



FOIL UPDATE

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Civil Litigation Costs Review – the Final Report

The debate has been intense, has ranged over a huge number of issues, and has been characterised by claims of unfairness and warnings of injustice on both sides but the publication of Lord Justice Jackson's Final Report on Civil Costs does contain material to support the argument that defendants' have had the rough end of the deal on costs over recent years.

At its most extreme the current regime can be seen as a system under which defendants pay all the costs, whether by way of direct costs orders on cases they lose, by way of success fees which pay the costs of the cases which claimants lose, and by way of ATE premiums which provide protection to claimants. The report outlines a system under which claimants have a 'free ride', unconcerned by costs which they will not be required to pay, whilst defendants pick up the bill.

In setting out his main provisions for reform Lord Justice Jackson seeks to change the system in fundamental ways:

- By reducing the costs inherent in the current system by banning referral fees and by introducing one-way costs shifting to remove the need for claimants to purchase ATE cover. (In the event that referral fees are not banned Jackson recommends that they be capped at a modest sum, say £200)
- By giving the claimant an economic interest in the funding of his case by making success fees and ATE premiums unrecoverable, thereby returning the CFA regime to the pre-2000 position.
- By taking steps to limit the impact of the changes upon claimants by increasing general damages by 10% to ensure that in many cases the payment of the success fee will not leave the claimant worse off; and by limiting the amount paid as a success fee to 25% of damages, excluding any damages awarded for future care or future losses.
- By making costs more predictable by introducing fixed costs in the fast track for personal injury cases.
- By making proportionality more of a reality by overturning the two-stage-test in *Lownds* and replacing it with a global test, with proportionality defined in the CPR by reference to sums in issue, complexity, conduct and any wider factors such as public importance.

There are a number of other provisions in the report, focusing on issues which have caused considerable debate:

- The indemnity principle is to be abolished. In its place CPR rule 44.4 will be amended to "constitute an effective control on recoverable costs". The court will allow "reasonable amounts in respect of work actually and reasonable done".
- Contingency fees will be permitted. Protection is provided for defendants by a provision that unsuccessful parties will only be ordered to pay an amount in costs reflecting what would be a conventional amount, with any difference to be borne by the successful party.
- Part 36 will be strengthened by a provision requiring defendants who fail to beat a Claimant's offer to pay an additional 10% in damages.
- Looking at the issue of software to assess general damages, a further working group will be established to work towards a consistent calibration and to consider the format of medical reports, with a view to introducing a system

which will be used by claimants and defendants and reduce the costs of assessing general damages in cases worth up to £10k.

- The role of the court in case and cost management should be enhanced with lawyers and judges receiving training in costs budgeting and costs management.
- The small claims limit should remain as it is at this stage. "If a satisfactory scheme of fixed costs is established for fast track personal injury cases and if the process reforms bed in satisfactorily, then all that will be required in due course will be an increase in the PI small claims limit to reflect inflation since 1999". It is proposed that the present limit stay at £1,000 until such time as inflation warrants an increase to £1,500.

Amongst the small print in the report is support for defendants who always believed that the decisions in *Lamont v Burton* and *Crane v Cannons Leisure* were unfair. Although the principles in both of those cases would become academic in the event that success fees were unrecoverable provisions are included, in the event that success fees remain recoverable, which would overturn both of those decisions.

The full details of the report still remain to be analysed but just to focus on a couple of the main provisions:

One-way costs shifting

Lord Justice Jackson is seeking to introduce qualified one-way costs shifting with a view to reducing costs but at the same discouraging fraudulent and frivolous claims and encouraging reasonable offers. To achieve this, provisions in similar terms to the 'legal aid shield' in the Access to Justice Act 1999 Sec 11(1) will be introduced. The rules will still allow a costs order to be made in appropriate circumstances taking into account the financial resources of the parties and behaviour. The making of a costs order will be the exception, rather than the rule but the provisions will enable the court to make a costs order in three specific situations where such an order would be appropriate: (a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim); (b) where the defendant is neither insured nor a large organisation which is self-insured; or (c) where the claimant is conspicuously wealthy.

Fixed Costs on the Fast Track

The starting point for consideration of fixed costs is Professor Fenn's data on actual costs. During the negotiations on fixed costs claimants had sought an increase in the figures of £400 to represent inflation, whilst defendants had sought to have the figures reduced by £400 to take account of and encourage increased efficiencies, and reflect disproportionate referral fees in current figures. Lord Justice Jackson has chosen to stick with Professor Fenn's figures. Matrices are included in the report showing the proposed figures.

On the issue of use of counsel on Fast Track cases Lord Justice Jackson seeks to avoid the use of a complex system and instead opts for an approach which will add a sum to all cases - for RTA cases, £100; for ELA cases, £225; and for PLA cases, £300. This will leave it to solicitors to decide whether to handle the work themselves or use counsel. Jackson's expectation is that junior counsel will continue to be used as they represent good value for money.

The report does not accept that Disease cases are a special category which should be excluded from the fixed fee regime. Written observations are to be sought to enable a fixed costs matrix to be drawn up for this type of work.

Further analysis of the Report from FOIL will follow shortly.

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