

The Review of Civil Litigation Costs

Review or Revolution?

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Introduction

On 8th May 2009, the eagerly awaited preliminary report of the Review of Civil Litigation Costs was published, as the culmination of phase 1 of what has come to be known informally as the Jackson Cost Review. In essence, it is a weighty document 663 pages long, which represents the preliminary findings, issues for discussion and tentative views of Lord Justice Jackson, who was tasked by the Master of the Rolls with undertaking a root and branch evaluation of the role of costs in civil litigation and to come up with proposals for reform.

This paper will look at what the report has to say about the methods of funding civil litigation and the potential scope for reform and the implications for personal injury litigation, singled out for particular treatment in the report.

The scope of the Review

The scope of the review as declared by the Master of the Rolls is:

To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

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It is immediately apparent that the phrase “rules and principles” has been given a purposive construction by Lord Justice Jackson because the breadth of topics covered by the report are far wider than an inquiry into the workings of parts 43 to 49 of the Civil Procedure Rules 1998.

Instead he has touched on topics as diverse as funding mechanisms, the organisation and deployment of the judiciary, the way general damages are calculated in personal injury claims and the potential costs implications of each and every part of the litigation process.

The report is an impressive piece of work, both in terms of its length and its scope. But in the longer term, the work may prove to be flawed in three crucial respects.

The first is the political and economic context of any likely proposals, which seem to have been set aside for pure blue sky thinking, at least at this stage. If any reforms are likely to require primary legislation or the expenditure of public monies, there has to be a real doubt as to whether they will happen at this stage of the electoral and economic cycle.

Secondly, the work has been rushed, to meet an arbitrary deadline. This is apparent in the general lack of newly commissioned empirical research², the lack of scrutiny applied or capable of being employed to facts and figures blandly put forward by the various interest groups and the way that empirical evidence has seamlessly been mingled with anecdotes and views better garnered as part of the consultation process.

Thirdly, and perhaps most significantly, the search for overarching principles has been dismissed as a Platonic irrelevance in favour of tinkering with familiar concepts, rather than putting forward wholly fresh solutions: with the result that where there are proposals, they fail to address simple yet profound questions, such as why are solicitors under the existing rules allowed to recover 6 minutes of time for a 30 second telephone call? or has the application of the test of proportionality ever made a difference to an assessment of costs over and above what the principle of reasonableness provides?

The contents of the Preliminary Report

The report is divided into two volumes: volume one, sets out the role and scope of the review, the basic facts of civil litigation, larded interestingly with caveats about the reliability of

² See for example the figures on what lawyers earn: they are so vague and general, no sensible conclusions on the number of fat cat practitioners compared to thin moggies in the law can be drawn.

official statistics. The evidence is set out principally in parts two and three, which include some interesting summaries of consultations with the judiciary, particularly in the county court.

It then sets out in probably the three most significant parts of the entire report, summaries, lists of issues for consideration and tentative proposals or conclusions, on the funding of civil litigation, a new regime of fixed costs and personal injuries litigation.

The final part of volume one, deals with other types of litigation, before volume two opens with considerations on the controlling of the costs of litigation, the assessment process and a review of regimes in this country where there is no costs shifting and reviews of the costs regimes in other jurisdictions.

The funding of civil litigation

The first of the big questions to be addressed by the report, is the issue of how civil litigation is funded and how it could be funded. It is hard to resist the conclusion that this is the single most important topic, overall, given that being able to pay for and obtain, legal advice and representation is at the heart of the issue of ensuring access to justice.

Conditional Fee Agreements

The first big question: is it Jackson's view that CFAs should be abolished and alternative mechanisms put in place? His own provisional view could not be clearer:

My own provisional view is that, following the retraction of legal aid, either CFAs or some other system of payment by results (contingent fee agreements, CLAF, SLAS, third party funding requirements etc) must exist in order to facilitate access to justice. The underlying principle of payment by results has been absorbed into our litigation culture over the 14 year period since 1995. A new generation of lawyers has grown up with CFAs. The real issue, therefore, is how CFAs or alternative "no win-no fee" arrangements should be structured, not whether they should exist.

The next big question then is: if CFAs or some other no win no fee arrangement is a legitimate means of funding access to justice, should the current approach to recoverability of success fees and ATE insurance continue? This question is picked up in chapter 47 of the report³ where having recited that recoverability has increased access to justice for claimants, he notes that it has massively increased the costs burden upon defendants.

³ See particularly pages 481 to 482

He also notes that solutions to ending recoverability but ensuring that individual claimants interests might be protected are available such as introducing one way costs shifting, capping the proportion of damages which can be deducted to represent success fees, ringfencing elements of damages and raising the level of damages, by stripping out what are referred to as transaction costs: for which read “referral fees”.

There has to now be a real prospect, though by no means a probability, that the recoverability provisions introduced in April 2000, may yet be repealed, which may herald the beginning of the end of the ATE industry.

After the Event Insurance

Further credence is given to this prospect, when one considers the luke-warm evaluation of the role of ATE funding. Although the chapter on ATE insurance, reads in neutral terms, buried away in the chapter on costs shifting is this revealing paragraph⁴

The personal injury litigation industry is populated by numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top. If any layer of activity can be removed from the process (and insurance against adverse costs liability is one layer of activity) it may be thought that this will serve the public interest.

The fate of the ATE insurance industry is intimately linked to the fact that there are no restrictions on recovering costs from a losing side. It will be recalled that the principal reason why ATE insurance is necessary, is to insure against an adverse costs order, the consequences of which might cause the individual litigant financial hardship, perhaps the loss of their home.

But such a person’s interests can be protected by other means: prior to the abolition of Legal Aid for personal injury claims, a defendant was faced with the practical impossibility of recovering their costs due to the statutory shield. If, as is radically canvassed in the report⁵ defendants are prohibited from recovering their costs, when successful, the question has to be asked, what is the utility of ATE insurance ? Only to cover the rump of irrecoverable disbursements in a losing case, given that both solicitors and counsel are likely to be working on a CFA.

Contingency Fee Agreements

⁴ At page 226

⁵ *ibid*

There is a respectable body of opinion in the legal profession, which would like to see the introduction of contingency fee arrangements for contentious work. There is a smaller body, who would like to see jury trials and punitive damages, but Jackson LJ has wisely concentrated on the issue as to whether contingency fees should be permitted.

In this respect it is hard to glean whether this is likely to come to pass. The report notes that there is an “overwhelming consensus” about not moving to a US style system where there are contingency fees and no costs shifting, but that if costs shifting can be retained, the views of practitioners are more evenly divided. Comments are invited on whether lawyers should be permitted to act under such agreements, if so how costs shifting could be accommodated, how the agreements should be regulated and what viable alternatives there may be.

Before the Event Insurance

The fortunes of the Before the Event insurance market have flowed and may now be ebbing. Seen as a panacea for small personal injury claims⁶ at one time, Jackson LJ has been informed of some of the other aspects of the BTE market, which may not represent such a good deal for litigants or the wider interests of justice. He notes a clear distinction is to be drawn between BTE cover, when insurers pay solicitors to act for the insured when a claim arises and BTE cover, where insurers sell to solicitors claims which arise in return for referral fees and the solicitors thereafter act on a CFA or CCFA.⁷

This latter variety is described by him as being “less beneficial”⁸ and given his “tentative” conclusion is that a substantial expansion of BTE insurance would be desirable, it is also plain that this recommendation is made with the former variety in mind.

More exotic funding schemes

Third party funding is something which in principle Jackson LJ seems in favour of, noting that the law on maintenance and champerty, would require modification, or indeed replacement with a regulatory regime.

The suggestion for a Contingency Legal Aid Fund or a Supplementary Legal Aid Scheme, is to be looked at further, though it is hard to glean that there is much support for

⁶ See the decision in Sarwar v Alam [2002] 1 WLR 125

⁷ See page 153 of the Report.

⁸ *Ibid* page 154

these proposals beyond the Bar Council and indeed hard to see why any firm of solicitors would wish to entangle themselves in such a scheme, whilst CFAs, with recoverable uplifts, remain the first choice of funding for many cases, most especially personal injury litigation.

Some thoughts about funding mechanisms

The most important point to note from the first tranche of the report is that the end of recoverability of additional liabilities and the beginning of the end of the ATE industry may be in sight. Whether that will herald the end of the Cost Wars, in itself, is dubious so I now turn to consider what the other implications of the review for personal injuries litigation may be, as that is the principal battleground for costs disputes.

Fixed costs

Part Six of the preliminary report devotes five chapters exclusively to personal injury litigation but, arguably, one of the more significant reforms which has a real prospect of coming to pass in the near future are the proposals in relation to fixed costs.

There is curiously little mention in the report on the long history of fixed costs and the scales formerly employed in the High Court and the County Court, which is surprising as what is proposed now is, in effect, to re-invent a wheel quietly abandoned on the introduction of the Civil Procedure Rules.

In essence, having enjoyed ten years, or so, where costs on claims worth marginally more than a small claim have been at large and where the Bar has laboured under fixed trial costs, which have for many chambers become the de facto brief fee, there are now concrete proposals to put in place fixed costs for solicitors fees, for all steps in a claim up to trial. Jackson LJ is unequivocal in his support for such a proposal:

I have canvassed views from my panel of assessors and it is our unanimous view that we should take forward this work and try to achieve a fixed costs system in fast track cases.

The actual system that is proposed, or at least tendered for consultation, is the notion of a matrix which permits arithmetical calculation of fixed costs for solicitors. In essence, for cases which settle pre-issue, a base fee, applicable to a given type of case, such as RTA, employer's liability, occupational disease etc, would be tweaked by adding to it a further element calculated as a percentage of the damages recovered, less a deduction where there

is an early admission of liability. A similar table would apply to cases which settle post issue, but with larger figures.

The matrix would leave out of account advocacy fees, costs of interim applications, which would be dealt with by summary assessment at the application, provide for further tweaking in cases involving children and protected persons, or cases where there is more than one expert witness, or where there are multiple parties or where a client cannot give instructions in English.

In addition, standard disbursements would be capped, there would be a procedure by which unreasonable conduct could provoke enhanced awards of costs and Part 36 would need to be revised, to take account of the fixed costs regime.

The draft tables included in the report as examples of the cost matrix make no provision for counsel's fees other than in respect of advocacy. This could be addressed either by putting in what amount to scale fees (perhaps £159 for an Advice and £69 for Particulars of Claim as devotees of costs history might fondly recall....) or by allowing reasonable disbursements, specifically including counsel's fees. Chapter 22 concludes⁹:

There seems little doubt that Lord Woolf's original concept of a fast track system with fixed costs at all stages now needs urgent attention. Whilst the recent increase of the fast track limit from £15,000 to £25,000 brings into its scope a range of cases not previously subject to such procedures, that increase was made in the knowledge that the fast track has fairly uniform procedures and therefore costs. It should be possible to devise a fair system of fixed costs for all cases within the new fast track limit.

Small Claims versus the Fast Track

Having successfully fought off proposals to raise the Small Claims Track limit to £5000 as proposed in "Case Track limits and the claims process for personal injury claims"¹⁰, solicitors for claimants will note that the ABI has been pressing hard for the limit to be raised as part of this review. The material put forward suggests that a sum in excess of £1.1 billion is paid in costs to claimant's solicitors, for litigating small personal injury claims worth less than £5000.

⁹ See page 212 of the preliminary report.

¹⁰ Department for Constitutional Affairs April 2007 Consultation paper.

It is suggested by the ABI that these sums could be saved: the suggestion is also put forward that instead of rejoicing in the new found costs savings and profits, the insurers could use the money to pay increased awards of general damages or to reduce premiums.

Conversely two particular points are made on behalf of claimants: that some of these cases may be more complex than straightforward small claims so lawyers are needed and also that a lot of firms of solicitors depend for their bread and butter on the basket of low value personal injury claims, on which they recover costs, to make their firms viable.

It is plain that the government's rejection of raising the Small Claims limit, is now a point of contention and that the arguments run a couple of years ago are being made again.

In addition, the report makes it plain that the fact that the valuation of general damages is currently an art, rather than a science is something which is perceived to be a costly problem. Chapter 28¹¹ is devoted to seeking to simplify this aspect of litigation: possibly because to do so will reduce the amount of costs which might be awarded on the Fast Track, possibly to enhance the prospects of settlement at the earliest opportunity through increased certainty or lack of controversy, or possibly to render the chief argument for claims worth more than £1000 to remain on the Fast Track otiose, in that calculating quantum will be a straightforward number-crunching exercise, rendering them more suitable to be allocated to the Small Claims Track.

Accordingly, potential reforms in this area would include a points system or tariff system for evaluating injuries or the introduction of a software system, akin to the Colossus system utilised by the insurance industry to calculate general damages.

Reducing the transactional costs of personal injuries

The question posed by Jackson LJ to claimant's and defendants representatives was why are such high costs being incurred in respect of personal injuries litigation, particularly on the claimant side ? The claimants' representatives said¹² that it was due to the need to spend time with clients, because of the expense of obtaining work through marketing or referral fees, through cash flow constraints, through the attitude of defendants to litigation, through there being a bolus of work that has to be done in every case and through assessing general damages.

¹¹ See page 240 of the preliminary report.

¹² At page 228

Conversely, the defendant's representatives pointed to the lack of market forces in relation to costs incurred by claimant's solicitors, excessive hourly rates coupled with the fact that hourly rates as the basis for recovery encourage inefficiency, referral fees, costs building as a strategy, no competitive tendering and excessive legal input. Jackson LJ observes:

One possible view is that there is some force in the points made by both sides, and that cumulatively the matters which are complained of by both sides account for the remarkably high costs of personal injuries litigation. Whether or not this is the correct analysis is a question which I leave open at the moment.

Undoubtedly he will have to come to a view, and form conclusions as to why, when dealing with the costs of a piece of litigation with a major insurance firm on one side and a major trade union firm on the other side, there is a discrepancy which can be anything between 50% to 100% between the costs of the respective sides. The interesting point is what potential reforms he would recommend, if any, to deal with this point.

What is only touched upon later in the report is the significance of the hourly rates used, which is a critical issue:¹³ the key points that the hourly rates allowable in the County Court have no relationship to either market forces which have no role to play in setting claimants' solicitors rates with their own clients, or the actual cost of litigation quantified as overhead and profit, are not given the central role that they deserve.

Moreover, the Advisory Committee on Civil Costs, which was meant to address the issue of hourly rates in *The Derivation of the New Guideline Rates* has failed to unravel the Gordian knot as to what is a proper hourly rate for the court to allow which relates directly to what are overheads and profits: what solicitors should earn.

Absent a massive and independently verifiable empirical survey of solicitors firms to establish their overheads, work out the "A" factor and then to consider what "B" factor for profit should be permissible between the parties, the actual guideline rates utilised by the courts are simply arbitrary figures, which a solicitor will shape his charges to.

Interestingly, the significance of defence firms acting on collective conditional fee agreements is not commented upon with any particularity. The fact that such agreements typically provide for a reduced hourly rate if defence of a claim is unsuccessful, but the court guideline rate if the claim is dismissed, merely underlines the artificiality of the guideline rates.

¹³ Ibid at page 525

Moreover, the effect of such collective conditional fee agreements, as they become more prevalent, is such that inevitably ATE premiums will rise to meet those increased defence costs claimed under ATE policies: and the costs of the ATE premiums will in turn be paid by the liability insurers, who, at one remove, are thereby (collectively) paying their panel firms perhaps rather more than they realise!

The report notes that representatives from both sides of the divide are critical of referral fees. But as this is a matter of professional regulation, it remains to be seen how a review of the rules and principles relating to costs might fall to address this problem.

The future face of personal injury litigation

The introduction of fixed costs and/or a rigorous approach to setting guideline hourly rates and/or removing the quantification of time based on six minute units would indicate the boom time for personal injury litigation would be over.

Raising the Small Claims Track limit, would however have catastrophic consequences, for solicitors firms who undertake bulk personal injury work and the junior Bar. It remains to be seen how radical this review will be, when its final proposals are published.

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For further information on Ropewalk Chambers generally please contact the Senior Clerk, Tony Hill, on (0115) 983 8000.

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