

Date

January/February 2017

Publication

Costs Lawyer

Type of publication

Legal press



Opinion

One thing is certain

... and that is that 2017 will bring a great deal of uncertainty. *John Brown* from the Forum of Insurance Lawyers finds that virtually all areas of costs will be affected



John Brown is a member of the Forum of Insurance Lawyers' costs sector focus team and director of legal costs advisers Acumension.

There is widespread uncertainty about how the law of costs is to be transformed. One thing is certain, however – the coming years will see even more massive upheaval in the civil litigation landscape, focused on bringing legal costs under control, which includes fixing legal costs in the vast majority of civil claims.

The government has expressed its intention to introduce a fixed costs scheme in clinical negligence claims. The Department of Health consultation has still not yet been published.

However, that's not the only consultation in town. In January 2017, Lord Justice Jackson is to start a speedy review, culminating in a July report, to fix costs in "every" category of civil claim.

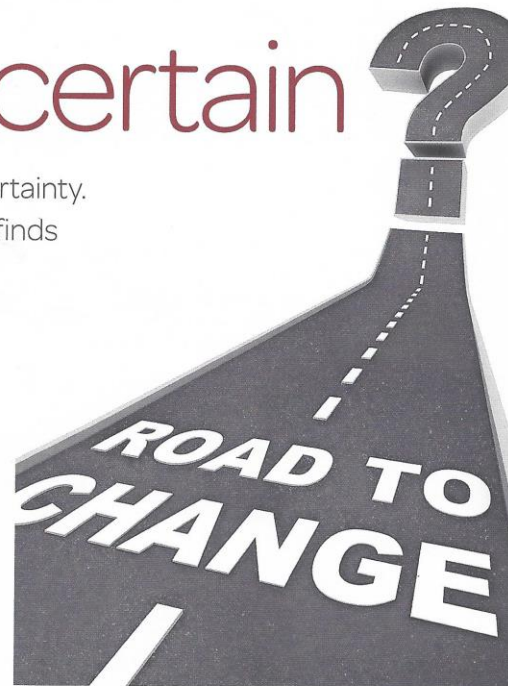
Jackson LJ has it in mind to recommend a costs matrix to cover claims with damages of up to £250,000. While he states that he is keeping an open mind and is open to persuasion, and the government may not go as high as £250,000, it is very conceivable that the ceiling will be set well north of £25,000. Implementation is likely in 2018, with Jackson LJ moving fast – he must retire in March 2018.

In addition, the Ministry of Justice has recently published a consultation on raising the small claims track limit to £5,000 (or higher) and reducing or scrapping damages for whiplash injuries.

Staggering reality

Historically, where fixed costs is on the horizon, there has been a spike in claim volumes as solicitors increase their marketing in an effort to capture claims so that costs can be recovered under the old, rather than new, fixed costs regimes.

However, claimants' solicitors are currently operating in an uncertain and dynamic legal and fiscal environment. One need only look to what happened with the Jackson reforms of April 2013, when many claimant solicitors captured as many claims as possible before the reforms were to be implemented. Everyone knew that a new proportionality test would be implemented, but they did not know exactly what impact on legal costs that change



would bring. The quite staggering reality is that, three and a half years on, there is still a dearth of guidance.

In *BNM v MGN* [2016] EWHC B13 (Costs), in a media privacy claim with damages of £20,000 where a bill claimed £241,817, Master Gordon-Saker reduced the costs to £167,389 and then, using the new proportionality test, slashed the costs by half again to allow £83,964. It was found that the judge could take into account both base costs and additional liabilities when considering whether the costs are proportionate under the new proportionality test.

Potent offers

But not all judges may share the Senior Costs Judge's views and *BNM* is listed for an expedited hearing in the Court of Appeal to be heard by 6 March 2017.

Proportionality has proven over the years to be a nebulous concept. It will be interesting to see what science (if any) the Court of Appeal can bring to the exercise.

Further uncertainty arises over how CPR 3.18 should apply to the detailed assessment of costs.

It is anticipated that part 36 offers will continue to become more potent and favoured by a judiciary doing all within its power to compel settlement of claims without the need for costly court hearings.

Another busy and uncertain year beckons in the world of civil litigation! ■