

CIVIL LITIGATION COSTS REVIEW

Lord Justice Rupert Jackson

PRELIMINARY REPORT 8TH MAY 2009

Summary and Overview

SUMMARY

The preliminary report of the Civil Litigation Costs Review was published at a press conference on 8th May 2009. This follows four months of detailed investigation and research including wide consultation. It is detailed thought-provoking and far-reaching and should be compulsory reading for all personal injury and medical law practitioners.

The three phases of the year-long Civil Litigation Costs Review are set out in Part 1, Chapter 1 at paragraph 5.1:

- January to April: Phase 1 – fact finding and preparation of the preliminary report
- May to July: Phase 2 – consultation.
- September to December: Phase 3 – preparation of final report.

Paragraph 2.1 of that Chapter sets out the ‘Objective’ and ‘Terms of Reference’ of the Review. The Objective 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’.*

The underlying question behind all funding issues is how much litigation should cost? Reference was made to the successful systems in Germany and Canada where there is widespread litigation funding because the costs of the litigation process are much cheaper¹.

During this first phase Sir Rupert received a large number of written submissions which were distributed to the assessors which included judges, costs assessors, court staff, court users, academics and government bodies, all of whom have been “*candid, indeed forthright, in their opinions*” (Part 1, Chapter 1, paragraph 5.9), leading Sir Rupert to observe “*I have been caught up in a maelstrom of conflicting arguments. Indeed, in comparison with the present Costs Review, the design and construction of the Tower of Babel seems to have been quite a harmonious and straightforward project. Whatever I may recommend at the end of this year ...one thing is inevitable. My final report will generate protest from at least some directions and quite possibly from all directions.*”

This Preliminary Report is arranged as follows:

¹ See Part 1, Chapter 2, paragraph 3.37

- Part 1: explains the present cost rules and the struggles to which they have given rise
- Part 2: considers court fees over which litigants and lawyers have no control
- Part 3: contains a review of academic research and literature and summarises the information obtained and research undertaken during Phase 1
- Part 4: reviews the different ways in which litigation may be funded.
- Part 5: reviews the fixed costs regime which currently exists in CPR and considers the extent to which such regime might be extended.
- Part 6: reviews the costs of personal injuries litigation and examines options for reforming both the process and the costs rules.
- Part 7: focuses on the costs of certain specific types of litigation from which it is deduced that it is dangerous to generalise about “costs” with the considerations in each individual area of civil litigation being very different
- Part 8: focuses on methods of controlling costs particular in the larger and more complex cases where disclosure and preparation of witness statements can be a major generator of costs.
- Part 9: reviews regimes in which there is no cost shifting such as employment tribunals and ancillary relief proceedings and also the effect of contingency fees in employment tribunals
- Part 10: concerns the two methods of assessing costs and examines options for reform
- Part 11: makes comparison with costs regimes operating in nine other jurisdictions
- Part 12: draws the threads together and sets out what is planned for Phase 2

The unsurprising conclusion is that the level of costs in the civil justice system is so high that justice is beyond the reach of most people who fear that an adverse costs order will result in financial ruin

There is careful discussion of a system which does not rely upon the loser pays principle (costs shifting) in distinct areas, such as personal injury claims. Options considered include costs capping; abolition of success fees; contingency fees with accident victims being treated no differently from other claimants with the ‘contingency’ being met from general damages. Lawyers do not escape criticism with the report pointing to Germany where the wide availability of litigation funding is directly related to more modest lawyers’ fees: the objective is to provide access to justice, not a source of high earnings.

Of particular importance are those issues covered in Parts 4 and 6 of the Preliminary Report which can be viewed at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

OVERVIEW

The introduction in Chapter 1 outlines the huge benefits brought by the Woolf reforms to litigants: these include increased settlement before issue; swifter progression to trial; less meritorious claims being struck out; and expedition of cases through tracks with fixed trial costs in the fast track.

It notes however that the other objective of the Woolf reforms, namely to reduce costs, has not occurred and that the costs of civil justice continue to rise. It attributes this in large part to the introduction of CFAs followed by the subsequent retraction of legal aid funding and introduction of the recovery of ATE premiums and success fees. There are also significant additional costs through the ‘front-loading’ of costs through the requirements of the CPR, pre-trial protocols and Case Management orders which have tended to offset the benefits introduced by the Woolf reforms and also the normally concomitant saving of costs through early settlement.

Those who have made submissions have commented upon the ‘explosion of litigation’ over costs issues with insurers and the media complaining of disproportionate costs and claimants complaining of the massive costs caused by the procrastination of liability insurers.

There is particular focus on ‘no win, no fee’ and the allegedly ‘scandalous’ ‘ramping up’ of lawyers fees and the level of success fees². After-the-event (ATE) insurance, which insulates firms and individuals from the cost of losing a lawsuit, may be removed from the market with the report questioning whether allowing claimants to recover their ATE premiums struck the right balance between ensuring access to justice versus a "massively increased" costs burden for defendants.

A number of alternatives are considered which are relevant to PI litigation:

Costs Shifting

One-way costs shifting

At paragraph 3.4 of Part 1, Chapter 2 and Chapter 25 the report considers how a *one way cost shifting* regime (whereby a losing defendant pays the claimant’s costs but if the defendant wins, each side pays its own costs). It was considered that this would in fact be cheaper for defendants than a regime under which they recover costs when they win, but pay ATE premiums (as well as all the other costs) when they lose. A crucial consideration, however, would be the need to provide incentives for claimants to accept reasonable offers and this reflects the more recent shift in the approach to Part 36 offers whereby a claimant will not automatically be awarded costs where s/he has rejected a lower offer than the eventual award but one which was nonetheless very close: see *Multiplex Constructions [UK] LTD v [1] Cleveland Bridge UK LTD [2] Cleveland Bridge Dorman Long Engineering LTD [2008] EWHC 2220 [TCC]*, Jackson J³

Partial Costs shifting is also considered whereby the winning party should recover part only of its costs and should pay the balance itself.

Sir Rupert considers that the general consensus of one way cost shifting *must be critically examined* and states his overall impression *that the ‘American rule’ does promote greater access to justice than the ‘English’ rule, but at a price*

Fixed Costs

Consideration is given to Part 1 Fixed costs which are the product of a genuine attempt to estimate the actual (reasonable) costs of the winning party (as in CPR Part 45) and Part 2 which are deliberately set at less than this level.

Part 1 Fixed costs

The perceived benefits are:

- that over time the lawyer will break even and make an appropriate profit on a “swings and roundabouts” basis.
- the claimant/client retains all of his damages intact.
- certainty is introduced and expensive assessment hearings are avoided.

² **C (a patient acting by her litigation friend Jocelyn Fox) v W** [2008] EWCA Civ 1459 (Arden LJ, Thomas LJ, Moore-Bick LJ, Master Hurst) *vide infra*

³ A commercial case decision where the judge was Jackson J and which is digested and commented on in the 13 KBW November 2008 PIMLU at page 5

To be set against this, the policy arguments include:

- the devil in the detail of devising proper fixed costs for:
 - a) each type of case
 - b) each stage at which that type of case might be resolved
- fixed costs require regular review which may not happen

Part 2 Fixed costs

Policy arguments include:

- there is evidence that some litigants (such as small businesses) may regard the risk of incurring indeterminate costs liability to the other side if they lose as worse than the risk of failing to recover all their own costs if they win: a party can control the costs which he incurs but not those which the other side may be running up. Nor can a retrospective detailed assessment achieve such control⁴.
- If both parties know that, win or lose, they will be paying at least part of their own costs, there will be an incentive for economy on both sides.

To be set against this:

- It is unjust that the party who is vindicated should bear part of his own costs.
- The successful claimant should keep all of his damages intact
- The successful defendant should walk away from the courtroom no poorer than when he arrived.
- A wealthy party can generate much expense by procedural manoeuvres and thus grind down the other side, which will never recover all of its costs.

Personal Injuries

Policy questions are considered include:

- The 100% principle which raises the question of whether it is ever right that claimants should suffer any deductions from damages for personal injuries, in order to cover costs?
- Is there a means whereby the current level of high costs can be reduced, whilst ensuring that proper compensation reaches claimants?

Deductions from damages to cover costs

The argument of principle is that personal injury claimants should not be treated differently from other claimants and that even in a costs recovery regime, it is normal for successful claimants to suffer some deductions from their damages, namely, items of costs disallowed on assessment. Examples include CFA cases prior to April 2005⁵ and legally aided cases⁶; further, if personal injury claimants know that, come what may, they will never have to pay any costs, then the costs rules are not imposing appropriate incentives upon claimants to encourage reasonable conduct.

On the other hand APIL and other bodies have argued that 100% retention of personal injury damages is now an established principle and sacrosanct.

The report considers this is a question of principle, which must be addressed during Phase 2 but observes that there is a halfway house between the two extreme positions with one

⁴ see too, paragraph 3.34

⁵ When the 2000 Regulations ceased to apply

⁶ although in practice solicitors and counsel accept deductions to ensure that the claimant does not suffer any reduction in his assessed or agreed damages with the shortfall often being made up in part from 'interest' on costs

view being that general damages for pain and suffering and, possibly, special damages in respect of past losses could be subject to deduction, but damages in respect of future care and future accommodation needs should never be.

Reduction of high costs whilst ensuring proper compensation

A common thread is that the majority of personal injury claims are legally relatively straightforward and ought to be capable of fair resolution without defendants' insurers paying costs to lawyer and experts comparable to those paid out in damages to claimants. This begs the question whether appropriate compensation could be transferred to claimants at lesser cost.

Conditional Fees

Defendants are concerned by the impact since 2000 of bearing the costs of success fees and ATE insurance premiums. The competing arguments are considered in Part 1, Chapter 1 (paragraph 3.23 onwards). The claimants argue that the current regime finally provides access to justice to claimants who would otherwise have no redress especially since the withdrawal of legal aid in 2000. Defendants on the other hand maintain that the price of such access is too high and bodies such as the NHSLA contend that the emphasis on justice for the individual is adversely impacting on the rights of patients as a whole as litigation is funded from monies set aside for patient care.

The report considers that these arguments give rise to 3 questions:

- i) Should success fees and ATE premiums continue to be recoverable at all under costs orders?
- ii) If yes, should this recovery be subject to some, and if so what, restrictions?
- iii) If no, how should access to justice be secured for claimants who currently benefit from the full recovery regime?

Consideration is not limited to the financial position of the parties and the burdens upon them but also the function of costs to provide an incentive for reasonable litigation behaviour. There is a strong argument that if the entire costs of litigation are transferred onto the shoulders of defendants then there is no proper incentive upon claimants to act reasonably and there is correspondingly excessive pressure upon defendants to settle unmeritorious claims. On the other hand, CFAs have the incidental merit of deterring weak cases as solicitors are unlikely to take these on a "no win no fee" basis⁷. The intention is to address these matters during Phase 2 in relation to the "recoverability" issue.

Proposed alternatives range from contingency fee agreements (possibly in conjunction with an increased tariff for general damages in respect of personal injuries) to CLAFS and SLASs⁸, as discussed in chapters 18 and 19.

It is not proposed to consider the detailed analysis in all the chapters in this summary but to concentrate upon those matters considered in Part 4 relating to funding of civil litigation in general and Part 6 where the consideration is specific to Personal Injuries.

PART 4 – THE FUNDING OF CIVIL LITIGATION

Legal Aid - Chapter 12

⁷ see paragraph 3.35, Part 1, Chapter 2

⁸ Supplementary Legal Aid Schemes such as those used to fund Mediations

Paragraph 4 of this chapter contains a review of the legal aid scheme from its inception in 1945 and other means of funding. The report lays emphasis on the almost unique basis of legal aid funding since 1994 whereby there are prescribed rates for most cases which only apply to payments from the Legal Aid Fund and thus do not limit recoverability of costs *inter partes*. This is considered to be “an important exception to the indemnity principle” as a successful claimant lawyer in a legal aid case can recover *inter partes* costs of precisely the same amount as in a privately funded case. Accordingly such claims are effectively litigated on a contingency fee basis with legal aid operating in non-family litigation as a banker, by providing payments on account as the case progresses, and as an insurer, by guaranteeing a minimal level of remuneration should the case be unsuccessful.

In Chapter 6 under ‘The Broader Picture’ statistical analysis showed that CFAs and ATE were being increasingly used and now funded more claims than legal aid in those areas where public funding is still available including clinical negligence. The majority of weak clinical negligence claims were resolved before issue and the very small minority that went to trial represented under 5% of the total number of claims for which legal aid certificates were issued (Chapter 6, paragraph 2.4). Of those that were issued the majority were settled in favour of the claimant before trial (Chapter 6, paragraph 2.8) and the data demonstrated that about half of all clinical negligence claims proceed on legal aid and the other half on CFAs.

It is pointed out at Chapter 12, paragraph 4.6 that the practical effect of legal aid costs protection is close to complete immunity for losing legal aid clients from *inter partes* costs orders with the usual order being a “football pools” or “lottery” order giving the opponent liberty to apply in the event of the claimant at some time into the future coming into substantial funds. The practical effect of this is that in funded cases one way costs shifting is the norm. and whilst this is unfair to opponents it is a pragmatic solution as there is no true access to justice if clients of limited means are fully exposed to *inter partes* costs orders.

Legal Aid is not the focus of the review but is considered in the context of alternative funding schemes; in particular comment is made upon the number of hoops a litigant has to jump through to receive public funding under the Funding Code and the simpler requirement of good prospects of success necessary to commence a case on a CFA. This *striking* difference it is suggested indicates that the recoverability of success fees and premiums have allowed litigation to move too far away from considerations of proportionality which were central to almost all types of funding prior to April 2000.

BTE Insurance – Chapter 13

Sir Rupert made a number of observations concerning BTE insurers. There is less take-up on LEI in England than, say, in Germany where a predictable costs regime allows *a more benign environment in which LEI can flourish*. Overall BTE insurers receive more they pay out in respect of RTA claims but maintain that much of this goes to intermediaries in commission in those BTE insurances where the insurer “sells” claims to solicitors in return for referral fees and the solicitors then act on a CFA or CCFA. They also require their insured to instruct solicitors based far away from their home and do not accept that this impairs the quality of case preparation despite considerable evidence to the contrary.

The preferred form of BTE cover is where insurers pay solicitors to act for the insured because in that way referral fees are eliminated and the insurer has control over the amount of costs expended by the claimant’s solicitor⁹. Further, no CFA is necessary and that keeps

⁹ FOIL produced statistical evidence to support this assertion

the costs down for the defendant. Sir Rupert's tentative conclusions therefore (paragraph 4.5) is that it is in the public interest to promote "*a substantial extension in BTE insurance*"

The Bar's CLAF Group

This proposal is discussed in chapters 18 and 19¹⁰. One proposal that Sir Rupert considers *merits serious consideration* is that motorists should be required to take out compulsory BTE insurance in addition to third party liability insurance; similarly employers and occupiers of premises should be required to take out BTE insurance in addition to public liability insurance. This insurance would only be in respect of costs, not damages and the litigant would be supported by insurers, subject to a merits test. There would be no success fee or ATE premium and BTE insurers would pay the defence costs in respect of cases lost.

There is a degree of consensus that it would be difficult for a CLAF to operate in direct competition with CFAs in their current form. A key question is whether, if recoverability of success fees and ATE premiums were abolished a CLAF could be viable alongside old-style CFAs, as the CLAF Group believe.

Sir Rupert sees some attraction in their proposal but a great deal of detail needs to be worked out.

Comment is therefore sought on:

- i) Whether there is agreement by stakeholders and court users with the above analysis
- ii) Comments on the feasibility and merits of the proposal put forward by the CLAF group¹¹
- iii) Suggestions from the insurance industry and others as to how substantially more extensive take-up of BTE insurance may be promoted

ATE Insurance – Chapter 14

A number of observations are made:

- The overwhelming majority of personal injury road traffic claims settle before proceedings are issued and this includes those funded by ATE
- ATE insurance is used extensively; in non-RTA cases the premiums are higher because the success rates (particularly public liability) are lower. Premiums conventionally charged (whether flat rate or staged) are generally recovered in full: *Rogers v Merthyr Tydfil CBC* [2007] 1 WLR 808
- ATE insurers have no control over the conduct of litigation
- The requirement for a *Rogers v Merthyr Tydfil* statement does not in practice ensure that premiums are competitive (paragraph 5.4)
- Third party funding is prohibited: 9.01(4) of the Solicitors' Code of Conduct 2007 but this is currently under review

¹⁰ and arises out of a number of earlier reports including *CLAF – An idea whose time has come*", Bar Council 1997; "*Proposals to link legal aid and conditional fees*", Law Society 1997; CA Policy Paper on CLAF, 1997. A further Bar Council paper on this issue is being prepared in response to the Preliminary Report

¹¹ akin to the scheme in place until 1988 whereby 10% of all public funded fees were retained to go into the (then) Law Society pot to fund other legal aid claims. Very few practitioners complained of this at the time or considered this 'clawback' to be unreasonable: it was an acceptable *pro bono* element of undertaking publicly funded work

Conditional Fee Agreements – Chapter 16

- Intended to plug the legal aid/access to justice eligibility gap, allowing payment by results
- The notion that a lawyer conducting litigation with the full panoply of duties to the court and to his client should also have a financial interest in the outcome of the case was alien to our legal culture and many were unhappy when this was introduced including Sir Rupert (paragraph 1.4)
- On the other hand, such a system:
 - Would address the access to justice principle and facilitate such access
 - Prevent the pursuit of weak cases
 - Provide incentives for lawyers
 - Was perceived by lay clients to be a benefit as the lawyer *‘was putting his money where his mouth is’* (paragraph 1.4)
- Despite the APIL/PIBA6 agreement, the personal financial risk to a barrister of a lost case is greater than for solicitors
- MINELAS¹² did not object to a 25% deduction under Style 1 CFAs as the price for access to justice that would not otherwise have been available (paragraph 3.2) and the ATE premium formed part of this deduction in Style 1 CFAs (paragraph 3.4)
- Style 1 CFAs were abolished in the Access to Justice legislation in the late 1990s when legal aid for personal injury claims was abolished and the recoverability of success fees and ATE insurance premiums was introduced to ensure the 100% recoverability principle so personal injury CFA claimants would be no worse off than litigants supported by legal aid.
- This was a significant cultural shift and the realisation that recoverability meant ‘no cost to you’ led to:
 - *“led to entrepreneurial organisations advertising for clients and developing complex networks of financial arrangements that were less than transparent”* with the ensuing Claims Direct and TAG claims placing a heavy burden on the courts and tarnishing the image of the no win-no fee system as a means of access to justice for consumers
 - provided ammunition for the Costs War in which insurers carried out minute scrutiny of the wording of the agreement and the behaviour of claimant lawyers in arranging ATE cover with the result that solicitors and counsel *“who had legitimately incurred substantial costs”* recovered nothing, not even the base fee. This has only been partially abated by the revocation of the 2000 Regulations.
- Two views have emerged in Phase 1 of the Review:
 - *The majority view:* CFAs have become absorbed into our legal culture over the past 15 years and provide access to justice for a large number of individuals who would otherwise be without a remedy¹³

¹² Middle Income Not Eligible for Legal Aid

¹³ see “Improved Access to Justice – Funding Options and Proportionate Costs; the Future Funding of Litigation – Alternative Funding Structures (published August 2007)

- *The minority view* (held by many senior members of the profession): CFAs are pernicious and injurious to the fabric of civil justice and should be abolished. This view has been strongly supported by PIBA¹⁴:
 - PIBA, noted Sir Rupert’s stated impression in the Terms of Reference document that the fears pre-introduction of CFAs that these would lead to irreconcilable conflicts of interest *“has not happened”*
 - PIBA stated this impression was wrong and that *“CFAs lead to huge conflicts of interest ... but the only way in which this system can operate is either to gloss over those difficulties or to ignore them altogether”*
 - There is an inevitable conflict of interest where the lawyer is financially interested in the outcome of the case and CFAs magnify this conflict as *“it is in the lawyer’s interest to effect any settlement, rather than one which genuinely in the interests of his or her client”*
 - Clients are very often reluctant to accept that they must bear a proportion of the blame for an accident and equally often have hugely inflated expectations as to what their claims are worth or as to what a realistic settlement value is, taking into account the risks on both sides.
 - It becomes totally artificial for a barrister who considers that the other side has made a reasonable offer to advise his client to accept that offer while at the same time stating that it is in his or her interests that such an offer be accepted.
 - These problems are magnified considerably when the settlement discussions are under pressure at the door of the court and even more so when the defendant makes a global offer inclusive of costs as occurs frequently.
 - The system has brought the civil justice system into disrepute.
- **Sir Rupert’s Provisional View¹⁵:**
 - Following the retraction of legal aid, some system of payment by results must exist in order to facilitate access to justice and this has been absorbed into our litigation culture and is now embedded.
 - The real issue, therefore, is how CFAs or alternative “no win-no fee” arrangements should be structured, not whether they should exist.
 - The aim should be structures which provide incentives:
 - For lawyers to get the best possible results for their clients, whilst discharging their duties to the court and to other parties;
 - for clients to propose or accept reasonable settlements; and
 - for all parties to keep costs down to proportionate levels.
 - Criticisms include:
 - Discipline is lacking as claimants have no interest in costs being incurred as they will not have to pay these (paragraph 5.5)

¹⁴ see Personal Injuries Bar Association (“PIBA”) in its written submissions for Phase 1 of the Costs Review (paragraph 5.3)

¹⁵ paragraph 5.4

- Success fees may be being set to high as to over-compensate lawyers for those cases that are lost
 - ATE premiums and success fees should not be recoverable from defendants
- **Comments and information are sought on the following questions:**
- Are CFAs satisfactory in their present form
 - If not, what reforms might be made to create appropriate incentives

PART 6 – PERSONAL INJURIES LITIGATION

Chapter 24 – Small Claims Limits

Views sought for consideration during Phase 2 concern the proposal to raise the limit to £5,000:

Arguments for:

- the disproportionate level of costs in relation to the damages claimed
- the relatively simple legal principles involved
- the widespread availability of BTE insurance

Arguments against:

- the complexity of some issues and the requirement for access to justice which may require legal guidance
- lay person may not have the time, knowledge or qualifications to effectively pursue such personal injury claims as a litigant-in-person and yet would not be able to recover the costs of instructing a lawyer; this would represent a considerable barrier to justice resulting in inequality in arms and undersettlement.
- practical considerations including more complex allocation hearings
- the unlikelihood that BTE insurance would reduce; on the contrary they would be likely to increase
- the number of personal injury firms dealing with these claims would disappear
- the pressure on free legal advice centres would rise significantly
- previous consultation by the DCA in 2007 concluded that the limit should remain at £1,000: 'Case track limits and the claims process for personal injury claims'¹⁶

Options for consideration under Phase 2 include:

- an increase to the small claims limit from £1,000 to £5,000
- a lesser increase e.g. to £2,500
- an increase in line with inflation
- no increase

Safeguards for consideration under Phase 2 include:

- the revised upper limit being applicable only to certain types of claim relating to soft tissue injuries thereby excluding more serious injuries
- a revised system for assessing general damages with a software system for assessing and calculating the level of general damages thereby simplifying assessment and obviating under-settlement

¹⁶ <http://www.justice.gov.uk/publications/cp0807.htm>.

- provision for recovery of the costs of a predetermined amount of legal advice

Chapter 25 – Costs Shifting

Views are sought as well as statistical data for consideration during Phase 2 concerning the proposal whether it would be more cost effective to remove the claimant’s liability for costs in respect of unsuccessful cases with the claimant recovering costs on the same basis as at present

Arguments for:

- it would be cheaper for defendants than the present two-way rule whereby success fees and ATE premiums are recovered by the successful claimant (Sir Rupert carried out an analysis of the figures which included the opinion of a medical defence solicitor that because of the high level of ATE premiums, defendants in clinical negligence cases would be better off under a one-way costs shifting regime than under the present costs regime.¹⁷ Supportive evidence from this person is awaited)
- it would reduce the burden on claimants of obtaining ATE funding since not being a risk of an adverse costs order, he does not need to insure such risk
- removal of interest groups and middlemen from the process (as is currently the position under CFAs and with ATE) serves the public interest

Arguments against:

- the risk of frivolous claims by claimants once the risk of incurring costs is removed
- claimants might be less inclined to accept reasonable offers

FOIL suggested a number of sanctions¹⁸ but Jackson J considered these may not be necessary in that:

- as a solicitor is on a CFA this already discourages frivolous claims and the rejection of reasonable offers
- a claimant must still insure in respect of court and expert fees which will not be recoverable if the claim fails
- as ATE insurance is mostly issued under delegated authority it is doubtful whether the risk of liability for adverse costs orders acts as a brake upon claimant conduct

Chapter 26 – Reduction of Transaction Costs

This chapter is concerned with “ordinary” personal injury claims: road traffic accidents (“RTA”), employers liability (including occupational disease) and public liability claims. Clinical negligence is not included¹⁹. This chapter arguably contains the most contentious observations and the most far-reaching proposals and re-pays reading in full.

Views are sought for consideration during Phase 2 concerning the matters summarised in the review at paragraph 4 and the specific points at paragraph 4.4

- Should solicitors and counsel be permitted to act on contingency fee agreements?

¹⁷ as tends to be the position where such claims are publicly funded

¹⁸ see part 10

¹⁹ Liability in these claims involves separate consideration of breach and causation, the interrelationship between which can be complex in clinical negligence litigation: see Jackson & Powell on Professional Negligence (6th edition, Sweet & Maxwell, 2007) at paragraphs 13-066 to 13-154. It is not unusual for claimants to fail on causation, even though they succeed in establishing breach.

- If so and if costs shifting remains, what form should that cost shifting take?
- In particular, should the losing party pay the additional element of costs (i.e. the amount by which the contingency fee exceeds costs assessed on the conventional basis)?
- If contingency fee agreements are permitted, what form of regulation should be imposed?
- If the concept of lawyers working on contingency fees is unacceptable, do the considerations set out in this chapter militate in favour of setting up a CLAF or a SLAS, as discussed in chapters 18 and 19?

Arguments for

- The great majority of personal injury claims are successful on liability with liability generally conceded well before trial and often before issue of proceedings²⁰. There is statistical support for this in the appendices, most clearly from Appendix 25
- Personal injuries litigation is generally fairly straightforward and “the general run of personal injury cases is not hugely challenging work for skilled and specialist lawyers or paralegals to carry out” (excluding high value cases which involve schedules of future loss etc)
- The cost of personal injuries litigation remains remarkably high particularly in respect of lower value claims with those of claimant solicitors being “*substantially higher than the defendant solicitor costs*”
- There is no proper scrutiny of costs by a lay claimant who never has to pay these whereas liability insurers watch over the costs of defence solicitors like hawks
- Liability insurers however can only exercise limited control over claimant costs because:
 - a) It is prohibitively expensive to go for detailed assessment
 - b) After-the-event, it is not easy to challenge items of profit costs which may be excessive
- Excessive hourly rates in excess of those paid to defendant solicitors many of whom are on fixed fees. This tends to encourage inefficiency on the claimant’s side.
- Referral fees which are only able to be paid because they are built into profit costs
- Exploitation of the rule through ‘cost building’ through:
 - a) Unnecessary applications for pre-action disclosure (a revenue generator)
 - b) Issuing proceedings prematurely to avoid escape the predictive costs regime for RTA claims
- No competitive tendering and thus incentive to devise and operate procedures to hold down costs
- Excessive legal input eg) low value claims where liability is admitted and the injury is straightforward, and therefore the disputes are not “legal” but could be resolved direct between the claimant and the liability insurers without input from lawyers

Arguments against²¹:

- the expenses of obtaining work either through marketing or referral fees, in contrast to the steady stream of work received by defence solicitors from their insurer clients

²⁰ an argument previously put forward for the retention of Legal Aid in these cases with the corresponding recovery of deductible benefits in claims which might otherwise not be brought. On average, over 90% of road traffic accident claims succeed and, in most years, over 70% of employers liability claims succeed. These two categories encompass the vast majority of all personal injury claims

²¹ see too APIL’s criticism at Appendix 28

- additional time required to be spent with claimant clients whereas liability insurers are repeat litigators requiring less contact and attention
- cash flow whereby defendant solicitors are paid by their insurer clients on a regular basis whereas claimant solicitors can wait years after the conclusion of the case before they are paid²²
- attitude of defendants who generate unnecessary costs through:
 - failing to respond properly to letters of claim;
 - failing to comply with the pre-action protocol;
 - failing to provide information which is in their exclusive possession (e.g. employer records);
 - denying liability in cases where there is no defence and by refusing to make proper admissions²³.
 - Putting claimants to proof in respect of matters which ought to be admitted.
- Minimum costs incurred in every case regardless of size. Claimants have the burden of proof and therefore have more work to do including taking the claimant's witness statement, requesting medical records, obtaining medical reports, etc. It is therefore inevitable that costs will be higher relative to damages in lower value cases.
- Assessing general damages for personal injuries which requires research as liability insurers' computer systems are unsatisfactory and invariably produce valuations which are too low

In fact Referral fees found little support by either side and Sir Rupert pondered *whether cumulatively the matters which are complained of by both sides account for the remarkably high costs of personal injuries litigation* (paragraph 2.14). Reference is made at paragraph 3 to the 2007 Ministry of Justice Consultation Paper in respect of claims up to £25,000 ('the new process')²⁴. The MoJ is currently working out the details of the proposed new process and is furnishing relevant documents to the Civil Procedure Rule Committee for consideration; the setting of fixed costs for the various stages of the new process is to be referred to the Advisory Council on Civil Costs.

At paragraph 3.8 Sir Rupert sets out his own preliminary view which is that a process along the lines of the DCA original consultation paper "*makes eminently good sense*" resulting in the reduction of costs of the resolution of some of the problems that currently arise. That process however is bound to be affected by reforms adopted following the conclusion of the Civil Litigation dCosts Review. Accordingly the report considers it may be sensible to dovetail in the development of the new claims process with whatever implementation programme may be put in place following completion of the 2009 Costs Review. He hopes to "*move beyond the rhetoric of both claimant and defendant practitioners*" to explore how the new 'claims process for personal injury claims' (RTA claims up to £10,000 with an admission of liability within a defined period) could be extended to many straightforward, low value personal injury claims which fall outside those parameters. In turn this is dependent upon whether as result of the review:

- The upper limit for personal injury damages in the small claims track is raised above £1,000
- Success fees and/or ATE premiums cease to be recoverable as costs

²² see Appendix 12 (the APIL schedule)

²³ An analysis recently carried out by one trade union of cases concluded in 2008 shows that in 72% of successful cases there was no admission of liability within 4 months of the preaction protocol letter.

²⁴ "*Case track limits and the claims process for personal injury claims*", Ministry of Justice consultation paper CP 8/07. See summary and analysis of responses to this Consultation in the July 2008 PIMLU, pages 1 and 2

- A comprehensive costs regime is introduced for all cases in the fast track²⁵

Matters for consideration in phase 2 therefore are:

- How the proposed new claims process would be affected, if any of the reforms canvassed in the preliminary report were to be adopted
- How this new claims process might be built upon, in order to embrace all personal injury claims within the fast track limits
- Other constructive suggestions for co-operation between claimant and defendant solicitors, which might facilitate the swift and fair resolution of the “vast mass” of low value personal injury claims where:
 - a) There is no defence
 - b) Quantifying damages is straightforward
- How the proposed new claims process would be affected, if any of the reforms

Chapter 27 – review of how general damages are assessed in other jurisdictions

Italy, France and Spain have some variant of a points based system with medico-legally qualified experts who examine the claimant and then form a view. Sir Rupert concludes that this appears to make damages for personal injuries more predictable in those jurisdictions than in England and Wales.

COMMENT

Described at the press launch by the Master of the Rolls as a *tour de force* this is an impressive analysis where the arguments even if unpalatable are high quality and soundly reasoned with tantalising hints of Sir Rupert’s own thinking. Save for those who use CFAs opportunistically and where the proposed success fees do not withstand close scrutiny, many practitioners will breathe a collective sigh of relief at the proposal to dispense with ATE insurance and premiums: claimants are disgruntled at the way in which satellite litigation for technical breaches of the rules is akin to the abuse which occurred in days of yore when ‘Forms of Action’ ruled prior to modern (albeit pre-Woolf) pleading practices²⁶; defendants on the other hand who litigate responsibly do not see why costs should be punitive not only in terms of success fees but in the requirement that they meet the costs of insurance premiums such that the commercial pressure to settle claims which otherwise would be properly defensible, is sometimes overwhelming. There is also concern that there is little incentive or pressure on claimants to take a realistic view of the merits of their claims or to engage actively in settlement negotiations when, win or lose, they run no financial risk in terms of costs save in respect of a narrowly beaten Part 36 offer²⁷. All this is a very welcome summation and analysis.

On the other hand, the implicit suggestion that personal injury law is really a simple concept and that specialist practice in this area is the first resort of the third rate mind, will be viewed by many as superficial and arguably ill-informed. Sir Rupert concedes that clinical negligence does have discrete challenges of its own and the successful conduct of such

²⁵ recommended by Lord Woolf but not implemented

²⁶ See, for example, **Kier Tankard (Appellant) v John Fredricks Plastics Ltd (Respondent) : (1) Fawcett Old Ltd (2) Michael Jane Hair & Beauty (Appellants) v Yvonne Hibberd (Respondent) : Mark Jones (Appellant) v Karl Joseph Attrill (Respondent) & Law Society (Intervener)** [2008] EWCA Civ 1375 (Sir Anthony Clarke MR, Dyson LJ, Jackson LJ) (digested and commented upon in 13 KBW December 2008 PIMLU at page 3

²⁷ **Multiplex Constructions [UK] LTD v [1] Cleveland Bridge UK LTD [2] Cleveland Bridge Dorman Long Engineering LTD** [2008] EWHC 2220 [TCC], Jackson J *vide supra*

litigation on both sides requires skilled, disciplined analysis and astute legal acumen, particularly on causation issues²⁸. Nonetheless, this otherwise thoughtful, well-written and objective report, does give more than a hint of the author's own antecedents at the Bar as the advocate *sans pareil* in professional negligence claims²⁹ and suggests some prejudice regarding the perceived simplicity of personal injury law which is frequently belied by the reality. All practitioners are aware of the Fast Track case with the tricky point of law which requires considerable research and skill to tease out the issues and it is by no means axiomatic that a fixed costs regime will ensure fairness on the swings and roundabouts principle; to do so argues that practitioners have a cross-section of easy and challenging cases whereas the reality is that junior practitioners and paralegals deal with the 'conveyor belt cases' and that the difficult ones are passed to the senior practitioners (largely irrespective of the potential global monetary value) who in turn send these to counsel. There are likely to be those at the junior and middle level of the Bar who may find themselves in the unenviable position of only advising on the lurchingly difficult swings without the comfort of the occasional predictable and less precarious roundabouts. Further, if all middle and low-cost claims are delegated to paralegals and even call centres operating 'one size fits all' software with tables for appropriate levels of general damage and special damage claims, how will practitioners acquire the necessary knowledge, skill and experience to handle the larger claims which Sir Rupert acknowledges require particular knowledge and ability

Moreover, the hope that there will be – as yet unarticulated – means of making defendants and claimants co-operate in the swift and fair resolution of the “*vast mass*” of low value personal injury claims, seems to be a classic example of trusting hope to triumph over experience³⁰. Despite the relentless pressure to settle; the belief that all claims are capable of compromise and that to go to trial is essentially an implicit admission of 'fault' by the legal advisers of one party of another, *access to justice* means precisely that, where proper resolution of triable issues should not be secondary to commercial expediency³¹. The law is not responsible for determining issues according to a moral compass or proposing pragmatic compromise: what lawyers should be able to demonstrate is an ability to master a 'brief'; formulate issues and provide skilled, cogent advice upon which lay clients can take an informed view and provide instructions. The move away from objective advice based upon legal tenets and evidence where the veracity of the latter remains the responsibility of the client with the lawyer assessing the probative value, has spawned an unattractive concept of litigation where cases are deemed to be won or lost by lawyers' skills with the factual basis of the claim being of only secondary importance. Accordingly, there is a perception that lawyers should be 'blamed' when a case is lost instead of the realisation being that, absent incompetence by legal representatives, cases are won or lost on objective adjudication by the court upon the evidence and properly presented legal argument. It is this which makes certainty so important.

As the government and other bodies now insist on describing legal professionals as service providers, an appropriate analogy is a plumber called out to repair a washing-machine. If he advises that it is incapable of repair he is not thereby denied his call-out charge on the basis that it is his 'fault' that the machine cannot be repaired; why then should professionals who

²⁸ the **Fairchild** and **Bailey** lines of authority are but one example and the 'responsible body of opinion' *Bolam/Bolitho* test, recently approved as the applicable test for all professional negligence claims, is another.

²⁹ *pace* his not infrequent references to Jackson on Professional Negligence

³⁰ see Sir Rupert's 'Provisional View in Chapter 6, paragraph 4.5 summarised at page 8 above

³¹ see for example the new Part 36 regime and the 47th update to the CPR with the quite rigid insistence on joint settlement meetings as well as recent decisions where judges have held that the recovery of damages only slightly in excess of a Part 36 offer is a basis for costs sanctions.

carry appropriate and timely investigations into a potential claim and thereafter use their hard-won skills and experience to advise that the claim is not viable, be punished for delivering this news? It may make life commercially easier for insurers and the NHSLA but it does not withstand 'logical scrutiny'. Accordingly, the questioning of the fee-shifting rule inviting views on whether claimants should assume responsibility for some costs even when successful, is an engaging concept and one on which could go some way to redressing the dissatisfaction felt by both claimant and defendant lawyers.

The suggestion for compulsory BTE is clearly an attractive one. A principal problem is BTE not identified, however, is that there is a reluctance by BTE insurers to fund beyond the limit of cover even in those cases where there has been a full admission of liability. This leaves the claimant with no alternative than to enter into a CFA and although the uplift in the latter circumstances will be considerably lower (between 20 to 25%³²), this does result in the driving up of costs which is the mischief the Review seeks to address

As to the assessment of General Damages, the leaning towards the methods adopted in other jurisdictions has two advantages from the assessors' perspective:

- The levels of awards for General Damages in France and Germany are considerably lower than in the UK (even below CICA levels) which will please insurers and the NHSLA
- They are capable of being assessed using software matrices and thus obviating the need for legal assessment, thereby reducing costs

Of particular importance are those issues covered in Parts 4 and 6 of the Preliminary Report which can be viewed at

http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

The matters on which Sir Rupert has sought views are set out on pages 223, 226, 232 and 246.

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Please note that this Summary and Overview is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

³² See **C (a patient acting by her litigation friend Jocelyn Fox) v W** [2008] EWCA Civ 1459 (Arden LJ, Thomas LJ, Moore-Bick LJ, Master Hurst) where the Court of Appeal considered that a success fee of more than 20% could rarely be justified in a RTA claim where there had been a pre-CFA admission