Chapter 8
Cost Wars in England and Wales: The Insurers Strike Back

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8.1 Introduction

Whilst characterised as a "loser pays" system, cost rules for litigation in England and Wales have, in recent years, become much more complicated than that. Separate from the other British systems in Scotland and Northern Ireland, which have their own characteristics, the last decade and a half has been the age of the Cost Wars, an end to which is not in sight.

In sketching this history, the chapter concentrates on personal injury claims as the predominant form of civil litigation and also the one over which most controversy has raged (other than libel litigation where the media has been adjutant in its own cause).

8.2 Pre-1995 Legal Aid, Hourly Fees and Subterranean "Speccing"

Up until the mid-90s, clients with personal injury claims had two main options for funding a lawyer if they were not members of a trade union. They could pay a lawyer themselves on an hourly fee basis or they could seek legal aid for their claims. It is worth dwelling for a moment on what legal aid meant for the lawyer and the client. This serves as a frame of reference for what has subsequently happened (with some of the reforms seeking to create a system of legal aid funded by insurers rather than by the State[1]). It is also important because, in broad terms, this system remains

[1] R. Moorhead, 'CFAs: A Weightless Reform of Legal Aid?', Northern Ireland Law Quarterly, 53 (2) (2002) 153–166.

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in place for about 50% of medical negligence claims (though current indications are that the Government will remove these cases from legal aid too).

Under the legal aid scheme, cases are (or were) assessed on their merits and also the client's income and capital. Clients might be asked to make a contribution out of income or capital but otherwise were protected from paying their own lawyer's costs. They would also, save in exceptional circumstances, be protected from having to pay their opponent's costs. That is, they were granted protection from the normal rule in personal injury litigation that the loser pay the winner's costs.

If the client's case was lost, the lawyer was paid by the legal aid fund, usually at the end of the case, on "legal aid rates". These were significantly below private practice rates (about a half to one third of private rates would give a broad indication of the difference). If the client won the case (at trial or through settlement), the lawyer could claim their costs from the opponent at private rates. This meant that for the lawyer, winning was significantly more profitable than losing. There was a degree of payment by results and costs were shifted one way, from claimant lawyer to defendant insurer.

Defendants (which usually meant insurers) tended to claim that legal aid was a blank cheque, which meant that the claimant was under no pressure to settle. Weak cases could be brought to extort nuisance settlements from defendants who would never get their costs back because of the protection provided against cost recovery by the legal aid certificate. There was the potential to claim against the legal aid fund, but this was possible only in rather limited circumstances and not much used. Similarly, because lawyers were getting paid anyway, and were being paid on an hourly basis under both schemes, they had every incentive (defendants said) to rack up as many hours as possible and the system, it was said, was too expensive as a result.[2]

In the late 1980s, legal aid had covered extensive sections of the community – as many as 75% of households – but by the mid-1900s, it had begun to decline towards covering about half the population. A debate about the needs of MINoLAs (middle-income no-access to legal aid) began. Similarly, the (then Conservative) Government began to express concern about the sustainability of the legal aid scheme. Those who did not qualify for legal aid had the unappetising prospect of paying privately on an hourly rate basis although it was widely reported that practitioners were willing to take cases on a "speculative" basis, particularly if those cases were racing certainties for success: solicitors would tell clients they did not need to worry about paying their fees if they lost, because they would not lose, and would claim the fees from their opponents if they won. Arguably in breach of

[2] Some support for the proposition was found here: G. Bevan, 'Has There Been Supplier-Induced Demand for Legal Aid?', Civil Justice Quarterly, 5 (1996) 98.

professional conduct rules, the practice became known as speccing (because the fee was a speculative one, dependent on winning). Yet, clients did not have the benefit of cost protection should they lose. Those who supported speccing were unperturbed by that.

8.3 1995–2000

After a quite turbulent debate, with particular resistance coming from barristers and the judiciary, the government reversed the legal system's longstanding hostility to contingent fee agreements. As a result, CFAs have been permitted since 1995 for personal injury, insolvency, and human rights cases, and since 2000 in most areas of litigation other than family and criminal. Partly to sidestep concerns about "the American problem", the introduced Conditional Fee Agreements (CFAs) were deliberately distinct from US-style damages-based agreements where a lawyer is paid a fee as a percentage of the client's damages.[3]

These "English" no win no fee agreements generally operate on the basis that lawyers get paid nothing if they lose but their normal fee (often called the base costs) plus a percentage of that same fee (the uplift or success fee) if they win. That "normal fee" would usually be calculated on an hourly basis (though lower value personal injury cases are increasingly falling under state-sponsored fixed fee regimes set after industry wide negotiation, see below).

Pre-2000 CFAs were introduced to supplement, not replace, legal aid. Lawyers were allowed to claim a success fee of up to 100% of their normal rate. If they won the case, the normal fee would be payable by the unsuccessful opponent. The success fee would be payable by the client out of their damages. That fee was subject to a voluntary cap, set by the Law Society, of 25% of the client's damages. If they lost the case, the lawyer would not be paid at all. The opponent, however, could then claim their costs from the unsuccessful claimant. To protect the claimant in such circumstances, after the event insurance (ATE) was developed. The premium for such insurance could be paid for by the client or their lawyer but it could not be claimed from the opponent.

8.4 Post 2000 to Date

The Access to Justice Act 1999 led to the current scheme of *recoverable* conditional fees. The background to the changes lay in the removal of most personal injury claims from the legal aid scheme. This was part of

[3] See, R. Moorhead, 'An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals', Modern Law Review, 73 (5) (2010) 752–784.

a package seeking to contain legal aid budgets. Estimates varied but around £30–50m was spent supporting personal injury claims per annum.[4] One of the reasons the reform proposals were criticised was that this sum of money supported a much larger body of casework (because winning cases were funded by opponents, the £30–50 million was only spent on the losing cases but enabled the winning cases to be brought). A second reason was that the (then) Labour government was reneging on the previous Government's promise that CFAs were not a replacement for legal aid. A third reason was the view that asking the kinds of poorer clients, who would originally have been funded under legal aid, to pay insurance premiums either up front or out of their damages was untenable or inequitable. Similarly, to ask them to fund success fees out of their damages was in breach of the principle of full compensation. This principle had, of course, been breached in fact already by the 1995 reform, but the breach was given extra weight by the importance of every pound of compensation to low income claimants. The result of all this debate was that in 1999, significant changes were made to the CFA regime, apparently in some haste.[5] Most importantly, in order alleviate concerns about undercompensation of claimants, both success fees and the ATE insurance premiums became recoverable from unsuccessful opponents.

For claimants, and their lawyers, the impact of these reforms was positive. Insurance companies developed ATE insurance products where the insurance premium was only payable if the claimant won their case. As a result, claimants did not need to meet the insurance costs if they lost cases, and their opponents paid those premiums when the claimants won (as they usually did). Clients were similarly unaffected by the level of the insurance premium. Furthermore, the uplift on a lawyer's base costs could be set without the client ever being likely to pay the uplift itself. If claimants lost the case, they did not pay, and if they won the case their opponent paid both the base and success fee. Understandably, defendants were concerned that there was no market pressure exerted by clients to push down on insurance premiums, although research on the way the pre-2000 scheme worked suggested that clients did not understand these costs even when they were imposed upon them – which called into question the extent to which clients *could* exert pressure on such fees.[6] Success fees were similarly set without

[4] The costs savings to the Legal Aid Fund of removing all personal injury cases from the legal aid scheme were originally estimated as being in the region of £37 million. Parliamentary answer, Geoff Hoon MP, Minister of State LCD (2nd February 1999). See, (1999) 1 Litigation Funding 12.

[5] There are possibly apocryphal stories about a senior Minister agreeing the idea in the back of a taxi cab.

[6] S. Yarrow and P. Abrams, 'Nothing to Lose: Clients' Experiences of Using Conditional Fees' (London: University of Westminster, 1999); S. Yarrow, 'Just Rewards: The Outcome of Conditional Fee Cases' (London: University of Westminster, 2000).

the client needing to worry about paying them. As mentioned previously, a statute limited the maximum success fee to 100% of the normal fee. The basis for allowing a 100% uplift was that it would allow lawyers to take on cases approaching a 50:50 chance of success on a basis that reflected their risk. At the time the test was brought in, this mirrored the legal aid test.

Defendants criticised the recoverable fee as riskless to the client. They either side-stepped the important point that the risk was borne by the lawyers[7] or suggested that lawyers bore minimal risk because they only cherry-picked the easier cases. Somewhat counter to that, they encouraged press concerns about a compensation culture that prompted too many claims and, sometimes in the alternative, too many spurious claims. The idea of a compensation culture did not bear academic scrutiny[8] but was twice addressed officially – once under the Labour Government and once under the Conservative-led Coalition[9]; both identified the idea of a compensation culture as imagined rather than real but also felt that the *perception* of a compensation culture made individuals, local authorities and businesses unnecessarily risk-averse. In other words, an imagined phenomenon had real effects. That feeling was fed by the portrayal of lawyers as (suddenly more) motivated by a financial interest because they could now get paid by results. This was coupled with a rise in TV advertising by solicitors and a new breed of claims management companies who did not need to practice as lawyers (and who were only belatedly subject to regulation[10]).

Against the more media-friendly compensation culture debate, a more significant battle was being waged on the minutiae of costs. Under the old systems of legal aid and then non-recoverable CFAs, defendants had, as mentioned, expressed concerns that claimants were under insufficient incentives to restrain the amount of time spent on cases. Claimants in turn blamed this on inappropriate defence tactics (borne out, in part, by what

[7] Claimant lawyers that lose cases invest their time and, not uncommonly, the cost of the disbursements (expenses) on their cases.

[8] A. Morris, 'Spiralling or Stabilising? The "Compensation Culture" and our Propensity to Claim Damages for Personal Injury', Modern Law Review, 70 (3) (2007) 349–378; R. Lewis, A. Morris and K. Oliphant, 'Tort Personal Injury Claims Statistics: Is There a Compensation Culture in the United Kingdom?', Journal of Insurance Research and Practice, 21 (2) (2006) 5–12.

[9] See, Department of Constitutional Affairs (2004) 'Tackling the "Compensation Culture" Government Response to the Better Regulation Task Force Report: "Better Routes to Redress"' (London: DCA); Young (2011) 'Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehallwide review of the operation of health and safety laws and the growth of the compensation culture' (London: HM Government) http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf, last downloaded 24th May 2011.

[10] Established under the Compensation Act of 2006.

little academic research there had been in the area).[11] Control of costs was dealt with by agreement between the parties or through judicial assessment (often by specialist judges known as taxing masters). There were rules designed to shift the burden of proof between the parties in relation to who paid what, but judges struggled to control costs on a case by case basis when presented with schedules of work which were difficult to critique on a line by line basis.

The problem was magnified significantly when costs-shifting applied to insurance premiums and success fees. Getting the level of these fees right was a matter of significant importance. Squeeze the fees too tightly and access to justice would be diminished; fail to squeeze sufficiently hard and claimant lawyers and insurance companies could garner unjustifiably large profits.[12] There was generally an absence of data to gauge which was more likely. Client protection rules (there to protect the claimant) and the indemnity principle[13] were used by defendants as bases of challenge to recoverability. For a time, large numbers of settled cases mounted up and remained unpaid because of open costs challenges.

The Courts did what they could to deal with the costs litigation. Claimant firms regarded the challenges as politically motivated and commercially damaging but also (for some claimant firms at least) the costs litigation was a source of extra profit. Time spent defending unsuccessful cost challenges was itself recoverable (and potentially uplift-able). Defendants nevertheless continued to lobby against the principle that claimants could litigate costlessly and suggested that claimant lawyers were profiteering.

With the costs war in full flow, the Civil Justice Council (a body chaired by the senior civil Court of Appeal judge, the Master of the Rolls, and bringing together the judiciary, practitioners, insurers, academics, and others[14]) hosted various "Big Tent" costs events to bring together the major stakeholders to negotiate industry-wide agreements on elements of the costs problems. Progress was partial but not insignificant. The Council's work led to the kind of approach now embodied in the predictable costs scheme established under Part 45 of the Civil Procedure Rules (CPR).[15] These rules

[11] H. Genn (1988) 'Hard Bargaining: Out of Court Settlement in Personal Injury Actions' (Oxford: Clarendon).

[12] Lord Hoffman recognised the essential problem in *Callery v Gray* [2002] UKHL 28.

[13] The indemnity principle is the rule that a solicitor may not recover from an opponent any costs that he could not recover from the client; this retained some purchase in spite of the fundamental nature of CFAs.

[14] The author is a former member.

[15] The rules can be found at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part45.htm#IDAE5SIC, last downloaded 24th May 2011. For a fuller discussion see, C. McIvor (2011) Jackson and Access to Justice in Oliphant et al (2011) *On A Slippery Slope – A Response To The Jackson Report* (London: Thomsons Solicitors).

provide for the base costs (that is the costs normally established by means of the hourly rate which have been recoverable under all the schemes discussed above) to be fixed in low value road traffic accident (RTA) claims (which make up the bulk of personal injury claims) by reference to a modest percentage of the value of the claim plus a specified amount (£800 in RTA personal injury claims under £10,000 in value). These rules also set the success fees that can generally be recovered for road traffic accidents, employers' liability claims, and employers' liability disease claims (ELD) where claims settle before issue and the success fee if they go to trial. In relation to RTA claims, a fixed solicitor success fee of just 12.5% applies to cases which are settled before trial, for example. The figures were negotiated on the basis that research suggested they were "revenue neutral" (that is, uplifts at this level covered the risk that solicitors took in on cases they lost but did not lead to additional profit).[16] More recently a portal has been introduced to speed up the handling of such claims "by providing a secure medium for the electronic transfer between Claimant Representatives and Defendant Insurer/Compensators of the information necessary to process claims by individuals for personal injury following a road traffic accident."[17] Costs are also fixed in relation to stages within the portal.

The then Master of the Rolls (now Lord Clarke) was frustrated by the Government's slow progress on civil litigation reform and thus appointed Sir Rupert Jackson, a then newly-appointed Court of Appeal judge, to review the costs system. Lord Justice Jackson set about his task with exceptional alacrity producing two encyclopaedic volumes by way of interim reports and then a final report containing a raft of recommendations for reform of the current systems.[18] Whilst his proposals are controversial with claimant lawyers, as are parts of his evidence base –unsurprisingly given the time and resources within which he had to work – the reports are likely to stand as seminal work on the domestic costs regimes for some time. In broad terms, they suggest a return to the position in the late 1990s with some modification. Current indications are that Lord Justice Jackson's 109 recommendations have broadly been accepted by the

[16] P. Fenn and N. Rickman (2003), P. Fenn (2003), 'Calculating "Reasonable" Success Fees for RTA Claims', (London: Civil Justice Council) and (2004) 'Calculating "Reasonable" Success Fees for Employers' Liability Claims' (London: Civil Justice Council).

[17] Taken from the portal's website: (http://www.rtapiclaimsprocess.org.uk/how_portal_works.html), 24th May 2011.

[18] R. Jackson LJ, 'Review of Civil Litigation Costs: Final Report' (London: Judiciary of England and Wales, 2010) and R. Jackson LJ, 'Civil Litigation Costs Review – Preliminary Report by Lord Justice Jackson' (London: Judiciary of England and Wales, 2009).

Government,[19] whilst remaining hotly disputed, particularly by claimant lawyers. The recommendations include:

- The recoverability of success fees and ATE insurance premiums would be abolished.
- Those costs would be payable by the claimant, effectively out of their award, and would be capped at 25% of the damages.
- A 10% increase in general damages (damages for pain, suffering and loss of amenity) to compensate for claimants' losses due to success fees that would be payable by them.
- "Part 36" arrangements (offers to settle) would be strengthened which would increase the penalties for failing to accept reasonable offers to settle.
- Qualified one way costs shifting (QOCS) would be introduced to remove, or significantly weaken, the need for ATE insurance. Claimants would be expected to pay costs only where their behaviour in bringing a claim merited it (e.g., very weak claims or claims pursued unreasonably might be subject to attack) or where their own means meant they could afford to meet the costs.
- Of final interest here is the proposal to bring in Ontario-style contingency fees. Under such agreements, the client would agree a percentage fee with his or her lawyer, who (if successful) would seek to recover their normal (hourly or fixed) costs from their opponent; "in so far as the contingency fee exceeds what would be chargeable under a normal fee agreement, that is borne by the successful litigant."[20]

The government has been consulting on these proposals, having broadly indicated support for them. An announcement on the outcome of that consultation is expected at the time of writing. Opponents of the reform have tended to concentrate on the extent to which such reforms undermine the principle of full compensation and also on the risk that limiting success fees to 25% of compensation will significantly inhibit access to justice for cases where the risks and costs cannot be financially supported by a 25% success fee. Such a wide-ranging attempt at one way costs shifting has not been attempted. Insurers might be expected to continue to rely on, and to propagate through the media, folksy arguments about the unfairness of only one side having to pay the costs and to continue to fight cost shifting orders through the courts where they can and where it is in their commercial interests to do so. That the system has shifted back towards the

[19] Ministry of Justice (2011) 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations' (London: Ministry of Justice).

[20] Jackson, n 18 above, p. 131 of the Final Report.

interests of liability insurers means that the field of battle has narrowed but the war may not have ended. The introduction of Ontario-style contingency fees, which are only marginally different from what will almost certainly be non-recoverable CFAs, would probably lead to lawyers to abandon CFAs in favour of the greater simplicity and slightly greater profitability of contingency fees without their clients noticing. The access to justice and cost impacts of a change from CFAs to Ontario-style contingency fees appears minimal: claimant clients might lose out but probably only marginally.

Other fronts have opened up in the costs battle as well. Liability insurers have begun to use "claims capture" models. They target potential claimants, offer to get their claims settled quickly for them and refer the claimant to a team of lawyers (and paralegals) tied to the insurer in some way who settle the claim without the need to have two sets of lawyers (one for the claimant and one for the defendant). Whether such arrangements operate in the interests of the claimant is questionable, but one can see straight away how they are likely to be cheaper and quicker. Insurers are seeking to de-adversarialise personal injury claims in this way but it would be a brave person that predicted that under such arrangements they would be willing to settle claims at their full value. Similarly, until there is contrary evidence, one would be wise to question whether claimants fully understand the lack of independence involved in such claims-capturing arrangements. The opening up of the England and Wales legal services market encouraged by the Legal Services Act 2007 is also part of the picture here. New models of claims-handling business may yet bypass the courts with one-stop mediation-arbitration services being offered to both claimant and defendant.[21] All these factors plus the growing significance of third party funders means that the direction of travel on litigation costs is both returning to the mid-90s and taking some intrepid steps into an uncertain future.

[21] See, R. Moorhead (2011) 'Paradigm Shifts: Better by Design?' http://lawyerwatch.wordpress.com/2011/04/07/paradigm-shifts-better-by-design/, last downloaded 24th May 2011.