



# REVIEW OF CIVIL LITIGATION COSTS

## EXECUTIVE SUMMARY

### 1. INTRODUCTION

1.1 Terms of reference. The terms of reference require me to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. They also require me to review case management procedures; to have regard to research into costs and funding; to consult widely; to compare our costs regime with those of other jurisdictions; and to prepare a report setting out recommendations with supporting evidence by 31<sup>st</sup> December 2009.

1.2 Evidence and review of overseas jurisdictions. I gathered most of the relevant evidence and data during Phase 1 of the Costs Review and set that evidence out in a Preliminary Report<sup>1</sup> published on 8<sup>th</sup> May 2009. My review of overseas jurisdictions is also contained in the Preliminary Report. The evidence and data gathered since 8<sup>th</sup> May is set out in this report or its appendices.

1.3 Recommendations. My recommendations are set out in this report, since all opinions expressed in the Preliminary Report were provisional only. In some areas of litigation costs are neither excessive nor disproportionate, so I do not recommend substantial changes. In other areas costs are excessive or disproportionate and I do recommend substantial changes. I also make recommendations in respect of funding regimes, in order to promote access to justice at proportionate cost. The funding regimes affect costs and the costs rules impact upon funding. Neither topic can be considered in isolation.

### 2. MAJOR RECOMMENDATIONS

2.1 “No win, no fee” agreements. Conditional fee agreements (“CFAs”), of which “no win, no fee” agreements are the most common species, have been the major contributor to disproportionate costs in civil litigation in England and Wales. There are two key drivers of cost under such agreements, being (i) the lawyer’s success fee; and (ii) the after-the-event (“ATE”) insurance premium that is usually taken out when a CFA is entered into (to cover the claimant against the risk of having to pay the defendant’s costs). Both the success fee and the ATE insurance premium are presently recoverable from an unsuccessful defendant.

2.2 Success fees and ATE insurance premiums should cease to be recoverable. I

recommend that success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented, it will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it. It will be open to clients to enter into “no win, no fee” (or similar) agreements with their lawyers, but any success fee will be borne by the client, not the opponent.

2.3 Consequences for personal injuries litigation. The importance of ensuring that successful claimants are properly compensated for their injuries or losses was rightly emphasised to me during the Costs Review. Indeed, it must be acknowledged that one of the benefits of the current CFA regime is that it is geared towards ensuring that claimants receive proper compensation. This, however, comes at a heavy price for defendants, who often have to bear a disproportionate costs burden. If the current regime is reformed along the lines I have proposed, so that success fees are no longer recoverable from an opponent in litigation, lawyers will still be able to agree CFAs with their clients, but any success fee will be payable by the client. This is likely to mean that the success fee comes out of the damages awarded to the client.

2.4 Increase in general damages. In order to ensure that claimants are properly compensated for personal injuries, and that the damages awarded to them (which may be intended to cover future medical care) are not substantially eaten into by legal fees, I recommend as a complementary measure that awards of general damages for pain, suffering and loss of amenity be increased by 10%, and that the maximum amount of damages that lawyers may deduct for success fees be capped at 25% of damages (excluding any damages referable to future care or future losses). In the majority of cases, this should leave successful claimants no worse off than they are under the current regime, whilst at the same time ensuring that unsuccessful defendants only pay normal and proportionate legal costs to successful claimants. It will also ensure that claimants have an interest in the costs being incurred on their behalf.

2.5 Referral fees. It is a regrettably common feature of civil litigation, in particular personal injuries litigation, that solicitors pay referral fees to claims management companies, before-the-event (“BTE”) insurers and other organisations to “buy” cases. Referral fees add to the costs of litigation, without adding any real value to it. I recommend that lawyers should not be permitted to pay referral fees in respect of personal injury cases.

2.6 Qualified one way costs shifting. ATE insurance premiums add considerably to the costs of litigation. Litigation costs can be reduced by taking away the need for ATE insurance in the first place. This can occur if qualified one way costs shifting is introduced, at least for certain categories of litigation in which it is presently common for ATE insurance to be taken out. By “qualified” one way costs shifting I mean that the claimant will not be required to pay the defendant’s costs if the claim is unsuccessful, but the defendant will be required to pay the claimant’s costs if it is successful. The qualifications to this are that unreasonable (or otherwise unjustified) party behaviour may lead to a different costs order, and the financial resources available to the parties may justify there being two way costs shifting in particular cases.

2.7 If it is accepted in principle that CFA success fees and ATE insurance premiums should cease to be recoverable, and qualified one way costs shifting should be introduced, there will need to be further consultation on which categories of

litigation should involve qualified one way costs shifting. I can certainly see the benefit of there being qualified one way costs shifting in personal injuries litigation. It seems to me that a person who has a meritorious claim for damages for personal injuries should be able to bring that claim, without being deterred by the risk of adverse costs. The same could be said of clinical negligence, judicial review and defamation claims. There may be other categories of civil litigation where qualified one way costs shifting would be beneficial.

2.8 Overall result. If the package of proposed reforms summarised above is introduced, there will be five consequences:

- Most personal injury claimants will recover more damages than they do at present, although some will recover less.
- Claimants will have a financial interest in the level of costs which are being incurred on their behalf.
- Claimant solicitors will still be able to make a reasonable profit.
- Costs payable to claimant solicitors by liability insurers will be significantly reduced.
- Costs will also become more proportionate, because defendants will no longer have to pay success fees and ATE insurance premiums.

2.9 Fixed costs in fast track litigation. Cases in the fast track are those up to a value of £25,000, where the trial can be concluded within one day. A substantial proportion of civil litigation is conducted in the fast track. I recommend that the costs recoverable for fast track personal injury cases be fixed. For other types of case I recommend that there be a dual system (at least for now), whereby costs are fixed for certain types of case, and in other cases there is a financial limit on costs recoverable (I propose that £12,000 be the limit for pre-trial costs). The ideal is for costs to be fixed in the fast track for all types of claim.

2.10 There are several advantages to the fixing of costs in lower value litigation. One is that it gives all parties certainty as to the costs they may recover if successful, or their exposure if unsuccessful. Secondly, fixing costs avoids the further process of costs assessment, or disputes over recoverable costs, which can in themselves generate further expense. Thirdly, it ensures that recoverable costs are proportionate. There is a public interest in making litigation costs in the fast track both proportionate and certain.

2.11 Costs Council. If a fixed costs regime is adopted for the fast track, the costs recoverable for the various types of claim will need to be reviewed regularly to make sure that they are reasonable and realistic. I propose that a Costs Council be established to undertake the role of reviewing fast track fixed costs, as well as other matters.

### 3. OTHER FUNDING ISSUES

3.1 BTE insurance (chapter 8). BTE insurance (or “legal expenses insurance”) is insurance cover for legal expenses taken out before an event which gives rise to civil litigation. It is under-used in England and Wales. If used more widely, it could produce benefits for small and medium enterprises (“SMEs”) and individuals who

may become embroiled in legal disputes.

3.2 Contingency fees (chapter 12). A contingency fee agreement may be described as one under which the client's lawyer is only paid if his or her client's claim is successful, and then the lawyer is paid out of the settlement sum or damages awarded, usually as a percentage of that amount. Lawyers are not presently permitted to act on a contingency fee basis in "contentious" business.

3.3 It is my recommendation that lawyers should be able to enter into contingency fee agreements with clients for contentious business, provided that:

- the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and
- the terms on which contingency fee agreements may be entered into are regulated, to safeguard the interests of clients.

Permitting the use of contingency fee agreements increases the types of litigation funding available to litigants, which should thereby increase access to justice. This will be of especial importance if (as proposed) the current CFA regime is reformed.

3.4 Contingency Legal Aid Fund ("CLAF") and Supplementary Legal Aid Scheme ("SLAS") (chapter 13). CLAFs and SLASs are self-funding and usually not-for-profit forms of litigation funding. They are used overseas (e.g. in Australia, Canada and Hong Kong), but on a relatively small scale. CLAFs or a SLAS could play a role in funding litigation, especially if the current CFA regime is reformed along the lines I have proposed. However, one of the critical matters for any CLAF or SLAS is whether a self-funding scheme is economically viable for any significant number of cases. The information I have reviewed during the Costs Review does not provide any strong indication of financial viability. I would, nevertheless, recommend that the use of CLAFs and SLASs as a form of legal funding for civil litigation be kept under review.

#### 4. PERSONAL INJURIES LITIGATION

4.1 Assessment of general damages for pain, suffering and loss of amenity (chapter 21). The majority of personal injury claims settle before trial. Computer software systems, which calculate the level of general damages based on the type of injury and other factors, already influence settlement offers. Defendants' lawyers and liability insurers currently operate and maintain the principal extant types of software used in the calculation of general damages. The complaint is sometimes made by claimant representatives that computer-generated assessments of claims for general damages are too low. This is said to have two adverse effects: (i) settlement may be delayed, thus increasing costs; (ii) alternatively, there may be undersettlement.

4.2 During the Costs Review I explored the possibility of producing a transparent and "neutral" calibration of existing software systems to assist in calculating general damages,<sup>2</sup> which could encourage the early settlement of personal injury claims for acceptable amounts. I believe that this is indeed possible, and suggest that a working group be set up consisting of representatives of claimants, defendants, the judiciary and others to take this matter further.

4.3 Process and procedure (chapter 22). In recent times progress has been made to develop new processes for personal injuries litigation. The Ministry of Justice has developed a process for handling personal injury claims arising out of road traffic accidents where the amount in dispute is up to £10,000 and liability is admitted. I recommend that this new process be monitored, to see whether it leads to costs being kept proportionate, or whether costs in fact increase due to satellite litigation. I also encourage a productive engagement, under the aegis of the Civil Justice Council, between claimant and defendant representatives to see whether a similar procedure can be applied in other fast track personal injuries litigation.

4.4 Clinical negligence (chapter 23). One of the principal complaints that was made during the Costs Review about clinical negligence actions was that pre-action costs were often being racked up to disproportionately high levels. There may be a number of reasons for this (which I mention in chapter 23). The recommendations I have made here include increasing the response time for defendants to pre-action letters from three months to four months (to give more time for a thorough investigation of the claim), and that where the defendant is proposing to deny liability it should obtain independent expert evidence on liability and causation within that period. I also recommend that case management directions for clinical negligence claims be harmonised across England and Wales and that costs management of clinical negligence cases be piloted.

## 5. SOME SPECIFIC TYPES OF LITIGATION

5.1 Intellectual property litigation (chapter 24). The creation and use of intellectual property (“IP”) rights play a crucial role in economic activity and the owners of IP rights must be able to assert or defend them in the courts. The cost to SMEs (and larger enterprises) of resolving IP disputes can be significant. To reduce the costs of IP litigation, and particularly the cost to SMEs, I recommend that the Patents County Court (the “PCC”), which deals with lower value IP disputes, be reformed to provide a cost-effective environment for IP disputes. These reforms include (i) allowing costs to be recovered from opponents according to cost scales; and (ii) capping total recoverable costs to £50,000 in contested actions for patent infringement, and £25,000 for all other cases. I also recommend that there be a fast track and a small claims track in the PCC.

5.2 Small business disputes (chapter 25). Much attention is often given to large, high-profile disputes in the High Court (particularly the Commercial Court). Yet the vast majority of business disputes that turn into civil court proceedings are between SMEs, or are for lower value amounts which are nevertheless significant to the businesses involved. These proceedings are brought in the Mercantile Courts and other courts. It is important that the litigation environment for such cases is streamlined, accessible to non-lawyers and cost-effective.

5.3 To assist bringing about such an environment for these disputes, I recommend that a High Court judge should be appointed as judge in charge of the Mercantile Courts, whose role will include streamlining procedures and preparing a court guide for users of all Mercantile Courts. I also recommend that HMCS<sub>3</sub> prepare a “small business disputes” guide for business people who wish to conduct lower value county court cases on the small claims track. The limits of the small claims track could be extended in cases where the parties on both sides are businesses.

5.4 Housing claims (chapter 26). The cost of housing claims is to some extent a function of the complexity of the substantive law concerning housing. A simplification of the law, along the lines recommended by the Law Commission in its reports of 2003, 2006 and 2008, should therefore be considered. I have set out other recommendations of a fairly specific nature in chapter 26.

5.5 Large commercial claims (chapter 27). Much large commercial litigation is conducted in the Commercial Court. The feedback that I received during the Costs Review indicated that there was a strong general level of satisfaction amongst court

users with the current workings of the Commercial Court, and that it generally deals with proceedings in a time and cost efficient manner. Advances in Commercial Court procedure have been made as a result of the efforts of the Commercial Court Long Trials Working Party (the "LTWP"). Many of the recommendations of the LTWP are reflected in the Admiralty & Commercial Courts Guide (8<sup>th</sup> edition, 2009). I do not recommend that any major changes be made to the specific workings of the Commercial Court, although I have made certain recommendations in relation to disclosure, the use of lists of issues as a case management tool and docketing of cases to judges.

5.6 Chancery litigation (chapter 28). I make a number of specific recommendations in relation to chancery litigation. One is that CPR Part 8 should be amended to enable actions to be assigned to the fast track at any time. This would enable smaller value chancery cases to be dealt with under the economical model that applies in the fast track. Another recommendation is that there should be developed a scheme of benchmark costs for routine bankruptcy and insolvency cases.

5.7 Technology and Construction Court litigation (chapter 29). Litigation in the Technology and Construction Court (the "TCC") is often conducted in a proportionate manner, and I make only modest recommendations concerning the operation of that court. I do, however, recommend that there be a fast track in the TCC.

5.8 Judicial review (chapter 30). Perhaps the main issue in relation to judicial review cases is the question of whether there should be qualified one way costs shifting. This is covered in the "major recommendations" section, above. Qualified one way costs shifting would ensure compliance with the Aarhus Convention<sup>4</sup> in relation to environmental judicial review claims. Also, judicial review proceedings have the benefit of a "permission" stage, which filters out unmeritorious cases (thus reducing the need for two way costs shifting as a deterrent).

5.9 Nuisance cases (chapter 31). Statutory nuisance proceedings in the magistrates' courts provide affordable redress for many claimants. I recommend that a greater take-up of BTE insurance be encouraged, particularly for households. This would help to meet the costs of private nuisance litigation in the civil courts.

5.10 Defamation and related claims (chapter 32). One principal concern that has been expressed in relation to the costs of defamation proceedings and privacy cases is the widespread use of CFAs with ATE insurance, which can impose a disproportionate costs burden on defendants. I have recommended that lawyers' success fees and ATE insurance premiums should cease to be recoverable for all types of civil litigation. If this recommendation is adopted, it should go a substantial distance to ensuring that unsuccessful defendants in such proceedings are not faced with a disproportionate costs liability. However, such a measure could also reduce

access to justice for claimants of slender means.

5.11 To overcome this potential problem, I recommend complementary measures for defamation and related proceedings, namely:

- increasing the general level of damages in defamation and breach of privacy proceedings by 10%; and
- introducing a regime of qualified one way costs shifting, under which the amount of costs that an unsuccessful claimant may be ordered to pay is a reasonable amount, reflective of the means of the parties and their conduct in the proceedings.

I also make a number of specific recommendations in respect of defamation and related proceedings.

5.12 Collective actions (chapter 33). Collective actions are used to provide a means of legal redress to claimants who have a shared or common legal grievance. It is often cost-effective if such claims are dealt with collectively, in a single action, rather than by each claimant bringing his or her individual claim. One of the major issues concerning collective actions is costs shifting, and whether claimants (who individually may be of modest means) should be required to pay the defendant's costs in the event that the claim fails. Costs shifting can reduce access to justice, but it may also have the effect of weeding out unmeritorious claims. My recommendation is that costs shifting should remain for collective actions (with the exception of personal injury collective actions), but that the court should have a discretion to order otherwise if this will better facilitate access to justice.

5.13 Appeals (chapter 34). Any changes to the costs rules affecting appeals should await (and follow) changes to the costs rules affecting lower courts. Having said this, one interim measure which I recommend is that where an appeal comes from a court or tribunal in which there is no costs shifting, the appellate court should have the power to order (i) that each party bear its own costs of the appeal; or (ii) that recoverable costs be capped at a specified sum.

## 6. CONTROLLING THE COSTS OF LITIGATION

6.1 Pre-action protocols (chapter 35). There are ten pre-action protocols for specific types of litigation. By-and-large they perform a useful function, by encouraging the early settlement of disputes, which thereby leads (in such cases) to the costs of litigation being avoided. I recommend that these specific protocols be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate).

6.2 On the other hand, the Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a “one size fits all” approach, often leading to pre-action costs being incurred unnecessarily (and wastefully). I recommend that substantial parts of this practice direction be repealed. Were this to occur, however, it would not give carte blanche to claimants to whom no specific protocol applied to act unreasonably, e.g. by commencing proceedings with no prior warning to the defendant of the claim or the nature of the claim. Cost sanctions will apply to curb unreasonable behaviour.

6.3 Alternative dispute resolution (chapter 36). Alternative dispute resolution (“ADR”) (particularly mediation) has a vital role to play in reducing the costs of civil

disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be. I therefore recommend that:

- There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.
- The public and small businesses who become embroiled in disputes are also made aware of the benefits of ADR. An authoritative handbook for ADR should be prepared, explaining what ADR is and how it works, and listing reputable providers of ADR services. This handbook should be used as the standard work for the training of judges and lawyers.

Nevertheless ADR should not be mandatory for all proceedings. The circumstances in which it should be used (and when it should be used) will vary from case to case, and much will come down to the judgment of experienced practitioners and the court.

6.4 Disclosure (chapter 37). Disclosure is an exercise which is necessary in many types of litigation, to ensure that all relevant evidence is brought before the court. The extent of disclosure has increased in recent times with the widespread use of electronic communications and electronic records. Disclosure can be an expensive exercise (particularly in higher value, complex cases), and it is therefore necessary that measures be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate.

6.5 E-disclosure in particular has emerged as a new and important facet of disclosure generally, and I recommend that solicitors, barristers and judges alike be given appropriate training on how to conduct e-disclosure efficiently.

6.6 I also recommend that there be a “menu” of disclosure options available for large commercial and similar claims, where the costs of standard disclosure are likely to be disproportionate. I would, however, exclude large personal injury and clinical negligence claims from this “menu” option, as standard disclosure usually works satisfactorily in those cases.

6.7 Witness statements and expert evidence (chapter 38). There is nothing fundamentally wrong with the manner in which evidence is currently adduced in civil litigation, by way of witness statements and expert reports. The only substantial complaint which is made is that in some cases the cost of litigation is unnecessarily increased because witness statements and expert reports are unduly long. I recommend two measures (in appropriate cases) for curbing litigants’ overenthusiasm for prolixity, being (i) case management measures to place controls on the content or length of statements; and (ii) cost sanctions.

6.8 Case management (chapter 39). One of the points that was impressed upon me during the Costs Review was that judges should take a more robust approach to case management, to ensure that (realistic) timetables are observed and that costs are kept proportionate. Case management can and should be an effective tool for costs control.

6.9 I recommend a number of measures to enhance the courts’ role and approach

to case management, including:

- where practicable allocating cases to judges who have relevant expertise;
- ensuring that, so far as possible, a case remains with the same judge;
- standardising case management directions; and
- ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost (e.g. where directions could easily have been given without a hearing).

6.10 Costs management (chapter 40). Costs management is an adjunct to case management, whereby the court, with input from the parties, actively attempts to control the costs of cases before it. The primary means by which costs management is effected is for the parties to provide budgets of their own costs, with those budgets being updated from time to time and submitted for approval to the court. The court then formulates the directions and orders which it makes with a view to ensuring that costs do not become disproportionate. It may do this, for example, by limiting disclosure, or limiting the number of witnesses.

6.11 Effective costs management has the potential to lead to the saving of costs (and time) in litigation. I recommend that lawyers and judges alike receive training in costs budgeting and costs management. I also recommend that rules be drawn up which set out a standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear to be beneficial in any particular case.

6.12 Part 36 offers (chapter 41). Most cases settle, rather than go to trial and judgment. It is manifestly beneficial that cases should settle, so as to avoid the further incurring of legal costs. Part 36 of the Civil Procedure Rules plays an important role in incentivising parties to make settlement offers. However, Part 36 does not go far enough in terms of incentivising defendants to accept offers made by claimants. In order to provide greater incentives for defendants to accept settlement offers, I recommend that where a defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%.

6.13 IT (chapter 43). IT plays an important role in modern litigation and court management. It certainly has the potential to lower the costs of litigation, when it is implemented and operating smoothly across the courts. I recommend that eworking, which is currently used only in the TCC and the Commercial Court, be rolled out across the High Court in London and (suitably adapted) across all county courts and district registries. The future development and use of IT in civil litigation (which I would encourage) is a matter that will require the oversight and input of court users, courts administration staff and judges alike.

6.14 Summary and detailed assessments (chapters 44 and 45). The procedure for the summary assessment of costs generally works well, and should be retained. I do, however, recommend a number of specific improvements to the process. For detailed assessments, I recommend that a new format for bills of costs be developed. I also recommend the streamlining of the procedure for detailed assessment through the use of IT.

<sup>1</sup> Most of the evidence and data are contained in the appendices to the Preliminary Report.

<sup>2</sup> Up to £10,000.

<sup>3</sup> Her Majesty's Courts Service.

<sup>4</sup> The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25<sup>th</sup> June 1998.