

THE FUTURE FOR CIVIL LITIGATION AND THE FIXED COSTS REGIME (future)

**LECTURE BY LORD JUSTICE JACKSON AT THE WESTMINSTER LEGAL POLICY FORUM ON 23rd MAY
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1. INTRODUCTION

1.1 This lecture. The title of this lecture (set by the conference organisers) is broad and the 15 minute slot allocated for delivering it is narrow. I shall therefore limit myself to four pages.

1.2 Definitions. I use the following abbreviations:

“CJC” means Civil Justice Council.

“ELA” means employer’s liability accident.

“ELD” means employer’s liability disease.

“Final Report” or “FR” means Review of Civil Litigation Costs Final Report.

“PD” means practice direction.

“PI” means personal injury.

“PL” means public liability.

“Review” means the Review of Civil Litigation Costs during 2009.

“RTA” means road traffic accident.

2. FIXED RECOVERABLE COSTS

2.1 New rules re proportionate costs. Since April 2013 there have been two new provisions in place governing the assessment of costs on the standard basis. Rule 44.3 (2) provides that the court will only award proportionate costs. It will not award any more, even if further costs were reasonably and necessarily incurred. Rule 44.3 (5) provides:

“(5) Costs incurred are proportionate if they 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.”

2.2 Debate about the need for supplementary guidance. There has been much debate about whether a PD should provide supplementary guidance. Lord Neuberger MR cautioned against this approach in the Fifteenth Implementation Lecture.¹ Unfortunately, any attempt to draft a PD which supplements those five general rules with another set of general rules, albeit more specifically focused, is doomed to fail. If a PD were to give more detailed guidance, it would inevitably be lengthy. The PD would be helpful in some cases and confusing in others. There would be arguments about its interrelationship with rule 44.3 (5). No legislator can foresee all the vagaries of litigation. Any detailed PD would generate satellite litigation. Then we would have rule 44.3 (5) + a lengthy PD + an encrustation of case law, followed up inevitably by much learned commentary from the academic community. Surely we are better off without all that?

2.3 The way forward. The best way to satisfy the requests for clarification is to convert the five identified factors into hard figures: in other words, to create a fixed costs regime. As Hurst, Middleton and Mallalieu point out in their excellent book *Costs and funding following the civil justice reforms: questions and answers*,² those seeking certainty about how rule 44.3 (5) will apply are “seeking something akin to a fixed fee regime for all cases”.

2.4 How can you convert the five factors in rule 44.5 (3) into a fixed costs grid? This will involve two principal steps:

- (i) Determining for each level of claim (e.g. £25,000 to £50,000; £50,000 to £100,000 etc) what amount of costs would be proportionate for such litigation.
- (ii) Then devising a set of rules for adjusting those costs in order to take into account factors (c), (d) and (e). This might be done by means of specifying percentage additions to the costs established at the first stage.

There may then be a need to add an escape clause or some other provision to deal with exceptional circumstances.

2.5 An illustration of how that might be done. My lecture³ to the Insolvency Practitioners Association on 28th January 2016 was a first attempt at that exercise. As made clear at the time, the lecture was not setting out a set of final figures to be incorporated as they stood into CPR Part 45. On the contrary the lecture proposed a programme of facilitative meetings under the aegis of the CJC in order to discuss the figures and the rules for adjusting the figures.

2.6 Fast track cases. In the Final Report I recommended that, as a first step, fixed recoverable costs should be introduced for all cases in the fast track before we tackle the multi-track. The Final Report set out detailed figures and proposals for how this should be achieved. The MoJ and the Rule Committee in late 2012 accepted this recommendation in respect of personal injury cases, but not in respect of non-personal injury cases. Fixing

¹ Available on the Judiciary website at <https://www.judiciary.gov.uk/>

² Second edition, 2016; see pages 42-43.

³ Available on the Judiciary website at <https://www.judiciary.gov.uk/>

recoverable costs for all remaining fast track cases is unfinished business, which needs to be addressed as soon as possible.

2.7 The anomaly. There is one anomaly in respect of personal injury cases, which has caused some confusion. The anomaly is explained (for anyone who is interested) in section 3 below. I will not go through that section orally.

2.8 The multi-track. I have previously proposed that we should develop a fixed costs regime for the lower regions of the multi-track and I stand by that proposal. There is room for debate about precisely what constitutes the 'lower regions of the multi-track', but that is not for today. Today's seminar is about the principle of fixed recoverable costs. As explained above the new rules on proportionate costs pave the way for creating a fixed costs recoverable costs regime. Furthermore, we have gained three years' experience of costs budgeting by reference to the Precedent H phases. Against that background, we are now in a position to establish a scheme for the lower reaches of the multi-track.

2.9 Benefits of fixed recoverable costs. The benefits of a regime of fixed recoverable costs were reviewed in the 28th January lecture. So I will not repeat the contents of that lecture. The benefits include certainty, the saving of process costs and an adverse costs risk which is always proportionate.

2.10 Survey by the Federation of Small Businesses. A survey carried out by the Federation of Small Businesses during the Costs Review revealed a majority view in favour of fixed costs in business disputes up to £500,000.⁴ Given the vital role of SMEs in our economy, this is of some significance.

2.11 I understand that the Government is taking a close interest in fixed recoverable costs. I look forward to any future announcement on this issue with great interest.

3. THE ANOMALY – EMPLOYER'S LIABILITY DISEASE FAST TRACK CASES

3.1 Why were ELD cases omitted from fast track fixed costs? One striking omission from the fast track fixed costs regime for personal injury cases is ELD cases where liability is disputed. People sometimes ask how this omission came about and whether it arose because ELD cases are unsuitable for fixed costs. The answer is that ELD cases are not unsuitable for fixed costs. The explanation for their omission is set out in paragraphs 3.2 and 3.3 below.

3.2 Preparation of fixed costs grid for other fast track PI cases. During the Review, with the help of Professor Paul Fenn, the CJC and others I prepared grids of fixed costs for fast track RTA, ELA and PL cases: see FR appendix 5. In relation to ELD I wrote at FR chapter 5:

"5.29 ELD data. The participants in the CJC's facilitative meetings reached the following agreement about Professor Fenn's data on ELD cases:

'It is agreed that the Fenn figures i.e. the analysis by Fenn of the data

⁴ FR chapter 25, paragraph 2.8

provided to him is statistically reliable, subject to the reservations expressed by Professor Fenn himself.’

At the time of the facilitative meetings the only data available to Professor Fenn had come from the claimant side. These data did not separate out multi-defendant cases or take account of apportionment. Professor Fenn stated that he would obtain supplementary data from insurers on ELD cases.

5.30 I propose that Professor Fenn continues his collection and analysis of ELD data and provides that material both to myself and to the claimant and defendant representatives from the CJC facilitative meetings by 31st March 2010. Those representatives can then have a period of six weeks to submit their written observations on that material. I will consider those written observations and then recommend a matrix of fixed costs for fast track ELD cases, drawing on the advice of the Senior Costs Judge and the CJC.”

3.3 Subsequent events. Unfortunately, the planned work programme had to be suspended during the run up to the 2010 General Election, because the work was deemed to be ‘political’. After the election the new Coalition Government had to decide (amongst much else) what to do with the FR recommendations. The Government initially accepted most of the FR recommendations, but not the proposals concerning fixed costs. So there was no point in doing further work on ELD cases. These matters rested for the next two years. Meanwhile, as the result of an operation in April 2012 and subsequent medical treatment, I ceased to be involved in the implementation of the FR reforms during 2012/2013. In late 2012 the Government had a change of mind and decided to proceed with fixed costs for fast track PI cases. Rules were made giving effect to the grids of fixed costs set out in FR appendix 5, subject to modest adjustments. Those rules came into force on 31st July 2013 (four months after the other reforms recommended in my report). But no grid for ELD cases was available for consideration, because the work which had been deferred in 2010 was never done.

3.4 The CJC working group. A working group of the CJC is currently seeking to develop a grid of fixed recoverable costs for noise induced hearing loss claims on the fast track. These represent the majority of fast track ELD cases. (Mesothelioma and other more serious ELD claims proceed on the multi-track.)

3.5 I am setting out the background facts, in order to explain why ELD cases were omitted from the fixed costs grids introduced into CPR Part 45 in July 2013. The omission was due to historical accident. It was not because the task was insuperable.

Rupert Jackson

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