



# briefing

Insurance - January 2010

## Review of civil litigation costs

Lord Justice Jackson

**Lord Justice Jackson has published his final report following his review of the civil justice system and has made some significant recommendations to control of costs. This summary looks at the recommendations that could affect personal injury claims.**

### Background

Lord Justice Jackson was asked to review the rules and principles governing the costs of civil litigation and to make recommendations to promote access to justice at proportionate cost. To prepare this report, he has reviewed case management procedures, researched costs and funding and compared the UK costs regime with those of other jurisdictions.

### Causes of excessive costs

Jackson identified the following reasons for the disproportionate costs in civil litigation:

- time consuming Court procedures;
- complexity of the law in some areas causes parties to incur substantial costs;
- costs rules which generate satellite litigation;
- too few solicitors, barristers and judges have a sufficient understanding of the law of costs or how costs may be controlled;
- lawyers are generally paid by reference to time spent, rather than work product;
- hourly rates of lawyers are not satisfactorily controlled;
- preparation of witness statements and expert reports can generate excessive costs;

- the costs shifting rule creates perverse incentives;
- litigants with CFAs have little interest in controlling costs incurred on their behalf and opposing litigants face a massively increased costs liability;
- emails and electronic databases means that, in substantial cases, disclosure may be prohibitively expensive;
- no effective control over pre-issue costs; certain pre-action protocols lead to magnification of these costs and duplication of effort;
- in some instances there is ineffective case management, both by the parties and the court;
- some cases which ought to settle early settle too late or not at all;
- detailed assessments are unduly expensive and frequently discourage litigants from securing a proper assessment;
- court fees are too high and the current policy of full cost pricing is wrong in principle;
- even so, civil courts remain under resourced in terms of both staff and IT.

Each of these reasons is examined in depth in the report.

### Solutions

Jackson proposes some major changes to the current costs regime:

- success fees on CFAs should cease to be recoverable from the losing party;
- ATE premiums should cease to be recoverable from the losing party
- qualified one way costs shifting - save where a claimant is guilty of unreasonable conduct, a successful defendant will not recover his costs;



Please email Simon Cradick at [simon.cradick@morgan-cole.com](mailto:simon.cradick@morgan-cole.com) with your feedback, comments and suggestions on this publication. If you would like to receive further copies, including copies produced using a larger typeface, or information relating to our services in this area, please call 029 2038 5542.

- fixed costs in fast track litigation; and
- if success fees and/or ATE premiums remain recoverable, there should be changes to give claimants more incentive to settle and control costs.

### Recoverability of success fees

Recoverability of success fees was introduced with effect from 1 April 2000, to coincide with a substantial retraction of legal aid. In personal injury claims, the replacement of legal aid by the CFA regime was flawed because:

- legal aid was targeted at persons who merited financial support in their claims;
- legally aided claimants were often required to make a contribution to costs in accordance to means;
- the burden placed on opposing parties is too great and sometimes amounts to a denial of justice; and
- the CFA regime presents an opportunity to lawyers to make excessive profits through cherry picking.

Jackson concludes that the solution is to revert to CFAs as they existed prior to April 2000, where the success fee was not recoverable from the losing party but from the client. In a personal injury claim, the defendant would pay base costs and the claimant would pay the success fee from his damages. To protect claimants, there would need to be ancillary measures:

- damages for PSLA should be increased by 10% across the board;
- the recoverable success fee should be capped at 25% of damages excluding any damages referable to future losses; and
- if a defendant fails to beat a claimant's Part 36 offer, the damages awarded should be increased by 10% (possibly less in major claims).

In the alternative, if the recommendation to make success fees non-recoverable from the defendant is rejected, there should be changes to the current regime:

- fixed success fees should be introduced to all areas of litigation where CFAs are commonly used;
- no success fee should be recoverable if liability is admitted in the Protocol period;

- if a claimant fails to beat the defendant's Part 36 at trial, the success fee should be determined by that which applied at the date of the offer (so no 100% success fee because it went to trial);
- that part of a success fee referable to the risk of not beating a defendant's Part 36 offer should not be recoverable, thus increasing the incentive on the claimant to accept a reasonable offer;
- no success fee in Detailed Assessment proceedings; and
- if there was alternative funding available to the claimant when the CFA was taken out, base costs only should be recovered.

### Recoverability of ATE premiums – qualified one way costs shifting

Jackson concludes that the present regime of recoverable ATE premiums is unfair on opposing parties and flawed.

There was some data showing that insurers paid out more in ATE premiums than was recovered in costs from ATE providers. Jackson observed that, as only 65% of the premium represented the risk in each case (the balance being admin costs and profit), it was self evident that premium income exceeded outlay. The regime of recoverable ATE insurance premiums is thus indefensible. On the other hand, most claimants in personal injury cases have for many years enjoyed qualified protection against liability for adverse costs and there are sound policy reasons to continue such protection. The only practicable way that to achieve this result is by qualified one way costs shifting. Factors in favour are:

- Claimants are successful in the majority of personal injury claims. Defendants seldom recover costs, so they derive little benefit from two way costs shifting.
- Personal injuries litigation is the paradigm instance of litigation in which the parties are in an asymmetric relationship, i.e. the balance of power is with the claimant.
- The principal objective of recoverable ATE insurance premiums is to protect claimants against adverse costs orders. One way costs shifting would be a less expensive method of achieving the same objective.
- One way costs shifting is not new. Between 1949 and 2000, the vast majority of personal injury claims



proceeded under a one way costs shifting regime, i.e. the legal aid shield.

A one way costs shifting regime for personal injuries litigation (including clinical negligence) would need to:

- deter frivolous claims or applications by putting a claimant at risk of some adverse costs; and
- have incentives for claimants to accept reasonable offers by maintaining the costs penalty of failing to beat a Part 36.

Jackson proposes that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs so a Court would make an adverse costs order only when:

- the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim);
- the defendant is neither insured nor a large organisation which is self insured; or
- the claimant is conspicuously wealthy.

### Fixed costs in fast track claims

As widely expected, the report recommends a fixed costs stage based matrix for all litigated fast track injury claims, among others. An alternative matrix factors in a discount for early admission of liability. It is envisaged that the fixed costs scheme could be in place by October 2010.

Jackson's proposed figures are in Appendix 5 to the report and will be the subject of deliberation if the proposal of a fixed fee regime is accepted.

There is no recommendation for a fixed costs scheme in the multi track presently but it is a question for future consideration.

### Other recommendations

Some of the other recommendations relevant to injury claims are:

- The new process for low value RTA claims should be monitored to ensure that the costs savings achieved are not negated by satellite litigation and avoidance behaviour.
- There should be discussions between claimant and defendant representatives, under the aegis of the CJC, in order to develop a streamlined process for

all fast track personal injury cases which fall outside the MoJ's new process.

- Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.
- A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.
- CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper.
- In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.
- Pre-action applications should be permitted in respect of breaches of pre-action protocols.
- The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. In so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.
- If a claimant beats a Part 36 offer, he should recover costs (subject to conduct issues). The effect of [Carver v BAA](#) should be reversed.
- Claimants should recover "proportionate costs", to be defined in the CPR by reference to sums in issue, value of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance; proportionality should prevail over reasonableness and the proportionality test must be applied on a global basis. The effect of [Lownds v Home Office](#) should be reversed.
- The common law indemnity principle should be abrogated.
- Referral fees should be banned or, failing that, capped at £200.

### Comments

On the face of the report, there are several positive messages for paying parties. A wish list of two years ago included abolition of recovery of additional liabilities, fixed fees across the fast-track and a review of hourly rates. Each appears in this report. As with all



Please email Simon Cradick at [simon.cradick@morgan-cole.com](mailto:simon.cradick@morgan-cole.com) with your feedback, comments and suggestions on this publication. If you would like to receive further copies, including copies produced using a larger typeface, or information relating to our services in this area, please call 029 2038 5542.

things, the consequences will not fit easily into one box. For instance, if referral fees truly disappear, we can expect claims management companies to consider legal services direct and to retain the profit available from the new regime. Further consolidation in the legal market is highly likely as firms seek to protect themselves.

Increasing general damages for pain, suffering and loss of amenity (PSLA) by 10% is a great unknown. We do not know if this will come in with a public assessment tool calibrated to calculate PSLA at 10% more than present levels, which Jackson contemplates. APIL and MASS will argue that levels of PSLA are so low now that there should be a preliminary step to raise them to acceptable levels, with the 10% added to that new base level. Defendants should also be wary as to how District Judges react to an apparent mood that awards of PSLA are too low; will they react early and start to award higher PSLA before any official change? Holding the line of current levels of PSLA is critical in these next few months.

Ultimately, the figures will say whether this is good news for liability insurers. Insurers will immediately want to start modelling how spend looks with 10% added to PSLA damages paid historically. That additional cost must be within the savings available through not paying additional liabilities and savings on profit costs; insurers will also need to factor in the amount that they presently recover in costs from claimants.

This assumes, of course, that the recommendations are implemented. Whether the MoJ will seek to do so and, if so, over what timescale remains to be seen.

## More information

To discuss your individual requirements, please contact:



**Simon Cradick, Partner**  
T: 029 2038 5464  
E: [simon.cradick@morgan-cole.com](mailto:simon.cradick@morgan-cole.com)



**Neil McLaughlin, Partner**  
T: 0118 955 3009  
E: [neil.mclaughlin@morgan-cole.com](mailto:neil.mclaughlin@morgan-cole.com)

This publication is © Morgan Cole and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.