

costs update

Access to justice for defendants?

Jackson review of civil litigation costs completed

On 14 January 2010 Sir Rupert Jackson published his long anticipated report into costs, following an enquiry that lasted 12 months and which follows his 1,000 page preliminary report that was published last May.

The report is wide in breadth, covering the full spectrum of litigation and contains over 550 pages. The reaction to the report has been varied, defendants largely regarding it as a triumph and radical, while claimant representatives have generally been unhappy at the scale of the proposed reform and are hoping that the recommendations will either never be implemented or at least will be watered down.

Data analysis

Over the course of the review a wide variety of data was collated. The conclusions reached in one survey, in rough terms were:

- Claimant costs are substantially higher than defendant costs.
- Claimant costs in CFA cases are substantially higher than in non CFA cases.
- In claimant CFA cases, costs typically range between 158% and 203% of the damages awarded. In non CFA cases that figure dropped to a range between 47% and 55%.

Other data showed quite wide fluctuations but the data collected from one liability insurer suggested the overall average of costs claimed were 67% of damages paid, and that the

figure paid was 56% of damages. Other figures suggested that in litigated fast track litigated claims the average costs to damages ratio is 130%.

Hill Dickinson comment: Jackson LJ rightly concluded that “in some areas of civil litigation costs are disproportionate and impede access to justice.” It is clear why a large package of reforms were felt necessary.

Will any of these recommendations ever come into force?

Hill Dickinson comment: We feel that some or all of the proposals will be implemented. The first reason for this is that politically it will be hard for the Government (even if the Government changes in future months) to ignore Sir Rupert Jackson’s recommendations when it is clear that one of the ‘winners’ will be the taxpayer. The proposals are radical, thoughtful and politically sensitive. As we will explain the proposals will hopefully lead to a reduction in the amount of costs paid out by the NHS in compensation claims and in the amount local authorities have to pay out in claims. In addition fixed costs will reduce the amount of court time spent on detailed assessments.

Secondly Jackson LJ’s Review into costs seems to have a real impetus behind it. The Master of the Rolls and Lord Chief Justice have both accepted the recommendations in full (even seemingly where he has criticised their past failings to progress potential reform).

Finally, the first of the reforms could even be implemented as early as April. Jack Straw has launched an urgent consultation into the proposed changes to defamation costs.



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Welcome

Welcome to the February 2010 costs update.

In this special edition we focus on the recently published Jackson review. We provide a detailed analysis of the key themes and issues arising from the report, and explore the implications of the recommendations.

Hill Dickinson's in-house costs team are experts in the field of legal costs and would be pleased to discuss how these changes will affect you. For more detail please contact:

Paul Edwards
Head of Costs
+44 (0)151 242 3455
paul.edwards@hilldickinson.com

Abolition of recoverability of success fees and ATE premiums on an inter partes basis

Sir Rupert concludes that the use of CFAs have been the major contributor to disproportionate costs, with the success fee and the ATE premium taken out both adding to costs. As a consequence he recommends that both become no longer recoverable from defendants. He submits that this will lead to significant costs savings whilst still allowing access to justice. The additional liabilities will simply be borne by the claimant and deducted from damages, with potentially a cap on this deduction of 25% of damages.

Hill Dickinson comment: This proposal takes us back to the regime in place before the CPR was introduced in 1999. There is little doubt that this will significantly reduce costs. A significant threat arises in respect of the ATE market, if premiums are to be recoverable only from a claimant's damages the question must arise as to whether a policy will be taken out – particularly in light of the separate recommendation for one way costs shifting. Claimant solicitors may ultimately be forced to forego their success fees, particularly now we are in a market where claimants expect to recover 100% of damages. If they do deduct success fees then costs will also be forced downwards because for the first time in a decade claimants will actually be interested in the amount of work being undertaken in their name and will not accept costs building tactics as this has a direct impact on their damages recovery.

To partially compensate for the potential deduction of these additional liabilities from damages an increase of 10% in general damages is proposed

Hill Dickinson comment: This is a potentially simple solution to the risk of claimants suffering from deductions from damages. In practical terms it is fraught with difficulty as though in theory the impact of this proposal is minimal compared to the overall saving achieved in costs it is likely that defendants will resist

any real increase in compensation and previous attempts to raise damages for personal injuries have all struggled to make an impact.

A ban on referral fees

Jackson LJ concluded that whilst a common feature of modern civil litigation the concept of paying for cases by way of a referral fee adds no value to a case, he recommended that the paying of fees be stopped.

Hill Dickinson comment: This is something which has been discussed for years and whilst on the face of it is clearly desirable it may prove difficult, if not impossible to implement and enforce.

In addition, with LEI funders often relying on the receipt of referral fees for income, it may lead to higher ATE premiums and will put significant pressure on the ATE market. BTE providers also often sell cases so the disappearance of this income stream will also create pressure and could push the cost of BTE premiums upwards.

The advantage to claimant solicitors of not paying referral fees will counter balance the prospect of not recovering success fees and the impact of potential fixed costs on the fast track. It may also stop the pressure on less scrupulous claimant solicitors and costs draftsmen to inflate bills to try and recoup this expense.

Qualified one way costs shifting

This is a highly controversial concept. Jackson recommends that in order to reduce the need for ATE insurance in many areas of costs, particularly personal injury, that one way costs shifting be introduced. The impact of this would mean that in a case a claimant could recover costs if they win, but if they lose then the defendant has no right to recover costs from the claimant.

From a moral perspective this seems wrong however data assessed in the preliminary report highlight why on a commercial basis it may make sense. In a sample of 23,000 notified claims insurance premiums of circa £2 million were paid out. The defendant only was given 25 costs orders in its favour, no detail being given as to whether any costs were actually recovered.

The argument is that if there is no risk of being liable for a defendant's costs then there is no need to insure against that risk, thereby making a dramatic saving in costs for the defendant.

Hill Dickinson comment:

The commercial basis behind this concept is sound. However it will need further consideration before it becomes a workable and practical solution. The concept is 'qualified' in that unreasonable and unjustified conduct may still result in costs orders. If there is that risk then it is arguable that ATE premiums may still be needed. If there is no protection for defendants then there is a risk of weak cases being pursued, however it seems Jackson believes that the market will provide protection as solicitors cannot afford to run too many unsuccessful no win no fee claims.

Fast track fixed costs

This has been mooted for years. As part of his review the Civil Justice Council were invited to lead a mediation process to see if claimant and defendant representatives could agree to the figures to be incorporated into a fixed costs regime. This was not successful but the recommendation has remained. The position is now that the proposed costs council should potentially impose a matrix of fees. The proposal is that this new regime will initially be for PI cases and ultimately for all fast track cases.

Hill Dickinson comment: Fixed costs may well reduce costs and provide certainty however they may also open up a 'Pandora's Box' making challenges to conduct possible as claimant solicitors rush to reach the stage that maximises their fees. We may find ourselves in a situation where a whole new costs war starts, based on conduct points.

Other proposals

- Current MOJ reforms to be supported and monitored

- Small claims track limit should remain
- Reforms to Part 36 to encourage defendants to accept sensible offers. It is proposed that there be a 10% increase in damages where a defendant fails to accept a claimant's Part 36 offer which is not subsequently beaten
- Contingency fees (where the solicitor takes a share of the claimant's damages) are to be legalised, but with the inter partes recovery of costs limited to what would normally be recovered.

Hill Dickinson participates in the Jackson review

Hill Dickinson and many of its clients were pleased to be given the opportunity to participate in the Jackson review process, both in the preliminary phase of the inquiry and during the summer whilst Sir Rupert was finalising the collation of evidence.

Our NHSLA team, in particular David Locke and Mike McKenna, were responsible for supplying data in respect of clinical negligence claims and participated in attending a number of meetings with Jackson LJ and his judicial clerks together with assisting in the drafting of detailed submissions on this specialist area.

Hill Dickinson's head of costs Paul Edwards attended numerous meetings with Jackson LJ, covering litigation in general and the issues relating to small businesses. He assisted clients in drafting submissions, prepared a number of briefing papers and ran seminars on the issues arising. On behalf of a large retail client we also arranged and attended a private meeting with Sir Rupert.

We will continue to participate in consultations relating to the reforms and to keep our clients fully informed whilst ensuring the training of our fee earners in these areas is up to date.

- Reforms to case management with greater emphasis on budgeting and costs management.

Defamation reform

Within five days of the Jackson report being published the Justice Secretary Jack Straw launched an expedited consultation period to consider Sir Rupert's recommendations that success fees be reduced to 10% in defamation cases.

Hill Dickinson comment:

The proposed changes potentially give access to justice for defendants in these cases, usually newspapers or other media organisations. Too often in recent years they have been forced to make simple commercial decisions to settle claims that they might actually be able to defend simply because the risk of becoming liable for huge amounts of costs is too great, particularly when the bill is doubled by a 100% success fee.

A fairer system will also encourage journalists to publish articles that are in the public interest. The reduced level of success fee may also encourage

libel lawyers to more carefully risk assess cases and to only bring the strongest claims as with lower levels of reward there will be less scope for bringing unsuccessful cases.

Impact for costs draftsmen?

The costs arena now faces an uncertain future, with the only uncertainty being that change of some kind is going to come. These changes will not be introduced over night, may be staggered and some may take years to implement due to the need to make primary legislation but it is clear that significant reforms are probably now inevitable.

Undoubtedly the role of costs draftsmen may change, and certainly those who solely deal with high volume, low value PI claims are full of doom and gloom at the prospect of fixed costs.

From a defendant perspective the need for good costs draftsmen will continue, in

order to support clients in terms of both the increasing need for accurate costs budgeting, costs management and of course in terms of challenging inflated claimant legal bills.

One can also see a new 'costs war' arising out of the proposed fast track fixed costs regime as claimant solicitors deliberately try and drive claims and avoid settlement at an early stage in order to maximise a higher recovery of fixed costs. Hill Dickinson's costs team will be aware of these issues and ready to act.

Success stories

Hill Dickinson costs team saves client 66% of costs claimed on 'straightforward' public liability claim

At a detailed assessment hearing before the Senior Courts Costs Office (sitting in Sheffield) a bill for nearly £19,000 was reduced to circa £6,400.

This was a straightforward public liability claim involving a slipping incident in a supermarket. Liability had been conceded four months after receipt of the letter of claim "subject to causation". One medical report was disclosed and settlement of damages agreed at £4,000 within one month from the disclosure of evidence.

The claimant solicitor's bill of costs totalled £18,985.85. Following an early and realistic assessment, the defendants made an offer and interim payment £6,500.

Upon detailed assessment the costs officer agreed with our submissions reducing the hourly rates from £256 per hour to £155. Costs were assessed at £6,439, a saving of £12,456.66 or 66.08%. In addition the defendant recovered costs of the detailed assessment process of £2,177.60, leaving the claimant's solicitor with only £4,261.40.



Hill Dickinson costs team steers through tough negotiations in complex EL claim

A complex EL claim involved four separate accidents, two pre dating the recent fixed success regime and two post. After settlement costs were claimed at over £36,000 including an inappropriate claim for 100% success fees on all costs, despite the fixed regime.

An offer was made at £17,500 and thereafter difficult negotiations ensued. Ultimately the claimant's solicitor conceded that the defendant's offer was appropriate and accepted the offer whilst agreeing to forego all detailed assessment costs.



For further details of how our costs management services can reduce the cost of your costs, please contact:

Paul Edwards
Head of costs
+44 (0)151 242 3455
paul.edwards@hilldickinson.com

About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Piraeus and Singapore. Collectively the firms have more than 1,100 people, including 160 partners.

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