The Jackson Final Report on Costs—Plastering the Cracks to Shore Up a Dysfunctional System

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Reprinted from **Civil Justice Quarterly**
Issue 3, 2010

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Editor's Note

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Conditional fee agreements; Costs; Fast track; Fixed costs; Legal costs insurance; Multi-track; Personal injury claims; Success fees

Introduction

In January of this year Jackson L.J. submitted his *Review of Civil Litigation Costs: Final Report* (FR). The reasons for the *Review* and the background to it were discussed in (2009) 28 C.J.Q. 45, where the Jackson *Preliminary Report* was considered. The recommendations of the FR are numerous and cannot be discussed in detail here. The purpose of this note is to consider the strategy adopted by Jackson L.J. and to comment on its main components.

This article argues that while the Jackson report stresses the need to ensure that costs are proprtionate does put forward some positive recommendations, its recommendations largely preserve the fundamental structure of the present system. As a result, the benefits to court users and their access to justice are likely to be modest.

The marks of dysfunction

A civil-justice system must be regarded as dysfunctional if the transaction costs of dispute resolution are out of all proportion to the subject matter in dispute and if, in addition, it creates further transaction costs to resolve disputes over original transaction costs.

Yet this is the system operating in England and Wales. The cost of litigation is high, unpredictable and can end up being out of all proportion to the value of the subject matter in dispute. Prosecuting or defending an action exposes the parties to unlimited financial risk because litigants have to undertake to pay their lawyers by the hour, regardless of outcome and without an upper limit, and in addition run the risk of having to pay their opponent's costs as well. Access to justice is in practice prohibitively risky, for even relatively affluent persons cannot litigate without risking financial ruin.

Litigants represented on the basis of a conditional-fee agreement (CFA) fare better. But as a result of the success fee and the after-the-event insurance premiums (ATE) the overall cost of litigation involving CFAs has very considerably increased. This cost has been passed on to unsuccessful defendants, normally insurance companies, which have in turn passed it on to consumers. As a result policy holders have been paying a premium to allow some to litigate without any risk to themselves but with enormous financial benefits to their lawyers.

A further feature of the English costs laws has been an explosive growth in litigation over costs. Since litigation costs are very high litigants have sought every possible avenue to shift the burden to someone else. The legal profession is now a major direct player in this form of litigation, due to lawyers' interest in recovering the success fee and ATE premium from defendants. The complexity of the costs rules in England and the satellite litigation it generates is without parallel in the world.

The conditions that a successful reform must achieve

To remove the dysfunction three simple conditions need to be fulfilled. First, litigation costs must be predictable in advance or, at the very least, litigants should be able to limit their financial commitment to the process. Secondly, the overall costs of prosecuting or defending a claim should be proportionate to the value of the subject matter at stake in the litigation. Thirdly, the recoverability of costs and their amount should be clear in advance and capable of being calculated without litigious activity.

The present system is governed by two general principles which together ensure that none of these conditions can be met: litigation services are paid by the hour without an upper limit and regardless of outcome and, furthermore, the successful party is normally entitled to recover uncapped litigation costs from the unsuccessful party. There is nothing wrong with a litigant agreeing to pay his lawyer uncapped hourly fees. But there is much wrong with a system in which such a litigant can then claim his lawyer's fees from another. It is beyond dispute that the recoverability of uncapped hourly fees has a chilling effect on access to justice and furthermore keeps in business a large and remunerative industry of litigation about costs.

It follows that in order to achieve predictability and proportionality and avoid satellite litigation it is necessary to decouple the hourly-fee system from the winner-takes-all principle. There is in addition the urgent need to reverse the outrageous excesses of the CFA and ATE systems which have allowed some lawyers to make disproportionate profit out of litigation at others' expense.

Abolition of the recoverability of CFA success fees and ATE premiums

The most urgent area of reform is the conditional fee agreement. In a conditional fee agreement the claimant agrees with his lawyer an hourly fee, a success fee and an ATE premium which the claimant will never pay but which they expect to recover from the defendant. The arrangement is commonly referred to as a "no win, no fee" agreement, though for the CFA claimant it is also a "win, no fee" as well. Success fees were rendered recoverable in England in order to encourage solicitors to take on cases on a no-win no-fee basis.[1] However, as a judge commented during the Jackson enquiry, the,

[1] See generally. CPR rr.43.2(1)(a) and 43.2(1)(k). See also, for example, CPR r.45.11(1) (RTA claims).

> "concept of a losing defendant … having to subsidise the costs which the opposing solicitor has notionally or actually lost in other cases is manifestly unfair, and could indeed be called grotesque" (FR, p.107).

Equally grotesque is the recoverability of ATE premiums.[2] For why should a losing defendant have to pay for the claimant's insurance taken out to cover the claimant against the risk that the defence might succeed? And to add insult to injury, the claimant's premium would be higher the stronger the defendant's case appears at the outset. We have a system which perversely increases the defendant's costs the stronger his case is (FR, p.83).

The ATE premiums presented solicitors and their ATE insurance companies with lucrative opportunities. As a result of the recoverability of CFA success fees and of ATE premiums there has been some threefold increase in the cost of personal injury litigation. Jackson L.J. reported (FR, p.83):

> "At the chancery litigation seminar held on 24th July 2009, one solicitor said that premiums quoted to him by ATE insurers were often in the region of 90% of costs. He added that in one current case he has been offered ATE insurance at a premium of 95%. That premium is assessed by reference to his own likely total base costs up to trial (currently estimated at £100,000), even though in practice such a case is unlikely to go to trial. This is a professional negligence claim where the sum at issue is £60,000."

Exorbitant practices are also evident in low-value personal-injury claims. Sir Anthony May recounted that in,

> "tripping and whiplash injury cases in Liverpool in which the claims had been settled for £1500, … district judges found themselves having to assess the claimants' costs at sums in excess of £3000, including an ATE insurance premium of £840, I think it was. Tripping and whiplash cases in Liverpool always settle for £1500 and the risk for which the insurance premium was paid is virtually non-existent. The same happened with road traffic cases."[3]

Jackson L.J. was therefore bound to conclude that on the whole the present system is, "neither logical nor grounded in any discernible social policy".[4] He recommends the abolition of the recoverability of CFA success fees[5] and of ATE premiums.[6] He accepts that CFAs and ATE insurance have a role to play in easing access to justice, but he is of the view that those who employ them should bear their cost and not expect to transfer it to their opponents.[7]

[2] Access to Justice Act 1999 s.29.

[3] Sir Anthony May, "Keynote Address - Costs Conference" (Cardiff: June 16, 2009), p.8. Available at *http://www.judiciary.gov.uk/docs/costs-review/pqbd-costs-conference-190609.pdf* [Accessed April 4, 2010].

[4] Jackson L.J., *Review of Civil Litigation Costs: Final Report* (TSO, 2010) (hereafter "Final Report"), p.89, para.5.6. Although this was said in the context of commercial litigation, it must be generally true.

[5] *Final Report*, 2010, p.133, para.7.1.

[6] *Final Report*, 2010, p.93, para.5.1(i).

[7] *Final Report*, 2010, p.89, para.5.7.

Special regime for personal-injury litigation

The abolition of the recoverability of CFA success fees and of ATE premiums would lay bare the problem that these measures were intended to solve: the chilling effect of the risk of losing a claim and having to pay the defendant's costs. Jackson believes that the risk of adverse and potentially ruinous costs orders tends to deter even persons with genuine grievances and a strong case from pressing their claims. This is particularly so in relation to personal-injury claims. He notes (FR, p.184):

> "There are two important features of personal injuries litigation. First and self-evidently, the claimant is an individual. For the vast majority of individuals it would be prohibitively expensive to meet an adverse costs order in fully-contested litigation. The most recent Social Trends report shows that 73% of all households have savings (made up of securities, shares, currency and deposits) of less than £10,000. Defence costs can easily be many times higher than £10,000 in fully-contested litigation. This would mean that for three quarters of households their other financial assets (their own home in most cases) would be at risk from an adverse costs order. Secondly, the defendant is almost invariably either insured or self insured. By 'self insured', I mean that the defendant is a large organisation which has adopted the policy of paying out on personal injury claims as and when they arise, rather than paying substantial liability insurance premiums every year."

He therefore recommends that in personal-injury claims the abolition of the recoverability of CFA and ATE premiums should be accompanied by three key measures:

(1) An increase in the level of general damages to compensate claimants for having to pay a success fee.
(2) One-way costs shifting to remove the claimant's risk of having to pay the defendant's costs.
(3) CFA success fee recoverable from claimants to be limited to 25 per cent of damages excluding future care and earnings.

Furthermore, he also recommends increasing the reward for making a successful claimant's offer under CPR Pt 36 (i.e. an offer which the defendant fails to beat at trial). It is worth noting in passing that Jackson also recommends that the level of general damages for pain, suffering and loss of amenity in all personal-injury cases,[8] for nuisance,[9] for defamation[10] and for any other tort which causes suffering to individuals be increased by 10 per cent.[11]

The one-way costs shifting in personal-injury claims would work as follows: if the claimant wins his lawyer recovers normal hourly costs from the defendant (or fixed costs in the fast track), but if the claimant loses he does not have to pay the defendant's costs. Jackson L.J. explains (FR, p.184):

[8] *Final Report*, 2010, p.112, para.5.3(i).
[9] *Final Report*, 2010, p.318, para.3.13.
[10] *Final Report*, 2010, p.329, para.7.1(i)(a).
[11] *Final Report*, 2010, pp.112–3, para.5.6. It is interesting to note that the broader phrase, "any other civil wrongs to individuals" was used—see *Final Report*, 2010, p.365, para.10. This could also include economic torts, such as incitement of breach of contract, or the public tort of misfeasance in public office, or even malicious prosecution. (I am grateful to Winky So for drawing this to my attention.)

"1.3 *Factors pointing towards one way costs shifting.*

The factors which make one way costs shifting a serious candidate for consideration in relation to personal injuries litigation are the following:

(i) Claimants are successful in the majority of personal injury claims. Defendants seldom recover costs, so they derive little benefit from two way costs shifting.

(ii) Personal injuries litigation is the paradigm instance of litigation in which the parties are in an asymmetric relationship, as discussed in chapter 9 above.

(iii) The principal objective of recoverable ATE insurance premiums is to protect claimants against adverse costs orders. One way costs shifting would be a less expensive method of achieving the same objective.

(iv) One way costs shifting is not a novel concept in personal injuries litigation. Between 1949 and 2000, the vast majority of personal injury claims proceeded under a one way costs shifting regime, namely the legal aid shield.

In the case of clinical negligence cases, I accept that the success rate of claimants is lower. But the other factors set out above are present. Furthermore, the level of ATE insurance premiums is significantly higher in clinical negligence cases than in ordinary personal injury cases, so that factor (iii) above gains greater force."

He concluded (FR, p.187):

"2.11 … On the basis of the material provided during the Costs Review, it seems to me inevitable that, provided the costs rules are drafted so as (a) to deter frivolous or fraudulent claims and (b) to encourage acceptance of reasonable offers, the introduction of one way costs shifting will materially reduce the costs of personal injuries litigation. One layer of activity, namely ATE insurance against adverse costs liability, will have been removed from the personal injuries process."

Tempting though the Jackson strategy appears, it is flawed in principle and its assumptions are suspect. Given that the recoverability of the CFA success fee and ATE premiums has been condemned as unprincipled and exploitative, it seems odd to justify the proposed system on the grounds that it would be no more burdensome to insurance companies than the system that was found wholly unacceptable. If the present system that shifts the claimant's litigation risk to defendants is absurd, there can be no merit in its substitution by a different method which also results in shifting the same burden to defendants.

From a practical point of view Jackson L.J.'s calculations are suspect. The entire strategy is founded on the assumption that one-way cost shifting would not increase the burden on insurance companies because the loss of the opportunity to recover costs from unsuccessful claimants would be more than compensated for by not having to pay CFA success fees and ATE premiums to successful claimants. It is, however, dangerous to extrapolate from the existing system because the new system will create different incentives. For example: C makes a claim for £100,000 which has 25 per cent chance of success. It is therefore not a frivolous claim. C knows

that it would cost D in the region of £40,000 to defend the claim. C could then turn to D and say: If I am willing to accept £35,000 and since it would make no commercial sense to defend the claim, why not pay? It is therefore quite possible that in the end the one-way costs shifting would prove even more expensive in aggregate than the presently grotesque system.

There are further disadvantages to the proposal. Claimants' lawyers will continue to benefit from the present economic incentives that reward input. The scope for satellite litigation over costs will remain since insurance companies would have reason to challenge the demands of claimant lawyers. Significantly, the proposal creates a new field of satellite litigation because Jackson recommends giving the court discretion to make a costs order against a losing claimant in the following circumstances:[12]

(a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim);
(b) where the defendant is neither insured nor a large organisation which is self insured; or
(c) where the claimant is conspicuously wealthy.

Successful defendants would therefore be entitled to require the court to investigate the claimant's means and ability to meet the defendant's costs. This will bring into the costs field the kind of investigation that is at present appropriate only in proceedings for the enforcement of judgment.

Fixed costs in the fast-track litigation

A more positive recommendation concerns the extension of the fixed-costs system to cover the entire costs of litigation in the fast track, the limit of which now stands at £25,000.[13] Jackson L.J. is of the opinion that in claims up to the fast track limit litigants should be able to litigate without fear of being liable to unlimited and therefore unpredictable amounts of costs.

This is a most welcome development even if the recommended implementation gives rise to some concerns. Chief amongst them is the idea of introducing judicial discretion to allow higher costs in exceptional cases (FR, p.150):

> "There must be a fair 'escape clause' which provides the right to recover costs actually incurred where the issues in the case and the interests of justice so require. Also, either party should have the right to apply at any stage if the circumstances of the case requires."

Practitioners are bound to invoke this discretionary power to obtain higher rewards, with the possibility that the cap would be eroded over time. Jackson L.J. is confident that the discretion will only be exercised in exceptional circumstances.[14] But this seems optimistic. The judiciary's record of keeping a downward pressure on cost is disappointing as the Jackson report demonstrates time and again. If there is one clear lesson that the history of costs teaches us it is this: that discretion in costs

[12] *Final Report*, 2010, p.190, para.4.8.
[13] Jackson L.J., *Review of Litigation Costs: Preliminary Report* (TSO, 2009), p.203, para.1.10.
[14] See *Final Report*, 2010, p.161, para.5.18.

creates expensive satellite litigation and no cost reduction in the long run. It is therefore likely that the discretion to allow more than the fixed costs could well end up undermining the new regime.

There is a further problematic aspect. The position taken by Jackson L.J. is that fixed costs must be the product of a genuine attempt to estimate the actual (reasonable) costs of the winning party. He proposes a maximum of £12,000 for the pre-action stage (fast-track advocacy costs are already fixed). This figure is unfortunate since the present cost levels are the product of a discredited system which offers powerful economic incentives to maximise hourly input.

For a system of fixed costs to succeed, it must be robust, i.e. discretion free and cap the expenses at a level which is proportionate. A fixed-costs system which is founded on the present costs level and which, in addition, permits the fixed level to be exceeded in "exceptional" circumstances, may present only a modest improvement on the present state of affairs.

Multi-track fixed costs postponed to placate vested interest

Nowhere is the lack of commitment to serious reform more evident than in the treatment of multi-track litigation. For multi-track litigation Jackson L.J. rejects the fixed-costs system and recommends for fast track. Pre-eminent amongst the reasons for not extending fixed costs beyond the fast track is the fact that the,

> "majority of respondents oppose any fixing of costs in the multi-track. Both the Law Society and the Bar Council oppose any extension of the fixed costs regime above the fast track"(FR, p.170).

He concluded (FR, p.172):

> "2.9 Having considered the competing arguments advanced during Phase 2, I think that it would be premature to embark upon any scheme of fixed costs or scale costs in respect of lower value multi-track cases for the time being. The top priority at the moment must be (a) to achieve a comprehensive scheme of fixed or predictable costs in the fast track and (b) to introduce a scheme of capped scale costs for lower value multi-track IP cases."

It follows that a general fixed-costs scheme is rejected not as a matter of principle, not because it is undesirable, but purely on the grounds that those with a vested interest in the continuation of the winner-takes-all system are opposed to the change.

Costs management in multi track to protect clients from their own lawyers

Although fixed multi-track costs are not on offer, this type of litigation could not be left to the vagaries of the hourly fee and winner-takes-all system. To control costs Jackson L.J. proposes a system of costs management, which he explained in the *Interim Report* (Vol.2, Ch.48, para.1.6):

> "Costs management is concerned with ensuring that the incidence of costs is actively controlled by the court as the case moves from inception to its conclusion. … Specific approval or sanction of the incidence of costs at stated or approved levels throughout the life of the case ought to have the effect of removing or reducing the need for an ex post facto examination of whether the costs incurred should have been incurred or were reasonably incurred."

He elaborated it in the *Final Report* (FR, pp.400-1):

> "1.4 *The essence of costs management.* The essential elements of costs management are the following:
> (i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.
> (ii) The court states the extent to which those budgets are approved.
> (iii) So far as possible, the court manages the case so that it proceeds within the approved budgets.
> (iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget."

The purpose of this exchange of budgets is meant to ensure that costs are reviewed in advance, rather than retrospectively, and that parties therefore become aware of their costs risk. Cost budgeting is accordingly at the heart of the proposed system.

Budgeting is used in most economic activities, small and large, as a method of allocating and controlling resources. Whether one plans a family holiday or embarks on a large-scale commercial-building development, one begins with a budget. It represents the total amount of money calculated, with greater or lesser precision, as necessary for accomplishing the project. No prudent person or organisation would embark on a project without an estimate of the cost and unless it is confident that any foreseeable cost overrun would be within reasonable limits and in any event affordable. Clearly, no sensible person would take their family on a holiday which might leave them stranded short of funds in a remote place. And no organisation would embark on a building project that it is unable to fund to completion.

At present it is virtually impossible to make a budget for litigation because legal services are charged by the hour without an upper limit. Even where a litigant is able to control his own costs, he has no control over his opponent's costs and cannot therefore know in advance the magnitude of the financial risk which litigation involves. It would therefore represent a great achievement if litigation costs could be determined in advance with some measure of certainty. Can the costs management system proposed in the report achieve this objective?

The system will operate as follows. A budget will have to be attached to the case management sheet. It will have to include an estimate of hourly fees and reasonable allowances for disbursements, court fees, counsel's fees and any mediator or expert fees. At each subsequent case management conference and pre-trial review the judge will receive updated figures, in order to ascertain what departures have occurred from each side's budget and why. A judge will, either by agreement between the parties or after hearing argument, approve or disapprove

such departures from the previous budget as have occurred. If any party exceeds the costs previously estimated for any activity, it shall notify all other parties and the court of the amount of the excess.

It is very difficult to see how this fluid estimate-based budgeting system can possibly meet the objective of rendering costs predictable. It does not offer a way of knowing in advance of proceedings what the cost would be because the parties will see each other's budgets only once the case management sheets have been filed. Costs will become knowable only once the court has reviewed the estimates and approved them. To get to this stage the claimant would have to commence proceedings and therefore make a considerable investment and in practical terms commit to litigation. If, on seeing the court's approved estimates, the claimant wishes to withdraw, he would be able to do so only by discontinuing and paying the defendant's costs. And vice versa: the defendant will be able to disengage at this stage only by paying up the claim plus costs.

A claimant could of course ask his solicitors to provide an estimate before commencement, but the solicitors will doubtless explain that they could provide only a very rough estimate without thorough investigation of the case and the evidence involved which they would have to charge to their client. And in any event, they would inform the client, a clearer picture can only emerge once the court has approved the estimates on the basis of the information supplied by both parties.

The proposed costs management process is labour-intensive in terms of litigant and court resources, as the Guidelines for the Birmingham pilot show (FR, pp.402–3):

> "1. The parties will submit detailed budgets of their 'estimates of costs' as attachments to their Case Management Information Sheets and Pre-trial Check Lists (or at such other time as ordered by the court).
>
> 2. At the CMC and PTR, the judge will have before him/her these detailed budgets of both parties for the litigation. He/she will take into account the costs involved in each proposed procedural step when giving case management directions. The judge:
>
> (i) Will, either by agreement between the parties or after hearing argument, record approval or disapproval of each side's budget for each step in the action.
>
> (ii) May order attendance at regular hearings (by telephone if appropriate), the purpose of which is to monitor expenditure. Parties will be expected to provide to the judge any budget revisions in good time before such hearings to enable the judge to prepare for the hearing.
>
> (iii) May include provision in the directions for any party to apply to the court for assistance if it considers that another party is behaving oppressively in seeking to cause that party to spend money unnecessarily.
>
> 3. The budgets will be in a standard Excel template form, as per the attached example. Each side will include separately in its budget:

(i) reasonable allowances for intended activities: e.g. disclosure (if appropriate, showing comparative electronic and paper methodology), preparation of witness statements, obtaining expert reports, mediation or any other steps which are deemed necessary for the particular case;

(ii) reasonable allowances for specified contingencies e.g. specific disclosure application (if an opponent fails to give proper disclosure); resisting applications (if made inappropriately by opponent).

4. The budget must include reasonable allowances for disbursements, in particular, court fees, counsel's fees and any mediator or expert fees.

…

5. At each subsequent CMC, PTR and at trial the judge will receive updated figures, in order to ascertain what departures have occurred from each side's budget and why. A judge will, either by agreement between the parties or after hearing argument, approve or disapprove such departures from the previous budget as have occurred.

6. If any party exceeds the costs previously estimated for any activity, it shall notify all other parties and the court of the amount of the excess.

…

7. … the judge will seek to manage the costs of the litigation as well as the case itself. When the court or a party relies upon one party's estimate of costs, the judge will record the fact of such reliance in the case management directions (for the purpose of any future argument concerning paragraph 6.5A of the Costs Practice Direction).

…

8. At the end of the litigation the judge conducting a detailed or summary assessment will have regard to the budget estimates of the receiving party and will generally approve as reasonable and proportionate any costs claimed which fall within the previously approved total."

Costs management is clearly going to call for the investment of substantial resources from solicitors and from judges alike. Solicitors will have to produce quite detailed costs calculations, though how practical it is to do so at an early stage is questionable. The parties are expected to discuss their estimates with each other. The court is to consider their calculation. And these are to be reviewed periodically by the court, "in order to ascertain what departures have occurred from each side's budget and why". And if this were not enough, there may still be a detailed or summary assessment at the end of the litigation. Indeed, Jackson L.J. considers that operating the new system would require specially-trained solicitors and judges (FR, p.416).

Not surprisingly, the reaction of the Council of Her Majesty's Circuit Judges to this elaborate system was unenthusiastic[15]:

[15] *Final Report*, 2010, p.411, para.6.2.

> "We view with trepidation and antipathy yet another area of out of court invigilation which it might be suggested the judiciary should take on. Consideration of parties' budgets would be a very significant and difficult exercise. It would also be very time consuming. If a Judge is worrying his way through two rival litigation budgets, assuming he had somehow acquired the expertise to do so, he will not be trying cases. Judicial productivity would be likely to fall as fast as morale if we are required to do this work."

Given that costs management does not provide predictability before commencement and that thereafter it can only achieve periodic scrutiny, what is the justification for recommending this costs system? Several answers are given to this question in the report. One is that it, "does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur" (FR, pp.414–5). This reflects a misapprehension of the function of case management. The court does not decide what investigations the parties need to make, what documents they need to disclose to each other, what witnesses to call or whether to commission expert reports. In an adversarial system of litigation this is for the parties to decide. The function of the court is to establish a framework within which such activity takes place. When the court orders that disclosure should be given by a certain date, that witness statements should be filed within a certain time, or that cross-examination should last no longer than half a day, for example, it does not oblige the parties to list any particular document, or to call any particular witness or to cross-examine; it simply sets a time table. It follows that the setting of deadlines, which is the main business of management, does not direct the parties to any particular investment of resources.

To justify the expense of costs management Jackson L.J. observes that any serious project calls for cost control. "Quantity surveyors", he observes,

> "have to be paid professional fees for their services in monitoring the costs of a construction project … But no-one suggests that quantity surveyors should be dispensed with, in order to 'save' the costs of employing them. … the costs of every multi-track case, unless it settles early, are comparable to at least the costs of a small building project and sometimes they are comparable to the costs of a major building project. There is precisely the same need to control the costs of litigation as there is need to control the costs of any other project"(FR, p.415).

Of course any major project, building or otherwise, calls for some form of cost control. But such control is invariably exercised by those engaged in the project, not by a judge, and not at public expense. It is up to those who embark on a development project to ensure that construction is carried out in accordance with the contract and that costs are not allowed to overrun the budget. They have the incentives to do so. Both the developer and his builder will put in place effective cost control mechanisms or they court disaster. They would certainly not leave it to others. So why not allow parties to litigation to do the same? Why should parties not do what any prudent developer does and look after their interests?

The answer given by Jackson L.J. is telling (FR, p.415):

> "7.3 *Effective costs management is in the interests of clients.* As previously noted, lawyers are human. Those who are spending other people's money sometimes have a tendency to be over-generous, particularly when they are paying that money to themselves and expect the costs to be borne by their opponents. There therefore needs to be some effective control over the costs which are expended on litigation. Non-commercial, first time litigants often are in no position to know what work needs to be done or to control expenditure. I accept that business litigants are better placed to control what their lawyers spend on litigation. But these are the very clients who seem most keen on costs management being undertaken by the court."

This is the nub of the matter: clients need protection from their own lawyers; a problem known as the agency problem. The client has to use an agent, but the agent being paid by the hour has an economic incentive to complicate and protract the litigation process. On his part, the client has an interest in keeping costs down but has no effective means of doing so because he depends on the lawyer to judge what the process requires.

The aim of costs management is therefore to protect clients from their own lawyers. Unfortunately, the proposed system is doomed to failure for a combination of two reasons: first, it is fundamentally reliant on the very agents against whom it seeks to protect clients; and, secondly, court regulation is the wrong tool for counterbalancing lawyers' economic incentives to maximise hourly input.

Budgets are going to be devised by the very people who have a financial incentive to inflate them. Moreover, the higher the claimant's lawyers estimate their expenses, the more reason would the defendant's lawyers have to respond in kind. Clearly, lawyers would have no financial incentives to challenge each other's estimates, but on the contrary to adjust their own accordingly.

The second reason for pessimism is that court regulation of costs is bound to be inefficient and in the long run ineffective. After all, the present system too is regulation based, because the court has to determine the reasonableness of costs claimed. Yet the court has been unable to keep any downward pressure on costs, which have seen a steady rise. The reason for this was explained by Buxton L.J. in *Willis v Nicolson* [2007] EWCA Civ 199; C.P. Rep. 24 at [18]:

> "One element in the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work."

The costs-management system too will assess the proper charge for work on the basis of market rates and on the basis of what is reasonable procedural activity in the context of the particular case. Yet the market for legal services is inefficient due to lack of transparency. Although hourly rates may differ it is well nigh impossible for lay clients to assess whether their solicitors provide good value for money. Put differently, there is no obvious correlation between the hourly rate and the efficiency with which litigation is conducted. A client represented by a solicitor

charging £100 per hour may in fact end up paying more in total than a client who is charged £150 per hour, because the first solicitor turned out to be less efficient and to have spent more hours on the same kind of case.

Conscious of this problem Jackson made the following recommendation (FR, p.418):

> "7.22 … In chapter 3 above I propose a definition of 'proportionality', which would come into play on those occasions when an assessment of 'reasonable' costs results in an excessive figure. In essence proportionality trumps reasonableness. If the recommendation in chapter 3 is accepted, this will introduce a new dimension to costs management.
>
> 7.23 …The judge carrying out costs management will not only scrutinise the reasonableness of each party's budget, but also stand back and consider whether the total sums on each side are 'proportionate' in accordance with the new definition. If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter both parties, if they choose to press on, will be litigating in part at their own expense."

The new proportionality test is elaborated as follows (FR, p.64):

> "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 in the proceedings;
> (c) the complexity of the litigation;
> (d) any additional work generated by the conduct of the paying party; and
> (e) any wider factors involved in the proceedings, such as reputation or public importance."

If proportionality were confined to a correlation between the value of the subject matter in dispute and the cost of the litigation, then we could hope for some measure of reasonable correlation. For example, since it would be unreasonable to invest £50,000 to recover £50,000 in damages and in addition carry a risk of paying a similar amount to the defendant in costs in the event that the claim is unsuccessful, it would soon become accepted that it would be unreasonable to invest more than £15,000.

But as the report's definition or proportionality suggests, this is not how proportionality would work. Regard would also have to be given to non-monetary value, to the complexity of the litigation, to the conduct of the paying party and to "any wider factors involved in the proceedings". This open-ended test of proportionality presents an invitation to the lawyers who are paid by output to exaggerate the significance of the relief, the complexity of the case, the obstructive conduct of the opponent, any conceivable wider factors and, of course, the amount claimed. And all that would stand between them and the client would be a bevy of overworked judges who, in addition to carrying out the judicial task of bringing disputes to an efficient and just conclusion, must now police the avenues of litigation to protect clients from exploitation by their lawyers.

Costs management is an unedifying system as well as an ineffective one, for it achieves neither predictability nor a guarantee against disproportionate costs exposure if one takes into account the risk of paying the opponent's costs. What it does achieve is much greater judicial and litigant activity about costs; filing of estimates, consideration of estimates at every juncture in the process, argument about estimate overrun and possibly more. This system has the potential to provide a new source of practitioner income just as pre-action protocols have done; one more excuse for front-loading.

Balkanisation of civil procedure

The one undoubtedly remarkable achievement of the great 19th century reforms was to make procedure trans-substantive. Under the old forms of action system there were different procedures for different types of claims. The procedure for action based on contract was different from that founded in tort. Even within each field of substantive law there were different forms for different types of claims. All this complexity was swept away by the reforms culminating in the Judicature Acts of 1875. The great variety of the forms of action gave way to a unified procedure usable for all types of claims—a trans-substantive procedure.

This monumental achievement served the administration of justice well for over a century-and-a-half. This is now threatened because Jackson L.J. is recommending the implementation of many different costs regimes for different types of litigation. As already noted, the costs regime for fast track litigation would be different from that applicable in multi-track litigation. Personal-injury claims will have their own one-way cost shifting. Different arrangements will apply to defamation and to other types of litigation. The tables provided in the appendixes prepared by Winky So[16] show the range of different costs arrangements.

It stands to reason that the greater the range of procedures, the greater the scope for process shopping and the greater the potential for dispute. Claimants would seek to bring their case under the costs regime that is most advantageous to them, and defendants would seek to pull the case towards the regime that benefits them more. Specialisation in the conduct of different types of proceedings would be even more critical than it already is; with the result that competition would be further impeded.

A different costs regime for different types of proceedings or for different causes of action is a retrograde step which threatens to push civil litigation back to the dark ages from which it emerged in the middle 19th century.

Conclusion

Although in England litigation costs present an intractable problem, the difficulty is by no means universal. For while costs occupy a great deal of court and litigant time in England, litigation costs attract far less learning and energy in Germany or in the United States. Each of these countries has fashioned a system which is virtually self-operating and which offers litigants predictability so that they can calculate the cost effectiveness of litigation and their own risk exposure before

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they start proceedings. Furthermore, in both Germany and the United States, the law operates one costs system across the entire civil litigation field (with only marginal exceptions). These two countries employ very different systems. Germany operates a fixed recoverable costs system while the United States has no cost shifting at all, so each litigant has to pay his own way, win or lose. However, both countries enjoy a successful economy and a well-ordered and highly-respected legal system which includes an effective dispute resolution service.

Yet Jackson L.J. set his face against adopting either of these well-tried systems. There would be nothing wrong if he were able to come up with something better or at least equally good. But as the above discussion shows this is not the case. There is no escaping the conclusion that the only reason the report does not recommend a German or US-type system is because such a radical departure from the present system would be too painful to the legal profession (for this reason alone a fixed-costs system is not recommended in multi-track litigation).

There are some positive suggestions in the report, such as the abolition of the recoverability of CFA success fees and of ATE premiums, and the introduction of fixed costs in fast-track litigation. But even these modest reforms make concessions to vested interests. The abolition of the recoverability of the CFA success fee and ATE premiums is accompanied in personal-injury claims by one-way cost shifting, which will enable PI lawyers to maintain their income. Fixed costs in the fast track are also calculated to broadly maintain present levels of fees. Uncapped hourly legal fees would remain in the proposed costs-management system, albeit under court supervision and subject to a nebulous proportionality test.

The special arrangements recommended for various types of litigation (personal injuries, intellectual property, nuisance, defamation and any other tort which causes suffering to individuals) are mere palliatives and do not address the underlying causes of the English disease.

Far from offering a cure, the measures that the report proposes shore up a dysfunctional system by plastering over its worst blemishes. Time and again the report discloses the reason for the detailed, convoluted and cumbersome efforts to maintain the fundamental structure of the present system: that it suits the economic interests of the legal profession in England and Wales.

Appendix I: Specific fields

Type of litigation	Proposed arrangement	Pages in Jackson Report
Personal Injury (Covered mostly in: Chs 10, 19–22)	- Increase of General Damages for "Pain, suffering and loss of amenity" by 10%	Ch.10, para.5.3 (p.112)
	- Setting up a working group be set up to establish a uniform calibration for all software systems used in assessment of damages for PSLA up to £10,000	Ch.21, paras 5.2–5.3 (pp.213–4)
	- Capping of success fees to 25% of damages, excluding those referable to future care or future loss	Ch.10, para.5.3 (p.112)

Type of litigation	Proposed arrangement	Pages in Jackson Report
	- Prohibition of Referral Fees, or in the alternative, capping them to £200	Ch.19, para.5.9, Ch.20, para.4.16 (pp.192, 205–6)
	- Qualified One-Way Cost Shifting	Ch.19, paras 4.7, 4.12 (pp 189–90; 191)
Fast Track Personal Injury Cases (Ch.15)		*Road Traffic Accidents* Ch.15, paras 6.8–6.11 (p.167)
	- Fixed Costs	*Housing* Ch.15, paras 6.12–6.17 (pp.167–68)
		Others Ch.15, para.6.18 (p.168)
Road Traffic Cases not exceeding £10,000, and liability is admitted	- Implementation and review of the "New Process" proposed by the Ministry of Justice	Ch.22, paras 4.4–4.5 (p.226)
Medical Negligence (Ch.22) General Recommendations: pp.246–247	Increase Response Time for Defendants from three to four months • Require Expert Evidence on liability and causation to be obtained within this period if liability is denied	Ch.22, paras 4.10–4.11 (pp.240–241)
	- Financial penalties for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the protocol	Ch.22, para.4.14 (p.241)
	- Providing in the protocol a limited period for settlement negotiations where the defendant offers to settle without formal admission of liability	Ch.22, para.4.13 (p.241)
	- Requiring that the NHSLA, the MDU, the MPS and similar bodies to each nominate an experienced and senior officer to whom claimant solicitors should, after the event, report egregious cases of defendant lawyers failing to address the issues	Ch.22, para.4.12 (p.241)
	- Harmonization of Case Management Directions	Ch.22, para.5.1 (p.242)
	- Pilot scheme for Costs Management	Ch.22, paras 6.8–6.11 (p.245)
	- Use of docketing and specialist judges in clinical negligence litigation	See Ch.39, below
	- Take further action in regards to the NHS Redress Act 2006	Ch.22, para.7.5 (p.246)

Type of litigation	Proposed arrangement	Pages in Jackson Report
Defamation and related Claims (Ch.32) General Recommendations: p.329	Provided that the changes made to recoverability of CFA success fees and ATEs were implemented: • Introducing Qualified One Way Cost Shifting, reflective of the means of the parties and their conduct in the proceedings • Increasing the General Level of Damages in Defamation and Breach of Privacy Proceedings by 10%	Ch.32, paras 3.13–3.14 (p.326)
	- Amending the wording in para.3.3 of the Defamation Pre-Action Protocol, in relation to identification of the meaning attributed to the words complained of, from "it is desirable for the Claimant" to "the Claimant should"	Ch.32, paras 4.3–4.4 (p.327)
	- Reconsider whether to retain trial by jury	Ch.32, para.6.4 (p.329)
Nuisance Cases (Ch.31) General Recommendations: p.318	- Encouragement of greater take-up of BTE insurance	Ch.31, paras 3.9–3.11 (p.317)
	- Increase of general damages by 10% if the general changes on CFAs and ATEs are implemented	Ch.31, para.3.12 (p.318)
	- Award of an additional sum representing 10% of damages and value of non-financial relief in cases where a claimant's Pt 36 offer is vindicated	Ch.31, para.3.13 (p.318)
Intellectual Property (Ch.24) General Recommendations: p.257	- More active Case Management, for example through the use of the US *Markman* hearing procedure	Ch.24, paras 2.5, 2.6 (pp 251–252)
	- Allowing costs to be recovered from opponents according to cost scales	Ch.24, paras 3.2, 3.3, 3.6 (pp 252–254)
	• Capping total recoverable costs to £50,000 in contested actions for patent infringement, and £25,000 for all other cases • Adopting also the other recommendations in the Final Report published by the IPCUC	Ch.24, paras 3.2, 3.6 (pp 252–254)
	- Establishment of Fast Track for claims under £5,000 and Small Claims Track for claims between £5,000 and £25,000	Ch.24, para.4.5 (pp 255–256)
	- Availability of one or more district judges, deputy district judges or recorders with specialist patent experience to deal with such cases	Ch.24, para.4.6 (pp.256)

Type of litigation	Proposed arrangement	Pages in Jackson Report
	- Changes to promotion opportunities and tenure of the Patent Court Judge	Ch.24, paras 3.8, 3.9 (p.254)
	- Use of model pleadings	Ch.24, para.3.10 (p.254)
	- A consultation for the need for Pre-Action Protocols	Ch.24, para.5.3 (p.256)
Housing Claims (Ch.26) General Recommendations: pp.271–272	- Simplification of the substantive law, along the lines recommended by the Law Commission in its reports of 2003, 2006 and 2008	Ch.26, paras 2.6–2.9 (pp.264–266)
	- Amending of the Rent Arrears Protocol in order to set out what steps should be taken by landlords, so as to comply with their obligations under ECHR art.8	Ch.26, paras 3.6–3.8 (p.271)
	- Allowing the landlord to only recover an amount equivalent to the PCOL issue fee where the landlord could use PCOL to issue possession proceedings but chooses to issue manually	Ch.26, para.3.3 (p.266)
	- Amending Paragraph 24.2 of the Pt 52 practice direction in order to set out what categories of documents should be lodged by the respondent in homelessness appeals and when these should be lodged	Ch.26, paras 5.1–5.3 (p.270)
	- Carrying out consultation on the proposal that where a housing claim is settled in favour of a legally aided party, that party should have the right to ask the court to determine which party should pay the costs of the proceedings	Ch.26, paras 6.1–6.2 (p.271)
Small Business Disputes (Ch.25) General Recommendations: p.263	Reform of Mercantile Courts • Appointment of a High Court Judge as judge in charge, to streamline procedures and prepare a court guide for all the users of the Mercantile Courts	Ch.25, para.3.3 (p.261)
	- Preparation of a "small business disputes" guide for business people who wish to conduct lower value county court cases on the small claims track by Her Majesty's Court Service	Ch.25, para.4.7 (p.263)
	- Extension of Limits of Small Claims Track where both sides are businesses to £15,000	Ch.25, para.4.6 (p.263)
	- Promotion of better awareness of BTE insurance	Ch.25, para.4.2 (p.262) See further, Ch.8.
	- Ensuring that decisions to not mediate are properly informed	Ch.25, para.4.3 (p.262) See further, Ch.36.
Large Commercial Claims (Ch.27)	No general changes to be made in principle	

Type of litigation	Proposed arrangement	Pages in Jackson Report
General Recommendations: p.281	- Changes in Disclosure	See Ch.37
	- Costs Management Initiatives	See Ch.40
	- Consider the use of Lists of Issues as a Case Management Tool	
	-After 18 months, the question whether section D6 of the Guide ought to be repealed or amended should be reconsidered in the light of experience	Ch.27, paras 2.9–2.13 (pp.277–278)
	- Reconsideration of docketing of cases to judges	Ch.27, paras 2.14–2.17 (pp.278–279)
	- Amendment of Sections D4 and D8 of the Guide to permit more frequent allocation of appropriate cases to designated judges	Ch.27, paras 2.19–2.20 (p.280)
Chancery Litigation (Ch.28) General Recommendations: pp.292–293	- Amendment of CPR Pt 8 to allow actions to be assigned to the fast track at any time	Ch.28, paras 3.1–3.7 (pp.285–286)
	- Development of a scheme of benchmark costs for routine bankruptcy and insolvency cases	Ch.28, paras 5.4–5.6 (pp.289–290)
	- Development of costs management procedures in order to control the costs of more complex insolvency proceedings	Ch.28, paras 5.7–5.11 (pp.290–292)
	- The amount of costs deductible from a trust fund or estate should be set at a proportionate level at an early stage of litigation. Whether the balance of costs should be paid by the party who incurred them or by some other party should be determined by the judge	Ch.28, paras 4.3–4.6 (pp.286–287)
	- Practice Direction B supplementing CPR Part 64 should be amended to provide that, save in exceptional cases, all *Beddoe* applications will be dealt with on paper	Ch.28, paras 4.7–4.9 (p.287)
	- A suitable body of tax experts should become an "approved regulator" within s.20 of the 2007 Act	Ch.28, para.4.13 (p.288)
	- Pt 6 of the Costs PD should be amended to require parties in Pt 8 proceedings to lodge costs estimates 14 days after the acknowledgment of service (if any) has been filed	Ch.28, para.4.15 (p.289)
	- The Law Society and the ChBA should set up a working group in order to consider the remaining chancery issues raised by the Preliminary Report	Ch.28, para.4.14 (p.288)
Technology and Construction Court (Ch.29) General Recommendations: p.300	- Amending the CPR and the 1981 Act to allow appropriate TCC cases to be allocated to the Fast Track and district judges to be authorized to try them	Ch.29, paras 4.2–4.3 (pp.298–299)

Type of litigation	Proposed arrangement	Pages in Jackson Report
	- Promotion of mediation with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful	Ch.29, para.4.6 (p.299)
	- Amendment of s.5 of the TCC Guide to draw attention to the power of the court to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material	Ch.29, para.2.2 (pp.295–296)
	- Amending paras 14.4.1 and 14.4.2 of the TCC Guide so that they are focused upon key issues rather than all issues in the case	Ch.29, para.2.10 (p.297)
Judicial Review (Ch.30) General Recommendations: p.313	- Introduction of Qualified One-Way Cost Shifting	Ch.30, paras 4.4–4.11 (pp.311–312) See further, Ch.19.
	- Allowing claimant's costs against a defendant as the normal order where the claim was settled after issue and the claimant complied with the Protocol	Ch.30, para.4.13 (p.311)

Appendix II: Non-Field Specific Items

Area	Proposed Arrangement	Pages in Jackson Report
Collective Actions (Ch.33) General Recommendations: p.336	• Retaining Cost-Shifting for Collective Actions, with the exception of Personal Injury Actions • Empowering the judge to direct the operation of a different costs regime	Ch.33, paras 3.14–3.15 (p.334)
	- Amending r.9.01(4) of Solicitors' Code of Conduct 2007 to permit at least the third party funding of collective personal injury claims	Ch.33, para.4.4 (p.339)
Appeals (Ch.34) General Recommendations: p.342	- As a short term measure, empower the appellate court to order at its discretion that each party bear its own costs, or to cap recoverable costs in cases where an appeal is made from a court where there is no cost shifting	Ch.34, para.3.6 (pp.340–341)
	- Separately Review the procedures and costs rules for appeals after decisions have been reached in relation to the recommendations in this report concerning first instance litigation	Ch.34, para.3.2 (p.340)

Area	Proposed Arrangement	Pages in Jackson Report
	- Consider the possibility of establishing a suitors' fund in England and Wales in the future	Ch.34, para.3.13 (p.342)

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