate other points of view.

The fundamental right to dignity, means that effective communication must also be respectful communication (respectful of the inherent worth and dignity of all human beings). In the context of dealing justly, Judges may consider the following four precepts (which can serve as guidelines) for respectful and effective speech:

- (A) Does it need to be asked/said?;
- (B) If so, does it need to be asked/said at this time?;



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- (C) Of/to whom does it need to be asked/said?; and**
- (D) How can it be asked/said so as to communicate respectfully, fairly and effectively?**

The CPR Judge has a positive duty to ensure that all parties, witnesses and attorneys experience the court process as enabling fair treatment— that they feel fully heard and understood and respected, and that they have full and meaningful participation in the legal process. This is a constitutional duty, about which there can be no compromise.

6. PEOPLE WHO ARE VULNERABLE AND PEOPLE WHO ARE DIFFERENTLY ABLED

It may appear harsh to say but, in Trinidad and Tobago, the regard and respect paid to people who are vulnerable and people who are differently abled is still below what is internationally normative and what is demanded by the many international treaties that Trinidad and Tobago has endorsed.¹⁶²

What is true for the Nation is no less true for the Administration of Justice in Trinidad and Tobago. However, over the last decade, definite steps have been taken by Judges to right these wrongs,¹⁶³ but much more is still to be done.

People who are differently abled may be classified as vulnerable, but people who are vulnerable are a larger group and include, for example, those that are socio-economically disadvantaged or lacking an adequate support system.

The CPR demands equality and fairness of treatment for all persons. The CPR Judge is duty bound to ensure that people who are vulnerable and people who are differently abled are treated so as to ensure that their matters are dealt with justly. The overriding objective and the principles that inform ‘dealing justly’, permit the CPR Judge to accommodate these special needs so as to deal with all matters justly. This is in keeping with the constitutional duty to ensure a fair trial.

The following guidelines are suggested:¹⁶⁴

- (A) Accommodating special needs permits a Judge to be flexible in relation to all aspects of court proceedings, once the steps taken are fair and cause no unnecessary prejudice to other parties;
- (B) Judges are required to be alert to the special needs of both parties and witnesses that are vulnerable and those that are differently abled; including what is required for effective communication;
- (C) Court procedures can be reasonably adapted to facilitate the effective and meaningful participation of all parties and witnesses. The steps taken ought to be intended to ameliorate and compensate for any disadvantages which accompany the vulnerable status of the parties or witnesses or their being differently abled;
- (D) Where there are vulnerable witnesses or parties, steps should be taken to safeguard these persons without creating unnecessary or disproportionate unfairness or prejudice;
- (E) Sensitivity to the special needs of both people who are vulnerable and people who are differently abled is important. A Judge has a duty to discover and know what these needs are and how they can be addressed to deal with cases justly;
- (F) This duty to know and understand the effects of vulnerabilities and being differently abled and how they can create unfairness in the court process, includes the duty to know and understand:
 - I. The impact of physical, psychological, cognitive and sensory impairment;
 - II. The disadvantages and difficulties experienced as a consequence of unaccommodating systems and facilities; and
 - III. The effects of decisions and procedures on court users.

The aim of fairness is to ensure that all parties and their witnesses and all court users that are vulnerable people or people who are differently abled are enabled to participate fully and meaningfully in the entire court process, from start to finish. Accommodating individual circumstances and the needs of persons is necessary for fairness and equality of treatment, and for a fair process, and to ensure that all matters are dealt with justly. Reasonable and proportionate steps can always be taken to balance competing interests and to accommodate parties so that overall fairness is achieved and therefore



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justice served throughout the process. Such steps ought not to be considered prejudicial.¹⁶⁵

The CPR Judge has a positive duty to pro-actively seek out and address these special needs. As a rule of thumb it is appropriate, when a Judge considers that intervention may be necessary, to inquire into what may be needed (rather than the nature or extent of any disability). Such an approach is consistent with the overriding objective of the CPR, particularly CPR 1.1(2)(a): ‘ensuring, so far as it is practicable, that the parties are on equal footing’.

This principle of ‘equal footing’ permits the CPR Judge to pro-actively manage cases so as to ensure that all persons with any kind of disability or disadvantage, are accommodated in order for every case to be dealt with justly.¹⁶⁶

CONCLUSION

I. TRANSFORMATIONAL SERVANT LEADERSHIP

It is clear that the CPR Judge is called upon to be both a leader and a manager—one person, two roles. As leader, the CPR Judge has to get their staff, attorneys and court users to understand and believe in the new vision of dispensing justice in the civil arena that the CPR mandates.

In addition, as leader, the CPR Judge has to inspire and motivate Judiciary staff, attorneys and court users to work with them to achieve the primary goals of the CPR.¹⁶⁷

The Judge as manager is ultimately responsible for the due administration of the CPR, and for making sure that what needs to be done is done. The CPR Judge has to ensure that at every stage and in every sphere of activity under the CPR, things are happening as they should according to the scheme of the CPR and so as to meet qualitative and quantitative performance standards and to further both the general and specific goals of the CPR. Essentially, there are two core management goals of the CPR, dealing justly with and facilitating the just disposition of all matters that come before the civil courts.

The CPR judge is called upon to be a Transformational Servant Leader, focused on both ‘production’ and ‘people’.

The CPR must be interpreted and applied effectively, efficiently and economically, so as to deal with each and every matter justly. In addition, all court users— litigants, witnesses, attorneys (including court staff), must be treated with respect, fairness, equality and with due regard for the inherent dignity of all people. Additionally, inclusivity and meaningful participation must be facilitated for the benefit of all court users. The CPR Judge must therefore ensure that the institutional goals of the CPR are met, as well as the legitimate needs of the people who engage the civil courts.

Service is thus at the centre of the vocation of a CPR Judge. Judges are appointed to uphold the Constitution and to administer the law, and in doing so to serve society and people through the delivery of justice.



CONCLUSION

2. MINDFULNESS, HUMILITY AND COMPASSION

To achieve these aspirations and to play these roles, the CPR Judge must acquire the skill of Judicial Mindfulness, the capacity for Judicial Humility and the art of Judicial Compassion.

(A) Judicial Mindfulness

Judicial Mindfulness¹⁶⁸ is the ability to be fully present to what is happening at every moment in relation to all relevant considerations in the context of the civil court process (and not caught up in the past or future or with irrelevant or only some relevant considerations), with an attitude of openness and receptivity (non-judgmentally), and with the intention to deal with each case justly, fairly, effectively and according to the evidence, the law and the Constitution (purposively).

Judicial Mindfulness requires the CPR Judge to have moment to moment awareness simultaneously in four quadrants: the individual interior and exterior, as well as the collective interior and exterior.

Individually, this means that the CPR judge must be fully aware of their internal state of mind (thoughts, feelings, attitudes, values, biases etc) and external behaviours (tone of voice, facial expressions, body language and other non-verbal characteristics etc). Collectively, the CPR Judge must also be aware of the internal, cultural, systemic and institutional values that are at play in the court system, the society and individual matters; as well as the external physical, infrastructural, systemic, structural, behavioural and linguistic realities that exist and are operating in the court system, the society and in each matter.

This three hundred and sixty degree awareness (four quadrant perspective), is essential if the CPR Judge is to truly achieve the aims of dealing justly with each matter and treating equally and fairly with all court users, that the CPR aspires towards.

Practically, the following simple guidelines are suggested: Whatever the task, bring to it your full attention, willingness (open engagement with each event) and the appropriate intention (purposiveness to deal with cases justly).

These three factors (full attention, willingness and intention) underpin the right judicial attitude in every situation. 'Check in' with yourself ever so often and ensure that these three are aligned appropriately before the work of judging begins. Whenever your attention to the task at hand wanders off,

simply bring it back to what you ought to be doing at that moment, i.e. bring it back to Judicial Mindfulness. Do the same whenever your willingness weakens or intention becomes tainted. **Judicial Mindfulness is being fully conscious at every moment of the work that you are called to do and of your mental state and behaviours when doing it, and of all relevant external circumstances, ensuring in particular that the imperatives of procedural fairness are always met.**

(B) Judicial Humility

The practice of Judicial Humility also assists in achieving these above-mentioned goals, and facilitates the goals of fairness and contextually relevant fact finding and legal interpretation/application.

Judicial Humility is premised on the insight that, whereas we often assume that we see things as they are, we actually ‘see’ things as they appear to us. This insight, about the inherent subjective element in all perception, is equally true in relation to interpretation.

As both finders of fact and interpreters of the law, Judicial Humility reminds the CPR Judge that their views (like everyone else’s) are partial. Thus, while every partial view likely contains elements of truth, the more perspectives that can be received and considered, increases the likelihood of discovering ‘the whole truth and nothing but the truth’.

Judicial Humility creates in the CPR Judge a truly open and receptive mind. A mind that is appreciative of different points of view, recognising the partiality of its own perspectives and the value of all others. Suspending premature judgment is the hallmark of judicial humility. Indeed, what is required is a species of ‘self-emptying’, whereby one empties oneself of all pre-conceived notions about a matter and of all self-interests and desires in relation to the matter. The CPR Judge who is truly in search of the ‘whole truth’ (as revealed on the available evidence) and of the most legitimate and contextually relevant interpretation and application of the law, knows that the best decisions are arrived at by having an open and receptive heart and mind, and after having invited and appreciatively considered all available perspectives and opinions, viewing all on their merits and with equal respect and regard. A question to ponder is whether the CPR Judge is called to be a ‘Great Judge’ or a Judge who is good, even excellent, at what they are tasked to do?



CONCLUSION

(C) Judicial Compassion

Judicial Compassion¹⁶⁹ is another quality that a good CPR Judge ought to possess. It is the ability to rationally approach their responsibilities with positive care, consideration and due regard for all court users, court staff and attorneys, and as well for colleagues and the general public.

Judicial Compassion is a rational, jurisprudential, cultural and societal sensitivity for the well-being of both people and the law as they intersect in the context of the CPR.

It is an ‘experiencing with’ court users that leads to greater understanding and insight in relation to any particular matter. Seen this way, judicial compassion is a value-free capacity that is an aid to understanding and insight, and therefore to just decision making. It is particularly relevant in diverse and plural societies where judges must seek to understand what all court users think, feel, perceive and understand in any given situation.

Judicial Compassion becomes compassionate independence and impartiality, moving towards just decision making, when CPR Judges:

- I. do not prematurely take sides (suspension of pre-judgment);
- II. hold the tension and balance between opposing contentions, alive to their potential to reveal new and more just insights;
- III. welcome and consider all perspectives, recognizing that perspectives other than their own can hold the potential for dealing with cases justly; and
- IV. remain constantly sensitive to the legitimate needs of all court users and the imperatives of procedural fairness; ultimately making decisions that are in touch with unfolding societal needs.

This attribute of Judicial Compassion both arises out of and feeds into Judicial Mindfulness and Judicial Humility, and together these three form an interlocking triad of core internal mindsets that facilitate the execution of the judicial function in ways that fulfil the highest aspirations of the CPR.

The result can be Judicial Equanimity or Judicial Poise that exemplify the highest ideals of the CPR Judge. Indeed, these three can together culminate in Judicial Wisdom—¹⁷⁰ just resolutions contextually tailored to the needs of each particular case, duly aligned with appropriate legal principles and values that advance the purpose and intent of the Constitution, the Law and Justice.

3. A NEW AND DIFFERENT ROLE

The role of the CPR Judge is both necessarily new and different, and the CPR and changing times make the requirements discussed in this publication imperative. They should not be applied by some Judges and not by others. The Judge controls the courtroom and as such, certain minimum standards are to be expected by the members of the public that come to court. After all, it is their business that is being attended to.

Some of the considerations and practices set out above should apply to all court users, although they were highlighted in specific sections. As Judges, this is a part of the management function. It is also a part of their leadership duty. Discretion is exercised by how liberally the considerations are applied and at times they may be set aside, depending on the circumstances of each case.

By implementing these specific practices and, more importantly, by actively engaging in the mindsets and general practices set out, it is hoped that a fairer and more just experience will be created for court users, as the overriding objective of dealing with cases justly is pursued. Naturally this will create not only a fulfilling experience for CPR Judges, but more importantly, this will generate increasingly broader and deeper levels of public trust and confidence in the Administration of Justice in Trinidad and Tobago.



ENDNOTES

1. Justice Peter Jamadar is a Court of Appeal Judge in Trinidad and Tobago, and the Chairman of the Judicial Education Institute of Trinidad and Tobago (JEITT). Kamla Jo Braithwaite is a Judicial Research Counsel II assigned to the JEITT. Research assistance on this publication was provided by Sumintra Singh (Judicial Research Counsel II), Mukta Balroop (Judicial Research Counsel I), Trisha Dassrath (Judicial Research Officer, JEITT) and Johanna Daniel (Judicial Research Counsel I). Assistance with finalising the manuscript was provided by Kelsea Mahabir (Research and Publications Specialist, JEITT), Elron Elahie (Legal Research Assistant, JEITT), and Kavita Deochan (Judicial Research Counsel I).
2. This Oath can be found in the First Schedule of the **Constitution of the Republic of Trinidad and Tobago**, as provided by s 107. <<http://laws.gov.tt/pdf/Constitution.pdf>> accessed 26 July 2017.
3. p i. <<http://www.ttlawcourts.org/index.php/component/attachments/download/2332>> accessed 26 July 2017.
4. The **Consolidated Civil Proceedings Rules 2016** was produced with the approval of the Rules Committee and incorporate all amendments to the **Civil Proceedings Rules 1998** (CPR) as well as cases with written decisions relevant to the CPR. However, they are not an official update to the CPR. The **Consolidated Civil Proceedings Rules 2016** is available in electronic format via the JEITT's e-book platform <www.ttlawcourts.org/jeibooks> accessed 1 November 2017.
5. In this publication, the term 'Judge' refers to all Judges, Masters and Registrars that administer the CPR (CPR Judge).
6. Foreword to the CPR, p vii.
7. (Also, Chief Justice of Western Australia) *Future Directions in Judicial Education* pp 3-4 (Supreme Court and Federal Court Judges' Conference, Wellington New Zealand, 2011) <http://www.supremecourt.wa.gov.au/_files/Future_Directions_in_Judicial_Education_January_2011_NZ.pdf> accessed 26 July 2017.
8. **Constitution**, s 2.
9. The **Statements of Principle and Guidelines for Judicial Conduct** <<http://www.ttlawcourts.org/jeibooks/books/GuidelinesforJudicialConduct.pdf?1>> accessed 26 July 2017, are aligned with the **Bangalore Principles of Judicial Conduct 2002** <https://www.unodc.org/pdf/corruption/bangalore_e.pdf> accessed 26 July 2017.
10. Emphasis added.
11. s 5(2)(e).
12. s 5(2)(f)(ii).
13. [2000] 2 AC 1, 22 [B]–[D] (emphasis added).
14. s 4.
15. p 58.
16. pp 60 and 61.

17. (n 15).
18. This expanded meaning of equality is supported by Professor Rose-Marie Belle Antoine, *The Rule of Law v Ruling by Laws: Promoting Development in Caribbean Societies*.
19. **Annissa Webster and others v The Attorney General of Trinidad and Tobago** [2015] UKPC 10 [24]–[25] <<https://www.jcpc.uk/cases/docs/jcpc-2013-0048-judgment.pdf>> accessed 26 July 2017.
20. As discussed below (at p 62), **Judicial Mindfulness** is the ability to be fully present to what is happening at every moment in relation to all relevant considerations in the context of the civil court process.
21. Both procedural and substantive law.
22. **Le Lys Rouge** (The Red Lily) (1894) Chapter 7.
23. [2006] CCJ 3 (AJ) [60] (de la Bastide and Saunders JCCJ) (emphasis added) <http://www.caribbeancourtsofjustice.org/wp-content/uploads/2012/02/3.-Judgment_-_President_Hon_Justice_Saunders.pdf> accessed 26 July 2017.
24. [2015] CCJ 15 (AJ) [47] (emphasis added) <<http://www.caribbeancourtsofjustice.org/wp-content/uploads/2015/10/2015-CCJ-15AJ.pdf>> accessed 26 July 2017.
25. (n 24). Also **The Attorney General of Trinidad and Tobago v Oswald Alleyne and 152 Others** CA Civ No 52 of 2003 <http://webopac.ttlawcourts.org/LibraryJudgments/coa/2003/mendonca/CvA_03_52DD20dec2011.pdf> accessed 26 July 2017; and **Jason Bissessar v The Attorney General of Trinidad and Tobago** CA Civ No P136 of 2010 <http://webopac.ttlawcourts.org/LibraryJudgments/coa/2010/bereaux/CvA_10_P136DD31jan2017.pdf> accessed 26 July 2017.
26. **R v Sussex Justices, ex parte Mc Carthy** [1924] 1 KB 256 <<http://www.bailii.org/ew/cases/EWHC/KB/1923/1.html>> accessed 31 October 2017.
27. 'A judge's knowledge of the law extends not only to substantive and procedural law, but to the real life impact of law.' **Guidelines for Judicial Conduct**, Principle of Competence and Diligence, Commentary 4 p 66. Also Commentaries 3, 4 and 5 on the Principle of Integrity pp 16 and 17.
28. CPR 1.3.
29. Foreword to the CPR, p iv.
30. CPR 1.1(i).
31. Foreword to the CPR, pp iv–v.
32. (n 6). Also **The Attorney General v Keron Matthews** [2011] UKPC 38 [19] <<https://www.jcpc.uk/cases/docs/jcpc-2010-0068-judgment.pdf>> accessed 26 July 2017; and **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 [28]–[31] <<https://www.jcpc.uk/cases/docs/jcpc-2009-0033-judgment.pdf>> accessed 26 July 2017.



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33. **United Nations General Assembly, A/62/885** (19 June 2008) <https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/Nuremberg%20Declaration%20UNGA.pdf> accessed 26 July 2017.
34. **Roland James v The Attorney General of Trinidad and Tobago** CA Civ App No 44 of 2014 [52] ‘The aim of the overriding objective is to deal with cases justly.’ <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2014/mendonca/CvA_14_44DD19dec2014.pdf> accessed 26 July 2017.
35. **Trincan Oil Limited and Others v Chris Martin** Civ App No 65 of 2009 [20] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2009/jamadar/CA_09_65DD00May2009.pdf> accessed 26 July 2017.
36. **United States of America v Jack Austin Warner and The Attorney General of Trinidad and Tobago** Civ App No P204 of 2016 [26] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2016/mendonca/CvA_16_P204_DD16dec2016.pdf> accessed 26 July 2017.
37. CPR 1.2(2); **Rain Forest Resorts Limited and Another v The National Gas Company of Trinidad And Tobago Limited and Super Industrial Services Limited v The National Gas Company of Trinidad And Tobago Limited** Civ App Nos P186 and 190 of 2016 [29] (Jones JA) <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2016/j_jones/CvA_16_P186DD23nov2016.pdf> accessed 26 July 2017; and **The Attorney General v Universal Projects Limited** [2011] UKPC 37 [12] <<https://www.jcpc.uk/cases/docs/jcpc-2010-0067-judgment.pdf>> accessed 26 July 2017.
38. **Her Worship Magistrate Marcia Ayers-Caesar and Another v BS (by his kin and next friend Karen Mohammed)** Civ App No 252 of 2015 [31] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2015/jamadar/CvA_15_P252DD15dec2015.pdf> accessed 26 July 2017.
39. CPR 1.1(2), states:
Dealing justly with the case includes—
- (a) ensuring, so far as is practicable, that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with cases in ways which are proportionate to—
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously; 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.
40. **Rain Forest** (n 37) [31] (Jones JA).
41. pp i–ii.

42. (n 32) [23].
43. **Neutrice Greaves v Nina Grant** CV 2010–00647 [26]: ‘Parties are constrained by the **CPR 1998** to assist the Court in furthering the Overriding Objective. This entails making use of ADR measures as available to settle their matters.’ <http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/PEMBERTON/2010/cv_10_00647DD28sep2012.pdf> accessed 26 July 2017.
44. p v.
45. p vi.
46. (n 6).
47. cl 6.1 CPR Pre-Action Protocols Practice Direction (15 November 2005). See also **Estate Management and Business Development Company Limited v Saiscon Limited** Civ App No P104 of 2016.
48. cl 1.4 Pre-Action Protocols (n 47).
49. CPR 25.1. See also **Estate Management** (n 47) and **Rain Forest** (n 37) [67].
50. CPR 25.1 provides that:
- The court must further the overriding objective by actively managing cases which may include—
- ...
- (c) encouraging the parties to use the most appropriate form of dispute resolution including, in particular, mediation, if the court considers that appropriate and facilitating their use of such procedures’;
- ...
- (e) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;
- ...
51. Appendix, Table 1: Statistics taken from the Judiciary of Trinidad and Tobago’s Annual Report for 2005-2006 <<http://www.ttlawcourts.org/images/annualreports/ar20052006.pdf>> accessed 25 July 2017.
52. Appendix, Table 2.
53. Appendix, Table 3: Statistics taken from the Judiciary of Trinidad and Tobago’s Annual Reports for 2014-2015 <<http://www.ttlawcourts.org/images/annualreports/ar20142015.pdf>> accessed 24 July 2017, and 2015-2016 (the 2015-2016 Annual Report has not yet been published).
54. Appendix, Table 4.
55. Because of the uncertainty with regard to the other categories, this percentage is probably higher, because it could include matters in the category ‘Claim Struck Out/... Dismissed’, which accounts for an average over the two years of 14.9% of matters.



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56. Jamaica's **Civil Procedure Rules, 2002**, Part 74— Mediation. CPR 74.3 reads as follows:
- (1) Subject to paragraph (2), this part applies to all matters arising in the civil jurisdiction of the court except for:
 - a) fixed date claims under Rule 8.1;
 - b) administrative law proceedings under Part 56;
 - c) writs of Habeas Corpus under Part 57;
 - d) bail applications under Part 58;
 - e) non-contentious probate proceedings under Part 68; and
 - f) admiralty proceedings under Part 70.
 - (2) A judge or master may by order direct a mediation in any proceedings.
57. **Civil Procedure Rules of the High Court of the Supreme Court of Judicature of Guyana**: Part 26— Court Ordered Mediation. CPR 26.01 reads as follows:
- (1) All parties are encouraged to and may, without permission of the Court, refer their dispute to mediation at any time prior to a Pre-Trial Review.
 - (2) Notwithstanding sub-Rule (1), the Court may, on its own initiative or upon application, order any or all parties to a proceeding to participate in a mediation.
58. See Hazel Genn (2012) *What Is Civil Justice For? Reform, ADR, and Access to Justice*, Yale Journal of Law & the Humanities: Vol. 24: Iss. 1, Article 18 <<http://digitalcommons.law.yale.edu/yjlh/vol24/iss1/18>> accessed 26 July 2017.
59. 101 matters were fully settled and 19 were partially settled.
60. (n 6).
61. (n 29); **Bernard v Seebalack** (n 32) [23].
62. **USA v Warner** (n 36) [28].
63. (n 34).
64. **Rain Forest** (n 37) [67] (Jones JA) and **Bernard v Seebalack** (n 32) [28]-[31].
65. (n 38).
66. **Celebrating 50 Years of an Independent Court of Appeal of Trinidad and Tobago 1962-2012**, Judicial Education Institute of Trinidad and Tobago (2015), p 50 <<http://www.ttlawcourts.org/jeibooks/books/independentcourtsofappeal.pdf>> accessed 26 July 2017.
67. **Real Time Systems Limited v Renraw Investments Limited and Others** [2014] UKPC 6 [14]-[17] <<https://www.jcpc.uk/cases/docs/jcpc-2012-0056-judgment.pdf>> accessed 26 July 2017.
68. (1996) 47 WIR 459, 467[h].
69. (n 38).



70. Preamble to the 1976 Republican Constitution.
71. Overriding Objective, CPR 1.1(1).
72. CPR 27.5(2) is in service of this procedural fairness requirement.
73. p 65.
74. See **Estate Management** (n 47).
75. (n 38) [31].
76. With the exception of the Pre-Filing/Pleadings sphere, these stages apply to appeals as well as first instance matters, albeit in different iterations (in appeals, the grounds of appeal function as the bases of review).
77. ‘The parties are required to help the court to further the overriding objective’.
78. Pre-Action Protocols (n 47), particularly cl 1.4 which states the objectives of the pre-action protocols and cl 6.1 which encourages settlement, and the avoidance of litigation.
79. CPR Parts 8 and 10 and CPR 72.8. Also **Bernard v Seebalack** (n 32) [15]–[16] and [22]–[28], **First Citizens Bank Limited v Shepboys Limited and Another** Civ App No P231 of 2011 [39]–[42] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2011/mendonca/CvA_11_P231DDIomar2015.pdf> accessed 26 July 2017; and **MI5 Investigations Limited v Centurion Protective Agency Limited** Civ App No 244 of 2008.
80. Pre-Action Protocols (n 47). Also **The Chief Fire Officer and Another v Sumair Mohan** Civ App No 45 of 2008 [20] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2008/mendonca/CvA_08_45DDI6nov2011.pdf> accessed 26 July 2017.
81. CPR Part 20, and CPR 2.3 which states, inter alia, “statement of case” includes a claim, defence, counterclaim, ancillary claim form, defence to counterclaim and a reply to a defence’. Also **Bernard v Seebalack** (n 32) [20]–[27]. And **Estate Management** (n 47).
82. **Rain Forest** (n 37) [50], [53] and [64] et seq (Jones JA).
83. The duties, powers and responsibilities of a CPR Judge in the active judicial case management stage are set out in Parts 25, 26 and 27 of the CPR.
84. CPR 25.1(a). Also **Rain Forest** (n 37) [57]–[58], [67] and [80] (Jones JA) and **Estate Management** (n 47).
85. CPR 25.1. Also **Rain Forest** (n 37) [50]–[53], [67] and [80] (Jones JA) and **Estate Management** (n 47).
86. CPR 8.6(2). Also cl 1.4 Pre-Action Protocols (n 47).
87. **Rain Forest** (n 37) [63], [67] and [68] (Jones JA) (interlocutory matters can raise the vexing question of when did the first case management conference begin and end, for the purposes of CPR Part 20) and **Estate Management** (n 47).
88. **Roland James** (n 34) [22], [24] and [43]–[48] and **Estate Management** (n 47).
89. ‘Judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court’s process is not abused. An appropriate



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measure of firmness is necessary to achieve this end. Judges are also obliged to ensure equality of treatment for all court users, taking care that judicial demeanour is, and is seen to be, fair and respectful.’ **Guidelines for Judicial Conduct**, Principle of Impartiality, Commentary B1 p 56.

90. CPR 20.1(2) states: ‘The court may give permission to change a statement of case at a case management conference’ and CPR 20.1(3) states:

The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that—

- (a) there is a good explanation for the change not having been made prior to that case management conference;
- (b) and the application to make the change was made promptly.

CPR 20.1(3A) goes on to state what the court shall have regard to ‘in considering whether to give permission’. Also **Rain Forest** (n 37) [63] (Jones JA), **Estate Management** (n 47) and **Gulf View Medical Centre and Another v Karen Tesheira and Another** Civ App No P 187 of 2013 [46]–[48] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2013/narine/CvA_13_187DD31jul2014.pdf> accessed 26 July 2017.

91. **Estate Management** (n 47).
92. **Rain Forest** (n 37) (for a helpful discussion on what constitutes active case management). Also **Estate Management** (n 47).
93. CPR 26.1 states:
- (i) The court (including where appropriate the [C]ourt of Appeal) may—
 - (w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

Also **Real Time Systems Limited v Renraw Investments Limited and Others** Civ App No 238 of 2011 [23] and [34] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2011/jamadar/CvA_11_238DD20dec2011.pdf> accessed 26 July 2017. The Privy Council found that the Court of Appeal was right in its decision.

94. **Steve Hagley and Another v Latchman Babwah** Civ App No 32 of 2015 [14] <http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2015/jamadar/CvA_15_32DD15jun2015.pdf> accessed 26 July 2017.
95. **Rain Forest** (n 37) [81] (Jones JA); **Estate Management** (n 47).
96. CPR 25.1(l)
97. CPR 27.11.
98. **Rain Forest** (n 37) [56] (Jones JA) **Estate Management** (n 47).
99. CPR 27.6(3).
100. **Rain Forest** (n 37) [60] (Jones JA) **Estate Management** (n 47).
101. CPR 39.6(1).
102. CPR 39.6(2).



103. The CPR Judge must also keep in mind the possibility of settlement by the parties.
104. **BS** (n 38) [34].
105. **BS** (n 38) [30], [34] and [51].
106. **Guidelines for Judicial Conduct**, Principle of Competence and Diligence, Guideline 6.6 and Commentary 8 pp 64 and 68.
107. **Guidelines for Judicial Conduct**, Principle of Competence and Diligence, Commentary 4 p 66.
108. CPR 2.2 states that the rules apply to ‘all civil proceedings in the Supreme Court’ and CPR 26.1 includes ‘where appropriate the [C]ourt of Appeal’ in the court’s general powers of case management.
109. **Guidelines for Judicial Conduct**, Principle of Competence and Diligence, Guidelines 6.2 and 6.12 pp 62 and 65.
110. At p 64.
111. Civil cases include, but are not limited to actions in the following categories: commercial, land, running down, bills of sale, public law, probate and family.
112. At p 63.
113. At p 65.
114. Improving access to justice includes the removal of barriers— cultural, legal, systemic, infrastructural (e.g. physical barriers, cost, need for representation, lack of information etc) to accessing the courts and court processes, but it must be acknowledged that the courts are one aspect of the justice system and the court’s decisions do not necessarily in and of themselves solve issues. For example, there are issues of enforcement and other support systems that need to operate for justice (as experienced by the person seeking it) to truly be achieved. In addition, in arriving at solutions, we should of course be mindful that the solutions need to be tailored to the needs of the users of the justice system in order to actually achieve the goal of improving access to justice.
115. 158 people answered this question.
116. 142 of 157 people who answered this question, or 90.4% of the sample.
117. 153 people answered this question.
118. 155 people answered this question.
119. 155 people answered this question.
120. Of the 100 people who answered this question, 15% attended to conduct business and 38% were involved in a matter as a party or witness.
121. 140 people answered this question.
122. 138 people answered this question.
123. 139 people answered this question.
124. 140 people answered this question.
125. 140 people answered this question.



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126. 139 people answered this question.
127. 144 people answered this question.
128. 144 people answered this question.
129. 143 people answered this question.
130. 143 people answered this question.
131. 142 people answered this question.
132. 142 people answered this question.
133. 142 people answered this question.
134. 143 people answered this question.
135. 142 people answered this question.
136. The number of responses by factor was as follows: Skin Colour: 142; Social Status: 142; Physical Appearance: 141; Religion: 142; Ethnicity: 140; Name: 141; Political Affiliation: 141; Sexual Orientation: 141; Age: 141; Professional Seniority: 142; Gender: 141; Education: 143; Wealth: 142.
137. 135 people answered this question.
138. 133 people answered this question.
139. 'Procedural fairness, the sense that decisions have been made through processes that are fair, is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts. Policies that promote a sense of procedural fairness are the vehicle with the greatest potential to change how the public views the state's courts and how litigants respond to court decisions.'. *Trust and Confidence in the California Courts A Survey of the Public and Attorneys* (September 2005) p 26. <http://www.courts.ca.gov/documents/4_37pubtrust1.pdf#page=26> accessed 26 July 2017.
140. See the discussion on procedural fairness above at pp 22–24.
141. 'International standards' as defined by Kevin Burke and Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, Court Review The Journal of the American Judges Association – Volume 44, Issue 1/2 p 5 (explaining Tom Tyler's findings in *Why People Obey the Law* (2006)) <<http://aja.ncsc.dni.us/publications/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf>> accessed 27 July 2017.
142. As they exist in Trinidad and Tobago.
143. Benjamin N Cardozo, *The Nature of the Judicial Process* (1921) p 167 <<https://archive.org/stream/natureofthejudico08454mbp#page/n169/mode/2up>> accessed 26 July 2017.
144. **Guidelines for Judicial Conduct**, Statement of Principle of Impartiality p 46; Commentary A.2 and A.3 on the Principle of Impartiality pp 54 and 55.
145. **Guidelines for Judicial Conduct**, Guidelines 1.1 and 1.2 on the Principle of Judicial Independence pp 6 and 7.
146. **Guidelines for Judicial Conduct**, Commentary 2 on the Principle of Judicial Independence p 8.



147. Civil Appeal No P294 of 2013 <http://webopac.ttlawcourts.org/LibraryJudgments/coa/2013/smith/CvA_13_P294DD12may2016.pdf> accessed 28 July 2017.
148. [2002] 2 AC 357.
149. **Guidelines for Judicial Conduct**, Principle of Impartiality, Guideline 4.6 p 49.
150. Oxford Dictionary Online <<https://en.oxforddictionaries.com/definition/bias>> accessed 27 July 2017.
151. (n 15).
152. Dr. Dylan Kerrigan is a Lecturer and Researcher in Cultural Anthropology, Political Sociology, and Criminology at the University of the West Indies, St Augustine Campus.
153. *Exploring Implicit Bias: Pathways for Transformation, Summary of Findings* (JEITT 2016 Continuing Education Seminar).
154. The rule of law which includes access to justice as a ‘constitutional right’ is a fundamental and core constitutional principle of the administration of justice. Without access to justice, how would people have access and recourse to the courts for the declaration of their rights and entitlements and the due determination of their legal disputes? As such, access to justice is to be jealously safeguarded and facilitated by CPR Judges.
155. **Real Time Systems Limited** (PC) (n 67) [14]–[17].
156. ‘The obligation to be patient and treat all before the court with courtesy does not relieve the judge of the equally important duty to be decisive and prompt in the disposition of judicial business.’ **Guidelines for Judicial Conduct**, Principle of Competence and Diligence, Commentary 6 p 68.
157. See ‘Effective Communication’ p 53.
158. ‘In a world marked by pluralism and cultural diversity, the judge stands as the interpreter of difference, the one who listens to every voice and understands it’, Chief Justice of Canada The Honourable Beverley McLachlin, *The Future of Courts in a Changing World* (Opening Address, 2008 Judges’ Conference) <https://conseildelamagistrature.qc.ca/en/medias/fichiers/publication/Colloque_2008_en_4.pdf> accessed 26 July 2017. **Guidelines for Judicial Conduct**, Principle of Judicial Independence, Guidelines 1.1 and 1.2 pp 6 and 7.
159. e.g. The self-tests provided by Project Implicit <<https://implicit.harvard.edu/implicit/selectatest.html>> accessed 26 July 2017.
160. So that even if one has ‘earned’ status, wealth or education due to hard work, there are still additional advantages that are not ‘earned’, but accrue nonetheless.
161. Oxford Dictionary Online defines intersectionality as: ‘The interconnected nature of social categorisations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.’ <<https://en.oxforddictionaries.com/definition/intersectionality>> accessed 26 July 2017. **Guidelines for Judicial Conduct**, Principle of Judicial Independence, Commentary 2 p 8.



ENDNOTES

162. Including the **Convention on the Rights of Persons with Disabilities** which was signed on 27 September 2007 and ratified on 25 June 2015 <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> accessed 26 July 2017.
163. See, for example **George Daniel v Attorney General** HCA No 393 of 2005, where the court mandated the provision of wheelchair access to the Hall of Justice, Port of Spain <http://webopac.tlawcourts.org/LibraryJud/Judgments/hc/bereaux/2007/HCA_05_393DD20July2007.pdf> accessed 26 July 2017.
164. These considerations should also be alive in the Judge's mind for all Court attendees.
165. (n 18).
166. Vulnerability includes financial vulnerability. See **Roland James** (n 34) [43].
167. e.g. By effectively, efficiently and economically managing cases so as to further the overriding objective; actively encouraging and enabling the early identification of the real issues and trying to settle matters without the necessity for a trial; and encouraging co-operation with the court to meet both quantitative and qualitative performance standards, including the objective of trial date certainty.
168. Pamela Casey, Kevin Burke and Steve Leben, *Minding the Court: Enhancing the Decision Making Process* (2013) 49 Ct Rev 76 <<http://aja.ncsc.dni.us/publications/courtrv/cr49-2/CR49-2.pdf>> accessed 24 July 2017.
169. Susan Bandes, *Empathetic Judging and the Rule of Law* (2009) Cardozo Law Review De Novo 133 <http://www.cardozolawreview.com/content/denovo/BANDES_2009_133.pdf> accessed 24 July 2017.
170. See: Terry Maroney, *The Emotionally Intelligent Judge: A New (and Realistic) Ideal* (2013) 49 Ct Rev 100 <<http://aja.ncsc.dni.us/publications/courtrv/cr49-2/CR49-2.pdf>> accessed 24 July 2017; Lawrence B Solum, *Virtue Jurisprudence A Virtue-Centred Theory of Judging* (2003) 34 METAPHILOSOPHY 178 <https://www.researchgate.net/publication/227773541_Virtue_Jurisprudence_A_Virtue-Centred_Theory_of_Judging> accessed 24 July 2017; and Jeremy A Blumenthal and Daria A Bakina, *Judicial Wisdom: An Introductory Empirical Account* (2016) 52(2) Ct Rev 72 <<http://aja.ncsc.dni.us/publications/courtrv/cr52-2/Bakina.pdf>> accessed 24 July 2017.

APPENDIX

Table 1: RSC Matters Determined by Manner of Determination
2001/2002-2004/2005*

Period	CASE DETERMINED BY MANNER OF DETERMINATION									Total
	Dismissed			With- drawn Leave Granted at Trial	Settled Consent at Trial	Discont- inued by Notice	Settled Before Trial	Default Judgment Satisfied	Notice of Full Satis- faction Filed	
	By Judgment After Trial	At Trial Stage	No Activity 2 Years							
2004-2005	1903	830	340	638	413	487	598	1464	1311	7984**
2003-2004	280	179	...	197	162	294	202	226	848	2388
2002-2003	172	106	...	108	163	588	163	203	469	1972
2001-2002	330	133	...	164	39	143	118	50	460	1437

* It should be noted that in 1998, a Practice Direction was issued which gave Judges the power to apply some CPR case management practices to the handling of RSC matters

** This figure includes matters determined as a result of a special backlog reduction project.



APPENDIX

Table 2: RSC Breakdown Analysis
(Average %)

Period	Case Determined by Manner of Determination								
	% Dismissed			4	5	6	7	8	9
	1 By Judgment After Trial	2 At Trial Stage	3 No Activity 2 Years	With- drawn Leave Granted at Trial	% Settled Consent at Trial	Discont- inued by Notice	Settled Before Trial	Default Judgment Satisfied	Notice of Full Satis- faction Filed
2004-2005	23.8	10.4	4.3	8.0	5.2	6.1	7.5	18.3	16.4
2003-2004	11.7	7.5	...	8.2	6.8	12.3	8.5	9.5	35.5
2002-2003	8.7	5.4	...	5.5	8.3	29.8	8.3	10.3	23.8
2001-2002	23.0	9.3	...	11.4	2.7	10.0	8.2	3.5	32.0
Average	16.8	8.2	1.1	8.3	5.8	14.6	8.1	10.4	26.9
Average less 2004-2005	14.5	7.4	0	8.4	5.9	17.4	8.3	7.8	30.4
Average Post-Trial And Pre-Trial	Pre-Trial= 61.1 Less 2004-2005= 63.9			Pre-Trial Less Settled 53.0 Less 2004-2005= 55.6			Post-Trial= 39.1 Less 2004-2005= 36.2		

Note: The methods of disposition categorised as pre-trial are columns numbered 3 and 6-9; and those categorised as post-trial are columns numbered 1, 2, 4, and 5.

Table 3: CPR Matters Disposed by Manner of Disposition

2014/2015-2015/2016
(Trial and Non-Trial Matters)

Period	Manner of Disposition													Total	
	Filing		Order by Consent					"Decision by Judge"					Default Judgment		Other
	Notice of Full Satisfaction	Discontinued	CMC	PTR	Trial	Mediation	Judicial Settlement Conference	Claim – Struck Out/ With-drawn/ Discontinued/ Dismissed	Judgment / Final Order	Summary Judgment	Application Refused/ Denied/ Dismissed/ Determined				
2015-2016	147	102	561	88	127	1	2	627	1443	5	100	448	10*	3661	
2014-2015	160	186	647	90	138	2	2	487	1478	6	123	529	8**	3856	

* Other disposed matters includes but is not limited to those matters that were transferred between CPR and RSC, matters Dismissed by Order 3 Rule 6.

** Other disposed matters includes but is not limited to those matters that were transferred between CPR and RSC.



APPENDIX

Table 4: CPR Breakdown Analysis

(%)

Period	Manner of Disposition								
	Filing	Order by Consent (General)	Order by Consent (other than at Trial)	Order by Consent (at Trial)	Decision by the Judge				Default Judgment
					Claim – Struck Out/ Withdrawn/ Discontinued/ Dismissed	Judgment /Final Order	Summary Judgment	Application Refused/ Denied/ Dismissed/ Determined	
2015-2016	6.8	21.3	17.8	3.5	17.1	39.4	0.1	2.7	12.2
2014-2015	9.0	22.8	19.2	3.6	12.6	38.3	0.2	3.2	13.7
Average	7.9	22.1	18.5	3.6	14.9	38.9	0.2	3.0	13.0

Note: The figures for 'Order by Consent (other than at trial)' and 'Default Judgment' are considered matters settled pre-trial; and the figures for 'Order by Consent (at trial)' and 'Judgment/Final Order' are used to represent matters determined at trial.

