

# Costs after the Jackson Review

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# Abolition of Success Fee Recovery

- The headlines are now well known:
  - Abolish *inter partes* recovery
  - In PI type cases, increase PSLA awards by 10% to compensate. Advised ‘in the great majority of cases ... claimants no worse off’.
  - Similar increases to general damages in defamation and nuisance cases, and other cases brought by private litigants
  - Cap success fees at 25% of damages, excluding damages for future losses.

# Alternative/Interim Proposals

- ‘Important & not lightly to be discarded’. But, if not actioned alternative proposals.
- Fixed success fees across the board.
- Fixed success fee anomalies to be abolished (reverse *Kilby, Lamont & Crane*)
- No recovery where liability admitted in protocol period
- No recovery for elements attributable to part 36 risk
- Legislation not required for alternative proposals

# ATE Premiums

- Again, headlines well known:
  - Abolish *inter partes* recovery
  - Qualified one way costs shifting in PI cases and possibly (after further consultation) others where parties in ‘asymmetric’ relationships
  - Model would be legal aid costs protection, s 11 of the Access to Justice Act 1999: amount reasonable to pay having regard to financial resources and conduct.
  - Damages would be exposed in part 36 situation

# Alternative/Interim Proposals

- ‘Important and not to be watered down’
- But, as before, proposal of alternatives.
- ‘Amnesty’ during the protocol period or other relevant period
- No recovery for part 36 risks
- Cap at 50% of the damages
- Protection for paying parties from repudiation of cover

# Referral Fees

- Payment of referral fees should be banned: “abhorrent” and “offensive”
- Not needed to ensure competition
- Alternative Business Structures will not change the arguments
- But other ways of expressing appreciation?
- What will happen to claims farmers?

# BTE Insurance

- Will adapt and have increasingly important role in new world
- Greater take-up from householders and small businesses
- But no compulsion
- Right to choose own lawyer from when letter of claim is sent?

# Third Party Funding

- Beneficial in promoting access to justice
- Most readily obtainable for high value monetary cases with good prospects
- Voluntary code rather than regulation for now
- Generally users commercial with full legal advice
- Tightening of capital adequacy requirements
- Funder cannot withdraw without proper grounds
- *Arkin* limit to be scrapped
- Champerty and maintenance to remain (in theory)

# Contingency Fees

- Permitted for solicitors and counsel on the 'Ontario model'
- Proper regulation including maximum damages percentage
- Solicitors' liability for adverse costs and/or own disbursements reflected in percentage
- Not valid unless countersigned by 'independent solicitor'

# Contingent Legal Aid Fund or Supplementary Legal Aid Scheme?

- CLAFs fully self-financing once established
- SLASs added onto existing scheme
- For those not generally eligible for public funding
- Not 'the only game in town'
- More financial modelling to ascertain viability

# Part 36

The effect of *Carver v BAA* should be reversed. “More advantageous” means better in financial terms by any amount, however small.

Where D fails to better C’s Part 36 offer at trial, C’s damages should be increased by 10%.

# New Definition of Proportionality

- “Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:
  - (a) the sums in issue in the proceedings;
  - (b) the value of any non-monetary relief in issue;
  - (c) the complexity of the litigation;
  - (d) any additional work generated by the conduct of the paying party;
  - (e) any wider factors involved in the proceedings, such as reputation or public importance.”

# Proportionality

- Reversal of *Lownds v Home Office*: the fact that costs were necessarily incurred does not make them proportionate.
- Court should:
  - (1) assess costs by applying the test of reasonableness; and then
  - (2) consider whether the total figure obtained is proportionate and if not make an appropriate reduction.

# Costs Council

- Replace Advisory Committee on Civil Costs
- Set guideline hourly rates for summary and detailed assessment
- Review the matrices of fixed costs for the fast track
- Review the overall upper limit for fast track costs

# Guideline Hourly Rates

- Robust decisions by costs council required
- Aim to reflect market rates
- Three issues Council should consider:-
  - (1) Rates for firms in City not doing heavy commercial work
  - (2) Reduction of hourly rates for personal injury if referral fees are banned or capped?
  - (3) If Defendant hourly rates are reasonable market rates, what factors justify higher rates for Claimant solicitors?

# Fast Track Fixed Costs

- All PI costs should be fixed (including disbursements)
- Proposed matrices for RTA, ELA and PLA claims
- Escape clause remain: 'exceptional circumstances' and assessed costs 20% higher

# Fast Track Fixed Costs

- Non PI cases: dual approach
- Overall limit (£12,000 pre-trial, where not indemnity costs). 12.5% increase for London firms. Court fees and trial advocacy fees separate
- Matrices so far as subject matter allows

# Costs Management

- Standard costs management procedure  
The essence: litigation budgets; court states how far budgets approved; court as far as it can manages case so within budgets; costs assessed in accordance with approved budget
- Primary legislation for pre-issue costs management

# Summary Assessment

- Retained but improved
- Straightforward assessment at the end of fast track trial
- 1 day multi-track trial: judge can fall back on detailed assessment with substantial interim payment; but first consider whether paper SA with written submissions
- Similarly with 'heavy' interim applications in Court of Appeal, High Court, specialist Courts
- More informative form N260 for trials and appeals

# Detailed Assessment

- With new software, more informative bills
- More explanation about what was done, why and when: phase; task; activity
- Points of Dispute and Replies shorter and more focused
- Compulsory offers by paying party with Points of Dispute
- Part 36 procedures to apply

# Detailed Assessment

- Disputed fast track disbursements generally decided paper
- Pilot (outside London) of provisional assessment (on paper) for bills up to £25,000 after fast track fixed costs introduced

# Indemnity Principle

Abrogation recommended. New CPR 44.4(1) proposed: court will allow reasonable amounts in respect of work actually and reasonably done and services actually and reasonably supplied

- But indemnity principle simply a facet of the wider 'compensatory' approach to monetary remedies

# Indemnity Principle

- Principle caused no trouble for centuries
- It ensures that savings achieved by market forces as between solicitor and client are passed on to a paying party
- The problem was in fact caused by a specific piece of ill considered and now repealed legislation

# Will it all happen?

- Some recommendations can be achieved by rule changes
- Others said to require primary legislation required for primary objective