

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

## **Final Report**

### **An Overview – Part III**

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## Introduction

1. This is the third in a series of three newsletters setting out a preliminary evaluation of the Final Report published by Lord Justice Jackson into his review into civil litigation costs. The first newsletter constituted an overview of the report, the second looked at its implications and proposals in relation to personal injury litigation and this third newsletter will consider the practical difficulties thrown up by Lord Justice Jackson's proposals.

## Implementation

2. Is “Jackson” actually going to happen? This is the question which is at the forefront of every cost practitioner’s mind. The odds against something happening immediately are long. Page 472 of the final report refers to nine particular instances of primary legislation required including:-

- (i) Such legislation as is necessary to abrogate the common law indemnity principle.
- (ii) Repeal of Section 29 of the Access to Justice Act 1999.
- (iii) Repeal of Section 58A(6) of the Courts and Legal Services Act 1990.
- (iv) Legislation to permit the regulation of contingency fee agreements of civil litigation.
- (v) Legislation to permit pre-action applications in respect of breaches of pre-action protocol.
- (vi) Legislation to permit pre-action costs management by the Court.

- (vii) Legislation to permit the proposed reconstitution of the Patents County Court.
- (viii) Section 68(1) of the Senior Courts Act 1981 should be amended to permit District Judges to be nominated to sit in the Technology and Construction Court for the purpose of hearing fast track cases.
- (ix) Legislation to permit the amendment of CPR Part 36 as proposed in chapter 41.

3. He notes that other recommendations in this report could be dealt with either by rule changes or by primary legislation. In reality the shopping list is not as formidable as it might appear. The legislation to abrogate the common law indemnity principle already exists: see Section 31 of the Access to Justice Act 1999 and for legislation to permit the regulation of Contingency Fee Agreements again see the Coroners and Justice Act of 2009.

4. The other fundamental point is that to repeal Section 29 and Section 58A requires simply their removal from the statute book with nothing to replace them and all the changes mooted above are in reality small beer set against the magnitude of what has already been done or could easily be done.

5. Moreover, Jackson may well be implemented either by stealth or overtly by the Judges utilising their existing discretionary powers: If they want to take a tough line in terms of the assessment of additional liabilities or the justification of after the event insurance premiums then all the principles that they need are already contained in the existing Civil Procedural Rules 1998 and through revisiting guidelines already given by the Court of Appeal.

### **Claims Management Companies and Referral Fees**

6. Are claims management companies going to go away? That has to be doubted. There are too many vested interests at play here, not only the claims management companies themselves, but the Solicitors who receive a steady stream of work from them and indeed who may often own or part own the Claimant's management company whether that is declared as an interest or not to their client.

7. Moreover the rule against referral fees was flouted as readily as it was observed prior to 2004. What can be anticipated is a stream of litigation or interventions by the Solicitors Regulation Authority where devices such as those used in the Claims Direct or the Accident Group scheme litigation might be used to try and disguise referral fees as charges for proofing witnesses or providing introductions to medical agencies or such like.

8. Once those devices have been quashed, as they surely will be, in the light of Lord Justice Jackson's sweeping definition of what will constitute a referral fee a more nuanced approach may be taken, as undoubtedly there will still be a need to market and advertise for claims. But by whom?

9. There may be consolidations in the legal services industry, through vertical integration. This undoubtedly is possible under the Legal Services Act 2007 with the possibility of Legal Disciplinary Practices or Alternative Business Structures whereby one anticipates that claims management companies if they are wise, will either start to employ solicitors, or solicitors will amalgamate with claims management companies in order to obtain the advertising and marketing expertise that will be required. Removal of the stricture on non-lawyers owning solicitors firms (likely in 2011) must surely pave the way.

### **Fixed Costs**

10. Few parts of the Jackson report can be have been pored over or subject to as much anxious number crunching as his appendices, which deal with the potential levels of fixed costs for personal injury claims.

11. Although Lord Justice Jackson has set his cap against there being an escape clause which would justify uplifts over and above these figures, it should be noted that the quantum of costs that a claim is meant to be allocated falls to be judged against the stage in proceedings at which is settles.

12. The later it settles the better the deal for the solicitor who is running the case. Consequently it can be anticipated that one form of abuse will be to leave settlement to as late a stage as possible in order to ensure the maximum recovery of costs.

13. Such behaviour is already visible in respect of the predictive costs regime where solicitors can often glean one early and inadequate offer from an insurer and then promptly issue proceedings escaping the predictive costs regime and doing so with full justification in that they can point to the need for the issuing of proceedings in order to prompt a higher offer.

14. In this case one can anticipate settlement will be delayed ostensibly to garner further evidence, take a clients instructions, or by of a further interlocutory application.

15. Moreover it would seem that interlocutory costs in relation to distinct applications will fall outside the remit of the fast track fixed costs. In those circumstances why give an opponent the benefit of an extension of time? Why not, if they fail to comply with the deadline or Court Order, not simply issue an application even if the same is ultimately compromised and recover several hundred pounds more worth of costs? There would be very little an insurer or an insurer's retained Solicitors could do if they were in default of time limits set by the Court.

16. Although the fixed costs are meant to incorporate elements in respect of work which were formerly done by Counsel it has to be anticipated that the drafting of the Particulars of Claim and Advice's from Counsel, now that they are incorporated within the fixed costs regime, will prove to be few and far between.

### Hourly Rates

17. The failure to grasp the nettle of hourly rates is the most glaring omission in Lord Justice Jackson's report. In practical terms hourly rates levied in the County Court are either rates agreed by insurers with their panel firms of Solicitors who either take the rates on offer or fail to take first place in the beauty parade, when insurers jig or re-jig their panel firms of solicitors or they represent the maximum that claimant's solicitors feel that a Cost Judge will allow.

18. In the one case there is a market based upon inequality of bargaining power and in the other there is no market in any recognised sense of the word. The market is made by the Court, who alone dictates what in theological terms might have been called without conscious irony "the just price".

19. The failure to require firms to lodge *Expense of Time* calculations or for judges to educate themselves upon what it really costs a firm of solicitors to operate an hour of fee earner's time continues. Similarly the question that must be asked sooner or later, is what do the judges regard as an appropriate amount of profit to allow on top of that? They must ensure that the Solicitor is adequately remunerated but also that a disproportionate burden is not put upon the tax payer or those who pay insurance premiums. It also means that the fixed costs derived from costs currently claimed are essentially plucked out of the air.

20. In reality what is required is an *Expense of Time* exercise in order to determine how much it is costing the Claimant's firms of Solicitors to run these cases and for the Court to accept that the only ceiling on the market rate of costs is what the Court will contemplate.

21. With the removal of additional liabilities, it remains to be seen whether a defendant's solicitors will be able to recover the enhanced Court approved rates allowed under their Collective Conditional Fee Agreements or whether they will be limited to lower rates of £100 per hour or there about, which are commonly negotiated with panel firms by insurers.

### **Before the Event Insurance**

22. One can purchase before the event insurance with ones household policy or road traffic insurance policy for £20. Some premiums are less, some are slightly more. They do not provide an indemnity in any meaningful sense.

23. The way the before the event insurance market works is that a steady flow of referral fees paid by firms on its panel of solicitors constitute *de facto* staged insurance premiums enabling them to make payment in those very few cases where they have a liability to pay by reason of a case being lost at trial.

24. In default of being able to charge referral fees, then undoubtedly the hourly rates on offer by before the event insurance companies must inevitably decline.

25. Either that or there must be a cap placed upon the limits of indemnity to levels which are a fraction of those currently underwritten by before the event insurance: typically £25,000 or £50,000.

26. Is a £5,000 before the event insurance policy worth having?
27. Perhaps a more fundamental point is whether legal expenses insurance should be sold as a compulsory element of a road traffic or household policy?
28. If so, undoubtedly, further primary legislation would be required and a consideration of European Union law would move swiftly into focus.
29. Again, a longer term solution may be for before the event insurance companies to set up their own legal services department employing solicitors or indeed to merge with solicitors practices providing in effect a one stop shop.

### **Costs Shifting**

30. It is noted that Lord Justice Jackson has proposed costs shifting along the lines of the legal aid public funding immunity described by Section 11 of the Access to Justice Act 1999.
31. The difficulty that such an order presents is it grants a very wide discretion on the part of the Court as to what order to make. If someone is dependent on social security benefit then it seems plain and obvious that they would be ordered to pay no costs.
32. But what if someone undertakes a job at the national average wage of £25,000 per annum? What if they have some equity in their house? In those circumstances deprived of the possibility of after the event insurance what chunk of their assets or income is the Court likely to award to a Defendant?

33. This is going to be very fertile ground for litigation because in many cases where a case is lost the party who loses is going to be able to make some payment towards the costs of the other side but at what level and in what circumstances?

34. At this stage the concept is very much a moveable feast. Moreover, although someone may bring a claim with the benefit of after the event insurance, that premium is not going to be recoverable.

35. On that basis will there be the development of bespoke after the event insurance capped, for example, at indemnity of £5,000 in order to meet a potential liability to the defence?

36. What are the economics for the after the event insurance industry and in particular terms will it enjoy a second wind selling a lot of policies with low levels of indemnity at marginal costs?

### **Part 36**

37. If a claimant beats their own Part 36 offer, as things stand at the current time, they receive indemnity costs, interest on those costs and interest of no more than 10% above base rate, notionally a figure of 10.5%.

38. On that basis, if a claim persists to more than a year after the Part 36 offer is made they would actually be better off under the old system than under Lord Justice Jackson's proposals which simply substitute 10% of damages awarded.

39. The notion that if you beat a defendant's Part 36 offer by £1 you are the successful party and are entitled to all your costs, will on the one hand bring certainty to litigation but on the other

remove an incentive on the part of the Claimant to settle their case because of uncertainty as to what a Judge will do in relation to costs at the current time.

40. It may also bring injustice to those cases where a claimant is malingering or fabricating symptoms, but still recovers a couple of thousands more than a defendant's Part 36 offer.

41. In those circumstances it seems difficult to see why the claimant should have all their costs in circumstances where a broad-brush approach could work substantially an injustice against a defendant.

### **Funding the Claim**

42. It can be anticipated that the notion that a deduction could be made from damages to fund a success fee on a solicitor and client basis is a non-starter. The world has changed beyond recognition from the position in 2000; with many solicitors chasing cases in the world of litigation there would be a race to the bottom.

43. Anyone who visits Liverpool to litigate from time to time will be aware of the multitude of firms advertising on the side of taxi cabs, that Claimants can receive 110% of their compensation if they place their instructions through the advertising intermediary.

44. In relation to the proposed introduction of contingency fees, on the basis that contingency fees are to be calculated in much the same way as traditional fees it is difficult to see why any solicitor would wish to have an increased regulatory burden by advising on contingency fees or why further would be required as there is a more natural alignment of interest between solicitor and client in a contingency fee arrangement than a conditional fee agreement.

45. In the context of clinical negligence cases there now arises a real issue as to how the very heavy disbursements which can be incurred in terms of investigating and obtaining an expert opinion on liability and causation will be funded and insured against.

### **Costs Building and Budgeting**

46. What can be anticipated in relation to the new budgeting proposals is something which will need to be approached with far more care and skill than the rather throw away estimates one commonly sees on allocation questionnaires or pre-trial checklists.

47. In particular terms, it is going to be necessary to build a costs budget through reasoned consideration of what could function as a de facto cap on a solicitors ability to recover costs in the context of substantial litigation.

48. Equally, once deprived of their additional liabilities success fees, one can anticipate that solicitors acting for claimants will be tempted to build costs by ever increasing sophistication of their case management software to ensure that standard but chargeable pieces of work can be built into the claim for costs which will enable some of the loss of the additional liabilities to be clawed back through an increase or expansion of base costs.

49. If such a process is permitted then it is very difficult to challenge on detailed assessment. Hence the cost budgeting proposals would need a considerable amount of time and deployment of judicial resources and training in order to ensure that they are dealt with properly and not on the basis of the “back of the fag packet” calculations which too often pertain to allocation questionnaire estimates and other costs estimates during the course of proceedings.

### **Philosophy**

50. The big questions that cost shifting should remain in principle and that the focus should be upon what a parties solicitor has actually done, to quantify costs awarded ensure that the philosophy behind the English and Welsh jurisdiction's approach to costs, remains pretty much as it did before the publication of Jackson's report.

51. However, the failure to grasp the nettle that there is no effective market for legal services in a cost shifting jurisdiction remains.

52. There has also been a failure to deal with the meat of what was reasonably anticipated from Jackson a year ago, namely reform to the archaic process of assessing costs to enable a swift and practical resolution to the quantification of costs.

53. Accordingly, it should be noted that although there are undoubted problems and difficulties ahead, the position of the costs lawyer is not yet redundant.

54. In particular terms one can anticipate an upsurge in litigation if there is fundamental change to the Civil Procedure Rules 1998 and the enactment of primary legislation as contemplated by Jackson LJ may generate a storm of satellite litigation in the next two years.

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