

Lord Justice Jackson's Review of Civil Litigation Costs

The eagerly awaited report of Lord Justice Jackson has now been published with the objective 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 costs. These words not unsurprisingly echo those of Lord Woolf some 14 years earlier who aimed to secure a regime in which costs would be proportionate. Lord Woolf then stated that the aim of his new procedural rules was to “ensure that litigation is conducted less expensively than at present and to achieve greater certainty as to costs”.

What is clear is that Lord Woolf did not anticipate the major problem that has arisen in those intervening years, namely the escalation of disproportionate costs primarily driven by success fees and after the event premia.

Lord Justice Jackson was requested by the Master of the Rolls in late 2008 to carry out a fundamental review to address the problem head on. This review has been carried out throughout 2009 to include two consultation periods.

The question that falls to be determined is whether or not the proposals of Lord Justice Jackson will resolve the problem.

Since the introduction of the Woolf reforms, the issue of costs has achieved greater significance due to the increasing prevalence of success fees on the part of claimant solicitors which have caused their claims for costs to accelerate rapidly beyond the prior expectation of costs figures. Whilst the Woolf reforms have assisted in speeding up the litigation process, the failure to institute a system that manages the costs as efficiently as the timetable has led to a significant increase in the costs by reference to the damages awarded in many claims.

In addition after the event insurance premia that are payable in certain cases have been rising increasingly as time has progressed. These premia are now at levels where the impact of the costs of an action compared to the damages awarded in a case are now disproportionate.

The combined impact of claimant costs being increased by a success fee and then augmented by a high level of premia in after the event insurance cases has been to place a heavy burden on the defendant in civil actions whilst providing limited recompense for defendants when they are successful.

The Government's initial proposals as to access to justice suggested that the cost of obtaining insurance would be borne by the claimant. However, the case of "Callery v Gray (No 2)" "loaded" the cost of successful claimant litigation squarely on the defendant.

The most significant change in the proposals is to reverse this cost loading so that the initial emphasis is restored and the costs of insurance and ATE insurance should not be borne by the Defendant in every case.

It has taken the government a long time to recognise the inequalities that this has created, the fuelling of a "compensation culture" by the availability of such a one sided system and the burden it has placed on Defendants. Lord Justice Jackson appears to be the first voice of authority that has stated unequivocally to the government that there should be a reversal of this policy.

Lord Justice Jackson's major recommendations may be summarised as follows :-

1. Success fees and ATE insurance premiums should cease to be recoverable from un-successful opponents.
2. Clients may enter into a "no win no fee" (or similar) agreements with their lawyers but any success fee will be borne by the client not the opponent.

The maximum amount of damages from which lawyers may deduct success fees should be capped at 25% of the damages excluding of course any damages referable to future care and future losses.

3. In order to ensure that any success fees do not eat substantially into damages, the awards of general damages for pain, suffering and loss of amenity be increased by 10%.
4. The abolition of referral fees.
5. There be further consultation on the introduction of qualified one way costs shifting. In such cases, the Claimant will not be required to pay the Defendant's costs if the claim is unsuccessful but the Defendant will be required to pay the Claimant's costs if it is successful subject of course to issues of unreasonable or unjustified behaviour.
6. The costs recoverable for fast track personal injury cases with a value of up to £25,000 be fixed. In addition, a Costs Council should be established to undertake the role of reviewing fast track fixed costs on a regular basis.

7. Greater encouragement for BTE insurance cover for legal expenses to be taken out.
8. Lawyers should be able to enter into contingency fee agreements with clients for contentious business with such agreements to be regulated and any unsuccessful party in the proceedings be only required to pay an amount for costs reflecting what would be a conventional amount with any difference to be borne by the successful party.
9. A working group be set up consisting of representatives of Claimants, Defendants, Judiciary and others, to explore the possibility of producing a transparent and neutral calibration of existing software systems to assist in calculating general damages.
10. The 10 pre action protocols be retained albeit with certain amendments to improve their operation.
11. There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how alternative dispute resolution works and the benefits that it can bring but it should not be mandatory for all proceedings.
12. Measures be undertaken to ensure that the costs of disclosure in civil litigation do not become disproportionate.
13. The Courts should take a more robust approach to case management to ensure that realistic time tables are observed and that costs are kept proportionate.
14. There should be effective costs management and the recommendation that lawyers and judges receive training in costs budgeting and costs management and that rules be drawn up to set out a standard costs management procedure.
15. Where a Defendant fails to beat a Claimant's offer under Part 36, the Claimant's damages should be enhanced by 10%.

Dealing with the various points set out, we would comment as follows:

1. The reversal of this burden is long overdue and to be welcomed as creating a more level playing field. The suggestion that success fees should be instituted as a means of "compensating" claimants for cases that they took on and lost did not appear to work in practice. Claimants have avoided taking cases without a prospect of success as insurers would not back the same. As a result, many success fees are no more than "windfalls" for Claimant lawyers in that they receive twice the amount of fees, for the same amount of work. Their proposed

abolition is welcome. The increase of insurance premia has progressed unabated and without apparent reference to the actual cost of litigation. The latter will now be borne by the Claimant and should therefore permit market forces to again influence their level. When the premia was paid by the Defendant, there was no incentive for market forces to operate.

2. A success fee would still be permissible for Claimant lawyers, but now it would come out of the Claimant's damages and would be capped at 25% of the same. This would be a matter between solicitor and client and would not affect the Defendant who would only be responsible for "base" costs.
3. The "downside" of the removal of success fees is the "balancing" measure of a "general" increase of personal injury damages by 10%. It is difficult to contemplate how this will apply in practice as general damages are subject to no "tariff" at present but it is likely that the judiciary, if prepared to embrace this proposal, would increase the Judicial Studies Guidelines in terms of quantum for various types of injury.
4. The abolition of referral fees has the potential to "decimate" the claims management industry. However, it should be borne in mind that Claimant lawyers have come to rely on this industry as the "lifeblood" of their marketing strategies. Before the legitimisation of referral fees occurred there was some evidence that "joint strategies" were in place with claims referral companies to create mutual business models. With the "de-regulation" of participation in solicitors firms ahead, there must be some risk of businesses "buying into" Claimant companies and avoiding the direct payment of fees. One might seek to regulate the problem, but it does not mean that one eradicates it.
5. The concept on one way costs shifting is a disturbing proposal. On the one hand the report recognises the inequalities of success fees and payment of ATE premia. How then does one arrive at "one way costs shifting?" This has the potential to recreate the inequalities that currently exist. More information is needed as to how this might be applied but it is a matter of concern for Defendants. The re-introduction of market forces to influence ATE premia is a welcome addition. The potential for unmeritorious claims to be pursued when there is very little risk of costs penalties will only fuel unnecessary actions. Whilst there are already costs sanctions for unreasonable or inappropriate conduct, it is the experience of many that the Courts are slow to apply such sanctions, save for the most "heinous" of cases. Is this another deterrent that will not deter? Will cases be brought that are without risk for the Claimant?
6. The introduction of fixed costs for fast track cases has to be welcomed as a means of capping costs if the level of fees is appropriate. As ever the devil will

be in the detail, but the proposal of a fee of £12,000 as a limit of pre-trial costs appears to be higher than might have been anticipated. The establishment of a Costs Council ought to ensure that these matters are not reviewed after many years, but on a continual basis.

7. The market for BTE insurance is currently not significant. Whilst more policies are providing such cover, it is not yet established as a means of funding litigation. This provision would also be open to abuse, just as ATE cover has been on occasions, but there is considerable work to be done in advertising / funding such options before it is a cornerstone of the legal market. Whilst ATE providers have made significant sums in the current environment, BTE cover is often seen as an “add on” provision in other products. The viability of the same will be tested when litigation funds are required for such funded actions on a regular basis.
8. The proposal for contingency fees again appears to be lacking the real detail. It is a proposal that the Ministry of Justice has treated with some caution to date. It will have to be seen whether there is an appetite for the same and the viability will depend on the relationship between success and cost.
9. Introduction of software between parties to “standardise” assessment of damages must be beneficial to all. Reference to Judicial Studies Guidelines has advanced the calculation and agreement of general damages. The introduction of common software solutions would remove some of the “argument” between parties as to quantum.
10. The pre action protocols have been one of the successful features of the Woolf changes, albeit they have brought a costs consequence. However, to date, their benefit had been recognised and the protocols have been retained.
11. Mandatory referral to arbitration or mediation can often be an expensive and unsuccessful additional expense. Nonetheless in “smaller” cases the benefits of ADR are significant in resolving disputes.
12. Disclosure is always seen as an “evil” in civil cases, albeit it is the bedrock of a successful trial. To date, it has been difficult to curtail the manner in which parties achieve a “meeting of minds” on disclosure which is always the key to a successful resolution of the same. Whilst Claimant lawyers continue to seek or suspect that Defendants are withholding documents, there will be costs implications. If this thorny problem is to be resolved, there would need to be some detailed changes rather than highlighting it as a concern.

13. This suggestion was the very ethos of the Woolf reforms. The failure to match tenacity of controlling the timetable with tenacity of costs control has been the failing of the Woolf changes. Without better understanding of costs issues amongst the judiciary, it is difficult to see how this aim is to be achieved. More realistic timetables are being achieved already, it is simply that the amount of work undertaken in those timetables is often not controlled by the Court.
14. The proposal that judges should have greater training in costs is potentially a huge step forward. To date, costs have often been dealt with as an “afterthought” by judges, or an inconvenience. Then, inconsistent and “broad brush” rules have been applied. Greater “front loading” control of costs would be welcomed. It is to be seen however what this might mean in practice.
15. In addition to the 10% uplift on general damages there is to be a further 10% “penalty” when the Defendant fails to beat a Part 36 offer. Whilst this is an unanticipated further burden on Defendants, it will be portrayed as an initiative for settling claims earlier and as such, it is an extension of the *raison d’être* of the Part 36 itself. It is unlikely to be met with much opposition in these circumstances.

It has to be recognised that, at this stage, although there are some promising elements to these proposals, they remain proposals at present. To ensure smooth passage of these proposals, there will either need to be a change to the CPR or primary legislation will be required to deal with the following:-

1. Such legislation as is necessary to abrogate the common law indemnity principle.
2. A repeal of Section 29 of the Access to Justice Act 1999.
3. Repeal of Section 58 (A) (6) of the Courts and Legal Services Act 1990.
4. Legislation/rule change to permit the regulation of contingency fee agreements for civil litigation.
5. Legislation/rule change to permit pre action applications in respect of breaches of pre action protocols.
6. Legislation/rule change to permit pre action costs management by the Court.
7. Legislation/rule change to permit the amendment of CPR Part 36.

Lord Justice Jackson clearly believes that this package will secure justice and reduce litigation costs.

How will this affect Defendants and their Insurers? Clearly there are some very welcome points particularly the abolition of success fees, ATE premia and referral fees. However, there has to be concern with the increase in damages, particularly, the recommendation as to the introduction of qualified one way costs shifting. How this will work remains to be seen but on the face of it, it does seem grossly unfair that a Defendant who successfully resists an action, should then be penalised in not recovering their costs.

The potential reduction in costs consequences will lead the parties back towards the balance that existed pre ATE premia and success fees. However, the government will have a concern as to how access to justice is to be achieved in that circumstance. The reduction / virtual removal of legal aid and assistance has removed that means of funding. The “claimant industry” will say that, without the benefit of success fees, theirs is an “uninsurable market” and unless BTE insurance creates its own levels of income, it is hard to see what will fill the void.

Whilst “contingent” fees might have some impact, limiting the same to 25% of the damages will restrict its viability. It remains therefore questionable whether the proposals of Lord Justice Jackson will be seen as viable and acceptable to the government.

Nonetheless the report certainly creates a sense that the concerns of Defendants and their Insurers have been taken on board and that concerns over the costs of Claimants and their solicitors and claims management companies have been recognised as having gone beyond what was originally intended and had a negative influence on access to justice.

All parties await the reception and reaction of the government to this most important of costs reviews.

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