

# **The Review of Civil Litigation Costs:**

## **Final Report**

### **An Overview – Part II**

**Andrew Hogan, Barrister at law<sup>1</sup>**

---

<sup>1</sup> Head of Ropewalk Chambers' Costs Special Interest Group - [andrewhogan@ropewalk.co.uk](mailto:andrewhogan@ropewalk.co.uk)

## Introduction

1. This newsletter is the second in a series of three drafted to comment upon proposals put forward by Lord Justice Jackson in the review of this Civil Litigation Costs: Final Report.
2. The first newsletter dealt with a general consideration of the key recommendations of the report. This newsletter will look in a little more depth at those proposals with particular significance for personal injury litigators and the third newsletter will consider the practicalities and problems facing the implementation of the report.

## Proportionality

3. Costs draftsmen are fond of recounting how in all the years since 1<sup>st</sup> April 1999, they have yet to encounter or recall a detailed assessment where the application of the principle of proportionality, as distinct from considerations of reasonableness made a blind bit of difference to the quantum of costs which were allowed by the Court.
4. The principle of proportionality, whilst a noble goal, has had very little impact upon the level of costs not least because of its wooliness as a concept and because considerations of additional liabilities were left out of account.
5. This failure is noted by Lord Justice Jackson in his report where he cites Sir Anthony May, President of the Queen's Bench Division, who had this to say about the case of Lownds v. Home Office (2002) 1 WLR 2450 in the Final report.

*"I do not for a moment question the correctness of the Lownds' decision as an application of the law under Civil Procedure Rules as they now stand. But the tension remains. I do think*

*we should ask whether, in the extensive world of adversarial litigation, the litigant should be able to recover from a losing opponent the costs which it was reasonable and necessary for the winner to spend, even though the resulting amount may be out of all proportion to the amount claimed or the amount recovered? Assessments which have to concentrate retrospectively on what the winning party have spent will always risk producing a disproportionate result.*

*In my experience, there is no doubt at all that the costs are assessed with nodding respect only to proportionality. An application of Rule 44.5 of the Civil Procedure Rules and Section 11 of the Costs Practice Direction can scarcely expect to do better than that."*

6. Jackson LJ accepting this criticism at paragraph 5.15 proposes that the definition of proportionality should be changed to read as follows

*"Costs of proportion if, and only if, the costs incurred bear reasonable relationship to:*

- (a) the sums in issue in the proceedings;*
- (b) the value of any non-monetary relief in issuing the proceedings;*
- (c) the complexity of the litigation;*
- (d) any additional work generated by the conduct of the paying party; and*
- (e) any wider factors involved in the procedures, such as reputation or public importance."*

7. If this reform is carried through, the days of small value personal injury claims, generating costs three, four, five or more times the value of the damages have come to an end. In fact, in every case, costs will be expected to be less than damages awarded.

## The Abolition of the Indemnity Principle and an end to retainer challenges

7. Jackson LJ clearly regards the indemnity principle as being a cause of the technical arguments which have led to enforceability challenges in relation to Conditional Fee Agreements.

8. He proposes the abrogation of the indemnity principle and the amendment of CPR Rule 44.4 by adding a new sub-paragraph (1) in these terms

*When assessing the amounts of recoverable costs, the Court will, subject to the following provisions of this rule, allow reasonable amounts in respect of work actually and reasonably done and services actually and reasonably supplied for the benefit of the receiving party. The Court will assess those amounts on either the standard basis or the indemnity basis.*

9. This amendment is intended to abrogate the indemnity principle. What it does is to remove that aspect of the formulation of that principle which looks upon the liability of the receiving party to actually pay costs or money in respect of the work that has been done. But it does not remove the concept of costs being an indemnity in its entirety.

10. It directs the court still to look at what the solicitor has actually done in terms of time on the clock and disbursements and other aspects of a bill in order to determine what should be reasonably paid by the paying party.

11. This in a sense is simply to remove the use to which the indemnity principle has been put over the last 10 years as the bedrock for enforceability challenges. But there are two points which need to be made.

12. The first point is to note that the law of costs, if it is anything, is a subset of the general law of damages. Therefore there has to be an enquiry into what the effect of the wrong, be it a tort, a breach of contract or some other cause for complaint, has caused by way of financial loss to the winning party, quantified as both damages and the costs of instructing lawyers to do something about it.

13. The second point to note is that even the abolition of the indemnity principle may not remove the grounds for technical challenges: it could be argued that where as a matter of public policy agreement between a client and his lawyer tainted by illegality the Court should not be awarding costs which represent tacit approval of the conduct and in circumstances where a client is under no liability to pay his lawyers by reason of the unenforceability of the retainer between the client and the solicitor.

### **After the Event Insurance**

14. Lord Justice Jackson sets out his conclusion that ATE insurance premiums ought not to be recoverable under a Costs Order. The regime of recoverable ATE insurance premiums he notes is based upon the premise that certain Claimants need to be protected against the risk of having to pay adverse costs.

15. The flaw in the present regime that he identifies is that it is not targeted upon those who merit such protection. Any person who finds a willing insurer can take out ATE insurance whether that person is rich or poor, human or corporate, deserving or undeserving.

16. The protection which a Claimant derives from ATE insurance is total and he is not even required to make a modest contribution towards adverse costs even if he can afford to do so.

17. He then goes on to grapple with the issue as to how the law should protect Claimants who, as a matter of social policy, should be protected against the risk of adverse costs.

18. He sets out his view that there is only one sensible way to give effect to that social policy, namely by introducing one way cost shifting. The formula that he lights upon is that contained in Section 11(1) of the 1999 Act. He goes on to say at paragraph 5.8

*In personal injuries litigation it must be accepted that Claimants require protection against adverse Costs Orders. Otherwise injured persons may be deterred from bringing claims for compensation.*

19. He notes that if his recommendation is implemented the ATE insurance industry will suffer a significant loss of business. He states that it is his firm view that the present regime of recoverable ATE insurance premiums is one of the factors that have driven up litigation costs. He believes that this element of the costs regime cannot be maintained in order to support one sector of the insurance industry.

20. As an interesting side wind he notes that there could still be reform even if this recommendation is not accepted by providing that ATE insurance could be brought in line with employer's liability or road traffic insurance by providing that in certain circumstances the insurer has to pay out despite as a matter of black letter insurance law having a right to void the policy, due to fraud on the part of a Claimant, but with a right to recover payments from the policyholder.

### Conditional Fee Agreements

21. Lord Justice Jackson is not opposed to Conditional Fee Agreements. The issue that he is concerned with is the recoverability of success fees from the losing party to litigation. He takes the

view that there are four flaws with the current regime of recoverability which generate disproportionate costs.

22. The first is that any person whether rich or poor and whether human or corporate is entitled to enter into a CFA and take out ATE insurance.

23. The second flaw is that the party of a CFA generally has no interest in the level of costs being incurred in his or her name.

24. The third flaw in the recoverability regime is that the costs burden placed upon opposing parties is excessive and sometimes amounts to a denial of justice.

25. The fourth flaw is the repeated criticism of the recoverability regime that some claimant lawyers cherry-pick cases by generally conducting winning cases on CFAs and rejecting or dropping at an early stage less promising cases and thus generating extremely healthy profits.

26. He notes that he has not seen the financial records of individual solicitors firms and barristers which are confidential but notes that it is the opportunity to cherry-pick which constitutes the flaw.

27. He proposes that recoverability of success fees be abolished and that in order to assist personal injury claimants in meeting the success fees out of damages he recommends that the level of general damages for pain, suffering and loss of amenity be increased by 10% across the board, that the amount of success fee which lawyers may deduct be capped at 25% of damages excluding any damages referable to future care or future losses. A further reward for making a successful Claimant's offer under Part 36, is that such damages as are awarded should be enhanced to the tune that an additional 10% of damages be added to the judgment.

28. He also recommends that the effect of the Court of Appeal decisions in Lamont .v. Burton (2007) 1 WLR 2184, Crane .v. Canons Leisure (2008) 1 WLR 2549 and Kilby .v. Gawith (2009) 1 WLR 853 be reversed by amendments to the Rules.

### **Contingency Fees**

29. His recommendation is that both Solicitors and Counsel should be permitted to enter into contingency agreements with their clients: however these are not contingency fees as properly understood by that phrase whereby a slice of damages represents the lawyers' remuneration.

30. He states that costs should be recoverable against opposing parties on the conventional basis and not by reference to the contingency fee. He also thinks that contingency fee agreements should be properly regulated and they should not be valid unless the client has received independent advice: against this backdrop it is hard to see what contingency fees bring to the table over and above the proposed revised Conditional Fee Agreement regime.

### **Fixed Costs**

31. The principle piece of unfinished business from the Woolf reforms of more than 10 years ago was the failure to introduce fixed costs in the Fast Track.

32. For more than 10 years now the Bar has laboured under fixed trial fees prescribed by Part 46 of the Civil Procedure Rules 1998 but Solicitors have successfully resisted proposals to fix their own costs.

33. It is thus rare indeed for a fast track case which concludes at trial for the Claimant's bill including, of course, the recoverable additional liabilities to be less than £20,000 and sometimes closer to £30,000.

34. Lord Justice Jackson is strongly in favour of fixed costs on the fast track generally but particularly with regard to personal injury claims. He has taken as his starting point analysis prepared by Professor Fenn of the actual costs being incurred in relation to Fast Track personal injury claims.

35. He has taken two sets of such figures and listened to what Claimants' representatives and Defendants' representatives have contended is the consequence for so doing. At paragraph 5.8 on page 158 he says this:

*I have carefully considered the competing arguments. My conclusion is that all costs for personal injuries litigation in the fast track should be fixed. I am not persuaded by the arguments of APIL and others that this fundamental element of Lord Bull's recommendation should be abandoned. Furthermore, in my view, it is possible to arrive at reasonable fixed costs for RTA, ELA and PLA cases on the basis of (a) the data available and (b) the detailed analyses and submissions which have emerged from the CJC's series of facilitative meetings. I do not accept the Law Society's argument that the introduction of fixed costs is a reform weighted towards savings for Defendants and insurers. In my view, there is a high public interest in making litigation costs in the fast track both proportionate and certain. Since personal injury claims constitute a substantial part of contested fast track cases, there is an obvious public interest in tracking these cases first. I accept APIL's argument that I must also consider the costs incurred by Defendants.*

36. He then goes on to say that he accepts "Fenn 2" figures as the correct starting point. Noting also that Claimants' Solicitors will no longer have to maintain documentation required for

costs assessment or spend time arguing about costs there should be business process efficiencies in the form of reduced management costs and overheads.

37. The position of the Bar in relation to fast track advisory work has been destroyed. Jackson LJ notes this at paragraph 5.11 and what he has chosen to advise is that some specified parts of overall costs should incorporate elements of work formerly done by barristers but they are not ring fenced or to be classified as disbursements.

38. The fixed costs are to be sufficient to permit the instruction of counsel to undertake appropriate work pre-trial and the Claimants' Solicitor will have a choice to carry out all pre-trial work in-house or to instruct counsel to carry out part of that work.

39. His expectation (he states loftily) is that in adopting this approach that junior counsel will continue to be used where appropriate for pre-trial work in respect of fast track personal injury cases. Such an expectation runs counter to all observations of human nature and the way that incentives work in the real world of litigation.

40. The actual proposed scale of fees is set out in the Appendices to the report and one notes for example in Table A that in relation to an employer's liability case where the claim for damages is worth between £5,000 and £10,000 a case which settles before issue will attract Solicitors' costs of £2,425 + 12½% of damages over £5,000; if it is issued but pre-allocation it settles the sum increases to £3,175 plus 20% of damages but cases which settle between allocation and listing attract £3875 + 25% of damages and cases which settle post-listing but pre-trial attract an award of £4,775 + plus 30% of damages.

## **Referral Fees**

41. Referral fees come in for considerable criticism by Lord Justice Jackson and at paragraph 4.13 on page 205 he notes that in relation to a prohibition on referral fees he is quite confident that it could be enforced

*It is argued by some that a prohibition on payment of referral fees could not be enforced. I am not persuaded by this argument. In my view, the vast majority of Solicitors are honourable professionals and will respect such a prohibition, whether imposed by legislation or by rules of conduct.*

42. He goes on to state that he has discussed the enforcement issue with the Solicitors Regulation Authority which has considerable experience of enforcing the ban on rewarding introductions up until 2004.

43. The Solicitors Regulation Authority has made the point that defining what a referral fee is requires some care in order to catch disguised referral fees but to permit legitimate marketing.

44. The definition which Lord Justice Jackson proposes, subject to review by the Solicitors Regulation Authority and the Legal Services Board, is a referral fee is “any form of payment or other consideration to a party for introducing clients to a Solicitor.”

45. The reason why he has set his cap against referral fees is because it is his view that referral fees are one of the factors which contribute to the high cost of personal injuries litigation.

46. He takes the position that the lifting of the ban on referral fees in 2004 has not proved to be of benefit either to Claimants or to the providers of legal services with the only winners being the recipients of referral fees.

47. What he does not deal with in the report is the effect of his recommendation and how it would tie in with the Compensation Act 2006 under which Claims Management Companies are licensed and subject to Regulation by the State and also no doubt taxed upon whatever profits they do make.

### **Procedural Reforms for Personal Injury Process**

48. Lord Justice Jackson comes up with a variety of suggestions which are meant to streamline the personal injury litigation process. He proposes monitoring of the new process for low value RTA claims to ensure that costs savings are actually achieved with discussion between Claimant and Defendant representatives to develop a streamline process for all fast track personal injury cases currently falling outside of the RTA process.

49. The effect of medical reports organisations upon the costs of personal injury litigation should be kept under close scrutiny, noting that in certain cases the majority of the fee charged for a medical report obtained from a General Practitioner goes to the organisation sourcing the report not the doctor, that there should be direct communication between a Solicitor and medical experts rather than through a medical report organisation. He also notes that docketing of cases for specialist Judges may also have a role to play.

### **Clinical Negligence**

50. Chapter 23 of the report is devoted to clinical negligence and it is noteworthy that the NHS Redress Act of 2006 has not been brought into force. To a certain extent that statute would overtake anything that Jackson LJ has to propose.

51. But, in brief, he proposes that there should be financial penalties for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the protocol and that the time for a Defendant to respond to a Letter of Claim should be increased to 4 months and copied to the NHSLA.

52. He further suggests that in respect of any claim other than a frivolous claim where the NHSLA is proposing to deny liability independent expert evidence on liability and causation should be obtained within the 4 month period.

53. And that the NHSLA, MDU, MPS and similar bodies should each nominate an experienced and senior officer to whom the Claimant's Solicitor should after the event report cases of Defendant lawyers failing to address the issues.

### **Hourly Rates**

54. It was interesting to note that at page 447 of the Report the Association of British Insurers has commissioned a consultancy firm to undertake an independent assessment of the market for personal injury Solicitors to compare marketing costs across different sectors and to assess whether reducing guideline hourly rates could have serious implications for access to justice.

55. Lord Justice Jackson in the sense puts the problem off for another day. He says that guideline hourly rates should be set by the Costs Council that he proposes and also sets out a number of questions that they may have to consider including whether there is any justification for paying city rates to firms of Solicitors which choose to set up in the city of London but are not doing city work, what reductions there should be in hourly rates for personal injury work if referral fees are banned or capped and if one takes Defendant hourly rates as representing a reasonable rate set by the market in certain areas of civil litigation what factors justify higher rates to Claimant's Solicitor and what allowance should be made for those factors.

56. He states that one of the first tasks of the Costs Council will be to formulate the principles on which guideline hourly rates are set and that these should reflect market rates for the level of work being undertaken which would be the rates which an intelligent purchaser with time to shop around for the best deal would negotiate.

57. He does not say whether this intelligent purchaser is to be judged to be a single mum living on a council estate who wishes to bring a tripping claim in circumstances where she takes the rates that are on offer or not at all, or an insurance company who, with the promise of thousands of cases, has been able to negotiate £100 per hour with its panel firms of Solicitors, the point being that there are *markets* in personal injury litigation, which are quite distinct.

### **The Assessment Procedure**

58. In a sense the meat that Lord Justice Jackson was asked to be addressed, it is noted that there is no proposal to reform the practice of charging in 6 minute units.

59. It is also notable that summary assessment, although to be tinkered with, is thought to be working well or in any event there will be fewer summary assessments due to fixing costs on the Fast Track.

60. In relation to detailed assessment one senses the lack of interest of Lord Justice Jackson in this area of work with his belief that an introduction of cost management software enabling bills to be created as a case goes along will in effect reduce dramatically the level of time needed for preparation of detailed assessment and (though he does not say this) reduce the need for costs draftsman to undertake work on a case.

61. He proposes some new forms of bills which are to be welcomed but in a sense reflect best practice amongst most innovative firms of costs lawyers who have devised new ways with the aid of information technology in presenting bills of costs in respect of group actions or similarly heavy matters.

62. No doubt the overall provisions on costs budgeting would also have an impact on the need for a detailed assessment but Lord Justice Jackson has plainly concentrated on areas which he perceives of more significance or import than the minutiae of the assessment of process.

## **Conclusions**

63. The Jackson Report makes proposals which will reduce the healthy levels of profit charged by many firms of Solicitors and Counsel representing Claimants and constitutes a triumph for the insurance industry.

64. What is quite plain is that if the proposals are adopted in full, or at least a significant part of them, then the level of costs transferred from the insurance industry to Claimants' lawyers will dramatically decrease and it will also mean the effective abolition of the after the event insurance industry.

Andrew Hogan.

Andrew Hogan is costs Counsel from Ropewalk Chambers – [andrewhogan@ropewalk.co.uk](mailto:andrewhogan@ropewalk.co.uk)

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

*This commentary is intended as a general overview and discussion of the subjects raised herein. It is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Neither Ropewalk Chambers nor the author(s) accept any responsibility for any actions taken or not taken on the basis of this commentary.*