

Lord Justice Jackson's Review of Costs
Liability SIG
Lunchtime Lecture
17 February 2010 - Manchester

Slide 1

Good afternoon Ladies & Gentlemen. Lord Justice Jackson's Review of Costs. Will it happen? Certainly the political picture is to some extent confused and there is, no doubt a vested interest, depending upon the colour of the next Government to be installed later this year. I believe that there is a need and also an increasing willingness, not necessarily on both sides of the fence, to question the issue of Claimant costs and how that particular "gravy train", and I would say that as a Defendant Party, can, to some extent, be reined in.

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There are two key themes running across the Review undertaken by Lord Jackson. Firstly, funding of litigation, in other words costs, and secondly, an uplift on General Damages.

I am going to pick out what I consider to be the key issues arising and it remains to be seen what the ultimate position is, as and when the Review is finally agreed and implemented. I suspect it will in part or whole need a regularity instrument.

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Insofar as costs are concerned, then the issues as I see them are qualified one-way costs shifting; no recovery of additional liabilities as between the parties; a banning of referral fees; fixed costs across the personal injury fast track; a proposed Part 36 enhancement; and the establishment of a Costs Council. Taking these issues in turn.

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What is qualified one-way costs shifting? What does it mean? How is going to affect in our daily applications?

In short, the Claimant does not have to pay the Defendant's costs if the claim is unsuccessful. Conversely, the Defendant has to pay Claimant costs if it is successful.

There are a number of exceptions, principally, unreasonable behaviour, also the financial resources available to the parties may well justify there being two-way costs shifting in particular cases.

Staying with this, straightaway, I believe that this area will become a potential source of litigation, certainly in the early stages, as the 'exception' issues will have to be fleshed out in order to reach an understanding of, essentially, what's in and what's out particularly where unreasonable behaviour is concerned.

It may well be that a relevant test for unreasonable behaviour may simply be fraud. That would be a simple way of a Claimant losing the protection of the one-way costs shifting proposed.

From the Defendant's perspective, if we do press for the loss of one-way costs shifting in circumstances which may be deemed "reasonable" or, indeed, seek to limit the impact of this particular proposal, then that will inevitably retain the need for Claimants to seek to after-the-event insurance in order to fund litigation.

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What about the fact that there is to be no recovery of additional liabilities as between the parties? In his Review, Lord Jackson comments and I quote *"...I recommend that success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented it will lead to significant cost savings whilst still enabling those who need access to Justice to obtain it. It will be open to clients to enter into 'No win no fee' agreements with their lawyers, but any success fee will be borne by the client and not the opponent."*

Whilst this introduces the Claimant having an interest in costs, I suspect that strong resistance is likely from the ATE market and from Claimants' Solicitors. Further, conflict may arise as between the Claimant and their Solicitors on settlement offers, particularly global offers, on the basis that the Claimant is paying the success fee. However, this could be of benefit to Defendants and global offers may be a factor of this aspect of the proposals.

Also I believe that some clarity needs to be introduced for the Claimant's benefit as to the assessment of success fees agreed and recovered from them by their lawyers. Will this be a regulatory matter or can it be left to the Client/lawyer?

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Moving on, banning of referral fees is exactly as it says on the tin. They should be dispensed with. Again, I suspect that there will be some resistance from the Claimant side, probably not least Trade Union bodies, who do benefit from a referral fee income stream. It is possible that referral fees could emerge elsewhere, but whether they can strictly form a disbursement payable by the Defendant in the circumstances, does remain to some extent unclear. I suspect that there will need to be some specific legislation on this point, if it is to have any bite going forwards.

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Already we have fixed costs in RTA cases and the Review seeks to extend this across the fast track arena for cases up to £25,000.

I think we would all wish to see this aspect of the Review proposals implemented and this could well be tied in with the formation of a Costs Council.

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Part 36 amendments have attracted attention and, again, I quote from Lord Justice Jackson's Report: "*... in order to provide greater incentives for Defendants to accept settlement offers, I recommend that where a*

Defendant fails to beat a offer, the Claimant's recovery should be enhanced by 10%."

This is a potentially important development insofar as a Defendants are concerned, because the 10% enhancement relates to the total financial value and is not limited to one specific area of damages, for example, General Damages. It will be recognised, therefore, that this could involve significant sums, certainly in catastrophic injury claims and other claims falling within multi track.

There is conflicting Case Law currently on Part 36 and it is not the time or the place to go into detail on that particular aspect, but from the Defendant's perspective, if a Part 36 Offer is made and not beaten at Trial, the receiving party should be limited to the level of success fee that applies at the last date when he or she could have accepted the offer. This reverses the decision in *Lamont v. Burton*, which created an unreasonable incentive in fixed success fee litigation to continue to Trial so as to secure a 100% success fee, regardless of whether the Part 36 Offer was beaten.

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Costs Council - this, I hope, will be a positive development in the event that Lord Justice Jackson's Review of Costs can be implemented. This will be established to undertake a review of fast track fixed costs. There is no doubt that the Defendant Lobby need to be strongly represented on the Costs Council and whilst it is perhaps encouraging for Defendant lawyers that the Review appears to recognise the wide divergence in hourly rates as between Claimant and Defendant firms, clearly a significant reduction in the Claimant rates will attract resistance and I

suspect that there is a significant way to go in Lord Justice Jackson's proposals coming into practice.

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So what is the Summary, what is the likely outcome? Well, Claimant damages are going to be enhanced, certainly by 10%, that is the proposal being made. However, costs payable by Defendants will be greatly reduced, absent success fees and ATE premiums. However, one-way costs shifting is a significant move, albeit, certainly in the Employer's Liability arena in my experience 99.9%, of claims are settled and the proposed costs changes in that context may well have little bearing.

It will need concessions on both sides, indeed, there is probably an argument that the two bodies should now enter into Mediation and seek to agree a consensus, but on the basis that there are, as the slide suggests, winners and losers, if the proposals are to be at all workable, then the package will have to be accepted as a whole and neither side seek to pick and choose their advantage.

When the Woolf Reforms were introduced, it seems a long time ago now, I remember doing presentations around the country to clients and various Institutes and there was a particular joke that we used to lighten the proceedings. It went along the lines: what is the connection between an Exocet missile and the archetypal mother-in-law? Well, you know they are both coming and there is bugger all you can do about it!

I don't think the same analogy can, at this stage, be used in connection with the Review of Civil Litigation costs by Lord Justice Jackson.

However, there is no doubt that his Report is a quantum leap forward and if parties can be seen to take a pragmatic view, and supported by Parliament, whichever colour is in power post-May this year, then as an industry we must hope that in large measure the proposals will be accepted. It will bring some degree of certainty and, hopefully, peg back some of the excessive costs currently being sought and achieved in the fast track arena.

Thank you for your attention.

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