

Results of the Oxford Study – Costs

Dr Christopher Hodges – see separate note.

The Jackson Costs Review

Lord Justice Jackson

Main points raised in discussion:

1. A review of personal injury cases in England in 2009 showed that for every £1 awarded in damages, £1.80 was paid in costs. The English approach to financing PI claims is unique.
2. Should costs recovery be 100% or not? Some jurisdictions gave claimants a choice between mechanisms: in New Zealand, there is a Weathertight Claims Tribunal in which there is a no (or low) cost shifting rule, and this is used by claimants instead of the courts. England has a tradition of no cost shifting in tribunals, in order to promote access to justice.
3. Are contingency fees successful? Kritzer has shown that US lawyers do not take frivolous cases, but take on a portfolio of cases that has a spread of risk, between the more and less risky. There is more of a problem over aggregate litigation, eg mass tort. Contingency fees were introduced in Italy 3 years ago; they are not often used, and the successful party only recovers the tariff fee, not the contingent fee. Contingency fees were introduced in Germany in 2008, but only for use in rare circumstances. They are successful in Canada.
4. What rules should apply in public law claims? Access to justice has a special meaning in relation to challenging government, and is encouraged as a matter of public policy. England has developed a Protective Costs Order, which limits loser pays in such cases. In Canada, such cases are one way (by law at Federal level, by convention in the Provinces). Ontario has a Class Proceedings Fund, which automatically protects from adverse costs. Note US Equal Access to Justice Act.

Germany

Professor Dr Burkhard Hess

The general principal is that the loser pays all the costs, on fixed tariffs based on the amount in dispute. The position is evolving: lawyers are permitted to enter other types of cost agreements, and limited contingency fee agreements have been permitted recently. Court fees are high, and capped at €30 million. Lawyers' fees under the tariff are based on three stages: case handling fee (the 'basic sum' set in the tariff is multiplied by 1.3), hearing fee (1.2 multiplier), and settlement (to encourage settlement; the court fee is also reduced for settlement). The sums in the tariff are set so that larger cases cross-subsidise smaller cases. The statutory fees for lawyers are perceived as minimum fees but the market is changing because of increased competition between lawyers. The German system is clear and predictable, but evolving.

The main sources of finance are:

- legal aid (about 8% of cases); depends on prospects of success;

- LEI: covers 43% of the population, and is facilitated by the high predictability of costs; its advantage is that it covers the cost of losing as well;
- Commercial funding: this is new; it can involve transferring a claim to a finance company and it is not yet resolved whether this transfer is legal;
- Contingency fee; permitted under a 2008 law, but very limited in scope; otherwise most contingency fees remain banned.

Australia

Professor Camille Cameron

The system is loser pays, but the court has discretion, although the loser almost always pays. There is a 40% irrecoverability gap, which the winner has to finance. For lawyers' funding:

- No win no fee is widely used.
- Contingency is prohibited for individuals, but not in the commercial area.
- There is little legal aid.
- There is quite a lot of *pro bono*, so firms fund these cases.
- There are 5 commercial funding companies. IMF is now a significant player in civil justice policy discussions. Their role was established after approval by the High Court in *Fostif*, but they have recently been attacked again. They take 20-40%. There is a huge regulation issue. The current companies are good self-regulators, because of the self-imposed discipline of risk assessment.

In considering a definition of "proportionality", one should consider government costs and the public expense of the courts. The Australian Law Reform Commission looked at issues in a 1999 Report 'Managing Justice', and the chapter on costs noted that the governmental contribution is "relatively modest". There are many tribunals.

There has been discussion of possible reforms. A 1995 Report considered cost shifting. Judges rarely identify the principles, including the basis for departing from the general rule. There are references to "fairness" but the meaning is unclear. There is not much will to remove the ban on contingency fees. There is also a glaring lack of empirical information.

Portugal

Professor Henrique Sousa Antunes

There was no debate on costs until the 2008 reforms. There are constitutional principles of proportionality and access to justice, but these now give rise to issues. The 2008 reforms included a number of controversial elements:

- An increase (aggravation) of 50% in the court fee for companies that bring over 200 actions (colonization of courts). The origin of this was the observation that over half of all proceedings were debt claims brought by a limited number of companies, and it was thought to be an abuse of judicial resources.

- There is the ability to charge an exceptional sanctioning fee if the courts are blocked with unreasonable applications, such as claims “against previous jurisprudence”: this is difficult to interpret, as there is no doctrine of precedent!
- The former 2 justice fees are now combined in a single initial fee, but after objections an amendment provides that until 2010 this will be payable in 2 instalments.
- If there is an ADR option, the justice fee exemption will not apply.
- The amount of the justice fee is set in a tariff so is theoretically predictable, but it may be revised in complex cases, so predictability is undermined.
- Are costs proportionate? Lawyers criticise the reforms – but no-one criticises lawyers for the level of their fees. There is no data on the cost of justice.

Canada

Professor Janet Walker and Associate Professor Eric Knutsen

There is a diversity of administrative regimes instead of the courts: employment cases are dealt with by a Board; work place injuries; motor vehicle accidents (various options, with a threshold to get into courts); professional indemnity (e.g. the Canadian Medical Practitioners Association, which pays compensation or defends the claim).

There are also specialised courts: e.g. small claims courts (legal fees capped at 15% of the claim value); simplified procedures for claims between C\$50k-100k); class actions (ongoing debate on costs recovery).

Contingency fees were recently made legal, and are common for personal injury. They may be based on an hourly rate or 20-35% of recovery. There is continuing controversy over risk premiums. There is some *pro bono*, and some public finance. The factors for assessing lawyers’ fees now include proportionality.

Under loser pays, there is substantial (but not complete) indemnity. This can be useful in providing a means by which a lawyer can control the client’s behaviour. Settlement is encouraged: an offer can be made by plaintiff or defendant. Fee shifting is effective as a policing mechanism. Unpredictability of costs is a real deterrent for small parties.

Belgium

Professor Vincent Sagaert

There has been a revolution: lawyers’ fees are now shiftable. The reasons for the reform were: implementation of the EU Late Payment Directive (after which discrimination between claimants was held to be unconstitutional); a 2004 Supreme Court decision that attorneys’ fees can be part of claimable damage if there is a causal link, although there are different approaches by different courts; and the fact that the previous non-shiftable rule made bringing small claims irrecoverable (there is now fixed recovery based on the value of the claim, but there are also criteria that are to be applied by the judge, which equate to ‘proportionality’). Since the reform, there has been a dramatic fall in the number of cases brought!

USA

See separate note

Professor Stephen Burbank

The European Commission Mr Alain Brun, Director, DG Freedom Security and Justice

The Commission has published its December 2007 study on the transparency of costs. This was aimed at identifying the sources of costs. Each Member State has sources of costs that are identifiable, but there are cross-border problems, such as language. The accessibility of legal aid is variable. Five case studies were considered.

The Commission has established an internet portal for information on costs that will start in 2009, and will be updated every one or two years. It also has information on ADR. The Legal Aid Directive will be reviewed in 2010. On 10 June 2009, the priorities for the next 5 years were established under the Stockholm Programme. Possible items will be to consider abolishing intermediate procedures such as *execuatur* (actions to enforce judgements). More evaluation will be necessary, and this Oxford project is a key contributor.

The Tilburg University Costs Research Dr Martin Gramatikov, Tilburg University
See the powerpoints and Tilburg website for the detailed investigation into costs in the Netherlands, Bolivia and Bulgaria. It is important to identify costs other than courts' and lawyers' quantifiable costs. This project adopts the perspective of users who try to solve their legal problems. A cheap procedure is not necessarily without stress.

Issues debated in response to Lord Justice Jackson

Should there be one way cost shifting in judicial review? Costs would not be awarded for this in New Zealand.

Should there be fixed recoverable costs? Poland has a tariff based on the value in dispute. The lawyer can request multiplication if a case is complex, or the amount can be lowered if the case is simple: this is done at the end so does not assist predictability. The Netherlands has fixed recoverable costs: as a result, people do not waste time on determining costs. In the UK, lawyers find when acting *pro bono* that the actual cost bears little relationship to the fixed costs. A group tried to fix costs in Australia in 1991 but failed to deal with issues of complexity. The problem is how to balance *complexity* with *predictability*. Predictability of procedure and work done avoids complexity, but raises problems of justice under some systems. The current economic climate means that government expenditure will reduce, so legal aid and court budgets will come under pressure. There will be increased pressure to settle disputes early (court fees will increase), and to find alternative means of financing cases (regulation needed).

The Netherlands

Professor Willem van Boom

The Dutch have an ancient approach: “If you litigate about a cow, be prepared to pay a cow”. There is a mitigated loser pays rule: the amount that a loser pays is fixed by a tariff. Pre-trial (action) costs are compensated in full subject to proportionality. Almost no success fees are allowed. Counsel have a monopoly inside court, but it is under pressure; there is no monopoly for dispute resolution outside court.

BTE LEI is flourishing. It depends on regulation of the legal services industry. Under the Dutch model (in contrast to the German model), a company renders “in kind” services to try to reach settlements. There is an objective of trying to keep costs low, but this does not fit well with the right of free choice of counsel (Art 4 of the Legal Insurance Directive). BTE acts as a watchdog to keep lawyers’ costs down.

Various techniques are being applied to bring down the hurdles in access to justice:

- making small claims bigger;
- not requiring legal representatives in labour or rent cases;
- differential court fees as between individuals and businesses (lower for the former, but not uncontroversial);
- allowing diversity of legal service providers.

Alternative pathways:

- what works for one might not work for another. Note the failure of Directive 2004/48 on IP enforcement, since moving to a harmonised 100% cost shift has reduced the number of cases: strange effects can be produced if there is insufficient understanding;
- multiple pathways may be better – look for options;
- high quality lawyering is not a prerequisite for an acceptable level of access to justice – it is too expensive;
- make often litigated standards easier to settle by introducing rules that are easier to apply;
- nudge the middle and lower classes into BTE: should it be a compulsory add-on to other policies?

Poland

Dr Magdalena Tulibacka

A great deal of reform is being carried out as Central European jurisdictions convert their laws and legal culture to the European market system. Pre-existing corporations of lawyers, bailiffs and other professions mean that there is no effective competition. Costs are shiftable on a tariff, but it can be increased or reduced (see above), and there are complaints of over-charging, but judges do not question levels of fees. There have been cases of compensation for judicial delays. Legal aid is old-fashioned: the party applies to the court so does not know whether she gets support until she brings the case. There is no provision for obtaining clear advice before starting court proceedings.

Latin America

Professor Manuel Gomez

Most of the 20 jurisdictions are based on Spanish or Portuguese traditional codified models. There are broadly similar recent reform processes in 12 of the 20, inspired by the World Bank programme. Legal aid has been a large element.

Self-financing of litigation is by far the largest used. There has been a historical prohibition on contingency fees (this is lifted in Argentina) but in practice lawyers enter such arrangements. Lawyers or others can form civil associations of victims, which can agree a contingency fee with a lawyer. Important factors include the rise of class actions and the increased involvement of US lawyers. Colombia has 2 systems of contingency fees: 10% of the total pool in group actions, and a percentage calculated on minimum wages if you win and which the judge awards.

All of the jurisdictions have legal aid, but it is badly funded. In some it is privately sponsored (Guatemala, El Salvador). It works reasonably well in Argentina, because of the class action mechanism. There is no money in the fund in Colombia. Third party funding is not illegal but is rare.

Filing fees are very small, and on a sliding scale in 18 ex 20 states. Access to the courts is free in Venezuela (under the 1999 Constitution: free justice for all), and maybe Bolivia will follow. In Argentina, fees are waived by statute – and even experts' fees for consumer cases, which the court must pay.

Some states have a 30% cap on recoverability, which creates a problem. In the more affluent states like Chile, Brazil and Argentina, lawyers often work on hourly rates.

But there are hidden costs, notably “gratification” or corruption, which are frequently high. In Mexico, there is even an official table of extra unofficial costs! There is a need for more empirical research.

England and Wales

Professor John Peysner

What would have happened if Lord Woolf had got what he wanted? In 1999, there was a toxic mixture of both procedural reform and introduction of the recoverable conditional fee. The problem of delay was meant to be attacked by procedural rationing (fast track) and case management (multi track). But the problem of costs was not solved. There has been a collapse in the number of cases litigated. The causes are varied: introduction of offers to settle; pre-issue activities; ADR (differences of view between Woolf and Genn); increases in court fees so as to give ‘full recovery of financing’ of courts; increases in lawyers’ and experts’ costs. Woolf proposed the fat track, a fixed costs matrix based on the then German Brago tariff system. That was blown off course in the multi track. Zuckerman had proposed ideas on budgeting or Brago but they failed because of huge

opposition from the profession. Woolf believed that there could be own side control of costs through estimates, and case management would resolve the position. But his thoughts on case management were contrary to Rand research. The new government asked Middleton, a banker, to review the position, and he took an unrealistic view of the potential of case management and penal sanctions (judges just don't impose them). (There was an interesting market solution mooted but buried on page 245, akin to spread betting!).

We now have:

- fixed RTA costs and success fee shifting. Fenn's research said this did not produce settling at under-values.
- APIL are opposed to fast track fixed costs in PI cases (they are wrong).
- Failure of will on estimates and cost capping.
- Failure of voluntary pilots: the Birmingham medical negligence scheme was very popular but not used because people were not prepared to swap predictability. It was voluntary and should be made mandatory.
- Withdrawal of legal aid and introduction of CFAs: hence unpredictability and having to pay double!
- There is not a market, and so the position needs regulation.
- Clientless litigation had not been predicted (ATE was supposed to be a 'magic bullet' but reality is different).

What if:

- Fixed costs in the fast track i.e. £25,000.
- Result – no costs war.
- Multi track is more difficult.

Litigation Funding

See powerpoints

Brian Raincock

Which? Consumers' Association

Michelle Lyttle

What do consumers want? Dispute resolutions that are effective, speedy, proportionate costs but not at the expense of quality, value for money: an overall package from advice to finality of outcome. They find the current court system long, cumbersome and intimidating. There is a lot more trust in ombudsmen. Note the advantage of single submissions. We should look at other ways: more ombudsmen, triage to identify simple, non-complex routes to resolution. Enforcement is a problem in small claims. There should be more incentives for early settlement, and realistic negotiations. There is a gap between a claim and its resolution: a single hearing is needed. Access includes defending claims that do not have merit. Which? receives some defamation claims over its product and service evaluations, so sees both sides of CFAs. An ATE is not necessary in all cases, especially PI where there is no dispute on liability. We need cost shifting: it is fair and a natural filter. The whole dispute resolution process should be looked at.

European Justice Forum

Malcolm Carlisle OBE

From the business perspective, we agree with all the points just made by consumers. We support a fair and balanced system and access to justice.

The current realities of the economic environment have yet to have impact: there is something of a phoney war feel. Taxes will rise, there will be substantial cuts in public expenditure, up to 20%. In justice, the priorities will be criminal and social justice, with civil justice last, and there will be more levies. We have to rethink the basis of our assumptions.

We need a tiered approach to resolving disputes. There must be rapid, low risk and low cost solutions. Litigation is always to be avoided because of its disruption. What is the new conceptual approach? For companies who value their reputation, there is a built-in desire to maintain reputation. They want to promote settlement systems. The UK has many, but little public information about them. The Netherlands' committee structure is attractive. There is a new and huge opportunity to use public authorities in assisting in dispute resolution. The Nordic ombudsmen approach works well: in Denmark, the collective action procedure is available but not used; instead 40% of people contacting the ombudsman drop their case after speaking to him, and to remaining 60% can settle through discussion with him as a neutral third party. The UK has a new statutory duty on regulators to consider restitution, and this can resolve many cases. We still need a judicial system and access to it, with a collective mechanism, but positioned at the end of the scale.

It is important to consider risks and safeguards of mechanisms. It is easy to talk about consumer rights. Brussels is currently considering two collective action systems – it is unrealistic to expect the Member States to accommodate two new and different systems. There has been no thought given to the risks. We do not want to see a multiplication of litigation, especially class claims. We need to think far more, and the biggest area is funding. The only source for funding now is the private sector. Conditional fees are bad for collective claims, and law firms have shown they can bring claims of questionable merit when funding was available under legal aid. Insurance needs careful regulation. The evidence is that law firms run cases as investment vehicles, on a securitised basis.

The Netherlands Ministry of Justice

Paulien van der Grinten

Should we have fixed fees for lower value claims, like Germany? There are difficulties, including an absence of competition. LEI insurance is widespread in the Netherlands. Should it be compulsory? There is a huge burden on governments to guarantee access to justice.

We are moving towards less compulsory legal representation in courts. This currently applies in claims under €5k and a new Bill raises the limit to €25k: we might exclude lawyers' fees also. Legal aid has wide coverage in the Netherlands – 40% of the population. It applies in individual cases, but there is no substantive cost reduction. In collective claims, lawyers do have a role in coordination, and there is some private funding, but there are questions of supervision and preventing private interests dominating.

We seek best practices, based on empirical research. In collective redress, we need creative solutions, and are thinking of collective legal aid schemes.

We have a loser pays rule. But beware of a boomerang effect: the IP Directive led to a strong decline in the high level of injunctions, since the costs are now too unpredictable with 100% loser pays. The courts are seeking to agree guidelines with lawyers to mitigate this situation.

More alternatives:

- 50% settlement rate at first hearing.
- Our funnel model, like Germany, excludes front-loading of costs.
- Look at substantive law so as to exclude unnecessary disputes.
- ADR and Ombudsmen.
- An e.standard form, which is simple: Wizard project.
- A project (and Bill) on PI involving a partial dispute resolution procedure, in which the parties can ask the court to resolve any issue that is an obstacle to solving a case out of court. All costs would be shifted.

We need further research:

- We plan an empirical study on costs and access to justice. We need to identify the cost of enforcement.
- We have a Bill on simplifying the court fee system. Companies might pay twice as much as individuals.
- We are looking for creative thinking, and not harmonization on a horizontal basis.

General debate

Legal Aid is spreading in New Zealand. It is linked to average earnings. In 2006, NZ\$ 85 million (£42 million) was paid; in 2007, NZ\$ 100 million, and NZ\$ 125 million is predicted by 2012.

Third party funding may provide some access to justice for larger commercial claims, but not for individuals' claims unless sufficiently aggregated. In UK, providers say CFAs and ATE are working satisfactorily. There needs to be clarity over any success fee: what is the 30% applied to?

In Germany, companies prefer to arbitrate rather than litigate – quite often in Switzerland.

In Northern Ireland, there are no CFAs, because the profession was frightened of them. A viable proposal had support instead for a CLAF, funded by top slicing of recoveries with no insurance, but it has not been introduced.

In USA, a lawyer will not be interested in a contingency fee for cases involving under \$150,000. Possible solutions put forward for small claims include no way fee shifting and small claims class actions. Lawyers operate contingency fee practices as portfolios, based on a spread of risk.

In UK, lawyers want a steady turnover of low value cases.

Lawyers' costs are the main element in litigation costs. What incentives do lawyers have to reduce costs? How do new sources of funding do this? Or should aggregation of spending power come through organisations? Funding companies need clarity over how far they can go in controlling cases.

The model of private lawyers as private representatives of public interest is recognised. But the public interest is often overlooked.

The UK has just published proposals to create a Consumer Advocate, along the lines of a Nordic Ombudsman, who will seek negotiated solutions between businesses and consumers, combining elements of settlement, ADR and public oversight techniques.

It is expensive to go to court, so the market is developing alternatives.

Legal education is needed. As the pool of legal talent increases, lawyers have higher expectations of remuneration, and are less able to afford to run lower value cases.

The perspective across the EU is that costs diverge considerably. Costs are a strong driving factor of the outcome of proceedings. There are strong private market forces at work, and important market issues. Decentralised enforcement of law is a feature of the EU. If divergences are not addressed, there will be increased competition and forum shopping between jurisdictions.