



**“Improved Access to Justice –
Funding Options & Proportionate Costs”**

Report & Recommendations



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IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS AND PROPORTIONATE COSTS

INTRODUCTION

1. In December 2001 the Civil Justice Council (CJC), as part of its terms of reference to monitor the civil justice system following the introduction of the CPR, commenced a review of problems relating to the funding of civil claims and proportionality of costs.
2. The trigger for the review was the growth of satellite litigation¹ largely spawned by technical issues concerning conditional fee agreements.
3. A two day forum hosted by the CJC for around 80 representatives of major stakeholders in December 2001 produced a consensus (i) to introduce fixed costs in the fast track for personal injury cases and (ii) to abolish the indemnity principle.
4. Since then the CJC, either of its own volition or on invitation has facilitated a process of supervised mediation that is steadily producing a framework of proportionate costs based on “industry” consensus. The CJC recommendations that have emerged to date have been accepted by ministers and have been put into force via the Civil Procedure Rule Committee, viz:-

¹ Callery v Gray (No.1) [2001] EWCA Civ 1117; Callery v Gray (No.2) [2001] EWCA Civ 1246; Callery v Gray (Nos.1&2) [2002] UKHL 28; Sarwar v Alam [2001] EWCA Civ 1401; Claims Direct Test Cases [2003] EWCA Civ 136; The Accident Group [2004] EWCA Civ 575 ; Hollins v Russell [2003] EWCA Civ 718

- A predictable scheme of fixed recoverable costs in RTA cases below £10,000 CPR Part 45 Section II
 - Fixed success fees for conditional fee agreements in RTA cases below £10,000 and in employer's liability cases (single accidents and industrial disease cases).
5. The CJC is currently engaged in supervised mediation of fixed success fees in public liability and defamation cases. It is also involved in discussions to produce guideline or fixed levels of ATE premiums and medical/police reports.
 6. The above programme of work by the CJC has included many less formal gatherings of stake holders involving a total of three large discussion forums and six smaller working party meetings (referred to as big or little tents) that have assisted the supervised mediation process, examining data and narrowing issues.
 7. Although the proportionality and funding problems identified in our jurisdiction (England & Wales) possess idiosyncratic features accruing from the history of our civil costs system and the special complexity of recoverability of costs as part of an already complex system of conditional fees, at an early stage in this programme of work the CJC appreciated that it should study how other jurisdictions around the world are currently addressing the issues of funding and costs of access to justice in civil cases.
 8. The CJC has engaged in a detailed comparative study involving visits to Germany, Northern Ireland, Scotland, Canada, the USA, Singapore, New Zealand, Australia, Hong Kong and Sweden. The findings of those visits are summarised in this report (**Appendix A**). A wider comparison with other jurisdictions was made possible by a specially convened forum arranged by the International Bar Association at its annual conference in October 2004.

The full day forum was presided over by the Master of the Rolls and chaired by Lord Brennan QC with representation of 22 jurisdictions around the table. As a premise for discussion the CJC offered the proposition that the delivery of access to justice is dependent upon:

- (i) a meritorious case.
 - (ii) the participants having at the outset access to means of funding their case.
 - (iii) the lawyers on each side having at the outcome access to reasonable remuneration.
 - (iv) the cost of (ii) and (iii) being proportionate to what is at stake.
 - (v) the availability of an efficient and properly resourced court system.
9. A study of the review of other jurisdictions in **Appendix A** of this report reveals, not surprisingly, that there is no simple single solution to global or even local problems of funding civil cases and ensuring proportionate costs. The study has however been invaluable in informing the thinking of the CJC on the proposition in Para 8.
10. A full list of those who have contributed to the Civil Justice Council's events, meetings and consultations appears at **Appendix B**.
11. The CJC's conclusions and recommendations to improve the costs system in civil cases are set out in Part 1 of this report. A more detailed discussion of the reasons behind the recommendations is set out in Part 2 of this report.



PART 1

RECOMMENDATIONS 1 – 20

Recommendation 1

Small Claims Limit for Personal Injury Cases

The starting point for recovery of costs in personal injury claims below £5,000 should remain at £1,000.

Recommendation 2

Fast Track Limit for Personal Injury Cases

The Fast Track Limit for personal injury cases should be increased to £25,000. There should be an opt-in option for cases up to £50,000 in value.

Recommendation 3

Personal Injury Cases in the Fast Track

The Predictable Costs Scheme (CPR Part 45 Section II), currently restricted to RTA cases below £10,000, should be extended to include all personal injury cases in the [increased level] fast track and should include fixed costs from the pre-action protocol stage through the post issue process & including trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme.

Recommendation 4

RTA Claims below £10,000

The vast majority of RTA claims fall below the £10,000 value threshold. The CJC recommends that in the vast majority of such claims where liability is not an issue speedy and prompt resolution would be assisted by a less resource intensive pre action protocol that would reduce unnecessary transactional costs. This should include:

- (i) the presumption that the claimant's lawyer will obtain a medical report from an appropriate medical practitioner, at a fixed fee, to be paid promptly by the third party insurer.
- (ii) the development of a "tariff" database for the valuation of general damages
- (iii) in cases where a police report is necessary, the agreement of a national standardised format, fixed fee & target timescale for delivery.
- (iv) a priority objective that all professionals involved in the claim should have regard to rehabilitation of the injured claimant in accordance with the APIL/ABI Rehabilitation Code.

Recommendation 5

In addition to personal injury cases, referred to in Recommendations 1 and 2 it would also be desirable to include housing cases within Recommendation 1, and non personal injury cases within Recommendation 2.

Recommendation 6

Section 6 of the Costs Practice Direction should be reviewed when the amendments to the Practice Direction, approved in July 2005, have come into effect, to ensure that the giving of an estimate carries a sanction if the estimate is departed from significantly.

Recommendation 7

In multi track cases where the value exceeds £1 million, in all group actions and in other complex proceedings there should be a rebuttable presumption requiring the parties to present budgets, supervised by the Court at appropriate stages to ensure compliance with the proportionality provisions of the overriding objective of the CPR.

Recommendation 8

Where the parties have agreed or the court has approved an estimate or budget and/or cap, both the receiving party and the paying party should be entitled to apply for detailed assessment but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.

Recommendation 9

Benchmark Costs

In all multi track cases benchmark costs should be provided for pre-action protocol work.

Recommendation 10

With a view to increasing access to justice and providing funding options in cases where ATE insurance is unavailable, the Legal Services Commission should give further consideration to the Conditional Legal Aid scheme (CLAS) previously proposed by the Law Society, the contingency Legal Aid Fund (CLAF) previously proposed by the Bar Council and JUSTICE, and the Supplementary Legal Aid System (SLAS) operating in Hong Kong.

Recommendation 11

In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario by the Solicitors' Act 2002 particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.

Recommendation 12

Building on the Protective Costs Order as explained in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, to permit access to justice in public law cases, further consideration should be given to the wider import of the judgment.

Recommendation 13

Building on the judgment of the Court of Appeal in "*Arkin*" further consideration should be given to the use of third party funding as a last resort means of providing access to justice.

Recommendation 14

Encouragement should be given to the further expansion and public awareness of Before the Event Insurance to provide wider affordable access to justice funding complemented where necessary by a strong After the Event Insurance market.

Recommendation 15

The particular problems of funding group actions should be taken into account when considering Recommendations 10-13.

Recommendation 16

In addition to the presumption relating to the provision of medical reports in RTA cases below £10,000 (Recommendation 4) further work should be conducted by the CJC to develop an industry based agreement for fixed/guidelines fees for medical experts in all personal injury cases in a revised fast track of £25,000 (**Recommendation 2**).

Recommendation 17

Between the parties costs should be payable on the basis of costs and disbursements reasonably and proportionately incurred and should be assessed at hourly rates determined from time to time by the Costs Council (Recommendation 19) without prejudice to the ability of solicitors (and barristers) to agree other rates on a solicitor/client basis.

Recommendation 18

The CJC endorses the proposed legislation announced by the Government to regulate Claims Management Companies and urges that this be introduced with as much speed and rigour as possible so as to protect consumers and reduce if not remove opportunities for “technical” costs litigation that have bedevilled the Courts at all levels.

Recommendation 19

Successful litigants in person should be entitled to a simple flat rate (or fixed fee in a scale scheme) whether or not they have sustained financial loss.

Recommendation 20

A Costs Council should be established to oversee the introduction, implementation and monitoring of the reforms we recommend and in particular to establish and review annually the recoverable fixed fees in the fast track and guideline hourly rates between the parties in the multi-track. Membership of the Costs Council should include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary.

Recommendation 21

That the DCA and the professional bodies (Law Society and Bar Council) should work together with the Attorney General's pro bono co-coordinating committee to introduce a pro bono CFA.



PART 2

A. FAST TRACK

A new predictable costs framework for fast track personal injury claims.

1. The Civil Justice Council is satisfied that the time is now right to introduce a framework to ensure proportionality and predictability of costs in all personal injury cases in the fast track. To do so would be a logical extension of its work to date in this area with the co-operation of industry participants as well as recognising:
 - The success of the predictable fees scheme for road traffic accidents below £10,000, already due for review in October 2005.
 - The post Woolf reform success of the CPR protocol and fast track in resolving personal injury claims up to the present level of £15,000. (Research by Gorielly, Abrams & Moorhead for the CJC and the Law Society, 2002).
 - The importance of preserving access to justice in personal injury cases by a conditional fee regime supported by a strong after the event insurance market.
 - The generally accepted need to eradicate the misconception that there is a compensation culture which, as the Better Regulation Task Force found and the Civil Justice Council agrees, exists only in perception and not in reality.

- The recommendations of the Better Regulation Task Force report “Better Routes to Redress” (May 2004) and the Department for Constitutional Affairs response “Tacking the Compensation Culture” (November 2004).
2. The Civil Justice Council **does not agree with recommendation 2 in the Better Regulation Task Force report** that research is necessary to ascertain whether the limit for recovery of costs in the small claims jurisdiction should be raised to £5,000 for personal injury claims. There is no evidence to suggest that the resolution of personal injury claims between £1,000 – £5,000 is working unsatisfactorily for the consumer. Only a very small number of such claims do not settle and litigation to trial in these cases is a very infrequent last resort. Provided that proportionality of costs is ensured, as has already been achieved in RTA claims below £10,000, there is simply no benefit to be gained by raising the small claims limit in personal injury cases. Rather, any such move that would remove costs recovery in such cases would work contrary to the public interest by removing quality controlled and regulated law firms from their role in resolving such claims which are still important to the injured consumer. The resulting gap in access to justice would be filled either by unrepresented consumers who would be unequal to the task of taking on the complexities of personal injury law and procedure, or by non lawyers whose only means of remuneration would be to deduct a contingency fee from the injured consumer’s damages.
 3. Although proposed legislation to control claims management companies is welcome the role of a claims management company is mainly to capture cases rather than to resolve them. Experience has shown that such companies also try to control the litigation.² The Civil Justice Council therefore supports Government proposals to regulate the behaviour of claims management companies in collecting claims, (a major factor in creating the perception of a compensation culture) and to control the

² Claims direct test cases 2003 EWCA Civ 136. The Accident Group test cases 2004 EWCA Civ 575. Hollins v Russell 2003 EWCA Civ 718

contingency fee method of remuneration of claims management companies in cases where there is no fee shifting rule.

4. The success of the Civil Justice Council in establishing the predictable costs scheme in RTA cases under £10,000 and agreed fixed success fees in certain categories of personal injury claim (RTA/work accident/industrial disease) still leaves a number of important gaps that need to be filled to complete a full framework of proportionate and predictable fees. The gaps are:

- Predictable costs in RTA cases below £10,000 for work done between conclusion of the pre action protocol and trial.
- Predictable costs for work done in RTA cases above £10,000.
- Fixed fees for medical and police reports in RTA cases below £10,000.
- The reduction of transactional costs in RTA cases below £10,000.
(This gap is already being addressed as the result of an initiative by the Law Society, the Association of British Insurers (ABI), members of the insurance industry, the Association of Personal Injury Lawyers (APIL), the Motor Accident Solicitors Society (MASS) and the Bar, who invited the CJC to facilitate. The results of this initiative have contributed to the deliberations of the Better Regulation Task Force Action Group Committee).
- Predictable costs for all stages of non RTA claims to complement the fixed success fees that have already been agreed.
- Agreement on fixed or predictable ATE premiums in all fast track personal injury claims.

5. In a post legal aid environment where conditional fees are the main means of bringing a claim (other than legal expense insurers see Recommendation 18), a strong ATE market that receives premium income in large numbers of lower value claims is vital to provide underwriting support for ATE insurance of medium and large claims. Access to Justice through the mechanism of ATE supported conditional fee agreements can only be achieved on the basis that “the many have to pay for the few”. The delicate balance of this crucially important economic equation will be assisted by widening the scope of predictable costs in personal injury claims to include more claims at the lower value end. This can readily be achieved by extending the fast track limit from £15,000 to £25,000 for personal injury cases. This would also reflect the success of the fast track in promoting speedier settlement so that it is now justifiable to increase the level five years after the introduction of the CPR which are now well established.
6. The Civil Justice Council is also satisfied that, as part of the proposed new framework, it would be appropriate to include an additional overriding objective that in dealing with levels of damages in personal injury cases, rehabilitation of the injured claimant should be considered as a first priority.
7. The Civil Justice Council therefore makes four recommendations for a new costs framework for personal injury claims in a fast track extended to £25,000 and would go further by including an opt-in facility for cases up to £50,000 if the parties wish to do so.

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Recommendation 5

Non Personal Injury Cases

In addition to personal injury cases, referred to in Recommendations 1 and 2 it would also be desirable to include housing cases within Recommendation 1, and non personal injury cases within Recommendation 2.



B MULTI TRACK

Estimates, Budgeting and Capping

1. Attempts by the court to control costs by means of case management directions, the use of estimates, costs capping and budgeting have met with mixed success. These measures are not used consistently and there is much confusion about what each term means in practice and about the relationship between these various devices to control costs. The CJC has therefore given careful consideration to what changes could be made to clarify usage of these mechanisms where appropriate.
2. The court may at any stage in a case order any party to file an **estimate** of costs and serve copies of the estimates on all other parties. Such an estimate should be an estimate of those costs already incurred and to be incurred by the party who gives it. A party who files an allocation questionnaire, other than on the small claims track, and a party who completes a pre-trial questionnaire must file and serve an estimate.³ The Court of Appeal has held that the Costs Practice Direction relating to costs estimates is expressed in clear and mandatory terms. Costs estimates must be provided.
3. The Court set out a non exhaustive guide as to the circumstances in which a costs estimate might be taken into account in determining the reasonableness of costs claims intended to assist Judges in the application of the direction. First, estimates made by solicitors of the overall likely costs of litigation should usually provide a useful yardstick by which the reasonableness and proportionality of the costs finally

³ Costs Practice Direction Section 6

claimed may be measured. If there is a substantial difference (say 20%) between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable and disproportionate.

4. Second, the court may take the estimated costs into account if the other party shows that it relied on the estimate in a certain way.
5. Third, the court may take the estimate into account in cases where it decides that it would probably have given different case management directions if a realistic estimate had been given. The court did not consider that it would be a correct use of the power conferred by the Costs Practice Direction to hold a party to his estimate simply in order to penalise him for providing an inadequate estimate. Thus, if the estimate has not been relied on by the paying party and the court concludes that even if the estimate had been close to the figure ultimately claimed its case management directions would not have been affected and the costs claimed were otherwise reasonable and proportionate, then it would be wrong to reduce the costs claimed simply because they exceed the amount of the estimate. The court considered that the Costs Judge should determine how, if at all, to reflect the costs estimate in the assessment before going on to decide whether, for reasons unrelated to the estimate, there were elements of the costs claimed which were unreasonably incurred or unreasonable in amount.⁴
6. The Court of Appeal has expressed the hope that Judges conducting cases will make full use of their powers under the Costs Practice Direction to obtain estimates of costs and to exercise their powers in respect of costs in case management to keep costs within the bounds of the proportionate in accordance with the overriding objective.⁵

⁴ *Leigh v Michelin Tyres Plc* [2003] EWCA Civ 1766. The approach proposed by the Court of Appeal avoids the danger of "double jeopardy" referred to by Lord Woolf CJ in *Lownds v The Home Office* [2002] EWCA Civ 365 at para 30; [2002] 1 WLR 2450 CA.

⁵ *Solutia (UK) Ltd v Griffiths* [2001] EWCA Civ 736

7. Suitably amended, the Costs Practice Direction⁶ could provide that a failure to adhere to an estimate given to the court and the opposing party should give rise to a presumption of disproportionality. This would mean that on assessment, any steps taken which were not necessary and reasonable would not have to be paid for by the paying party.
8. In June 2001, the question of **costs budgeting** was raised before the Rule Committee. At the request of the Lord Chancellor's Department the Senior Costs Judge and the Costs Sub Committee drafted a Rule and Practice Direction setting out the proposals for costs budgeting. The proposed draft rule set out a procedure by which the court might make an order setting a budget specifying the maximum amount of costs which one party could later recover from another. The court could set a different budget for each party and the budget could relate to the whole or part of the proceedings. A budget could be set by the court of its own initiative or on an application made by any party. In deciding whether to set a budget, and the amount of such budget, the court was to have regard to all the circumstances, including the factors set out in Rule 44.5(3). The court was also to have regard to the way in which those circumstances and factors were likely to apply to the proceedings in the future. The Costs Judge in assessing costs would not allow costs in excess of the budget unless satisfied that it was appropriate to vary that budget.
9. The draft Practice Direction attached to the draft Rule suggested that cases in which it might be appropriate to set a costs budget included:
 - a. cases with a financial value which was not likely to exceed the total amount of costs reasonably spent by all parties and there was reason to believe that there was likely to be an argument as to whether the costs incurred were proportionate;
 - b. cases with a financial value which were so great that the test of proportionality was unlikely to restrict a party's reasonable expenditure on costs, and one or

⁶ Section 6

more of the parties wished the court to determine the likely costs of each party in advance in order to facilitate negotiations for the settlement of the case;

- c. any other case in which the court was of the opinion that setting a costs budget would further the overriding objective.
10. As part of its programme of work on costs proportionality the CJC decided to undertake a consultation on budgeting. A paper “Predictability & Budgeting” prepared by Professor John Peysner was posted on the CJC website (www.civiljusticecouncil.gov.uk) in May 2004. The result of the consultation appended to this report (Appendix C) reveals lukewarm support for budgeting other than in high value cases.
11. The power to make a **costs capping** order has been considered by Gage J:

“18. Having referred to Section 51 of the 1981 Act to various parts of the CPR which deal with costs and giving full effect to the overriding objective of the CPR in my judgment the court has power to make a costs cap order. In my opinion the general powers of case management and in particular CPR 3.1(2) (m) and 44.3 are sufficiently wide to encompass the making of such an order in both [group litigation] and other actions. In addition the provision for estimates of costs in the Practice Direction about costs is in my view in keeping with such a power. Further I am fortified by the encouragement provided by the Court of Appeal in *Solutia (UK) Ltd v Griffiths* to conclude that in appropriate cases, of which GLOs are prime examples ... the court should do so.”⁷

⁷ *AB v Leeds Teaching Hospitals NHS Trust (Nationwide Organ Group Litigation (NOGL))* [2003] EWHC 1034 (QB) Gage J. This reasoning was followed in the *Ledward Group Litigation* [2003] EWHC 2551 QB Hallett J.

12. The Court of Appeal subsequently expressed the view that Gage J was correct to consider that the court possessed the power to make a costs capping order in an appropriate case:

“The language of Section 51 of the Supreme Court Act 1981 is very wide and CPR 3.2(m) confers the requisite power. Needless to say in deciding what order to make, the court should take the principles set out in CPR 44.3 (which governs the retrospective assessment of costs) as an important point of reference.”⁸

13. Subsequently Gage J decided that where the claimant’s solicitors are experienced in the field and there is not a real and substantial risk that costs would be disproportionately or unreasonably incurred, the risk could be managed by conventional case management and detailed assessment after trial. When such an application was made the allocation and pre-trial questionnaires should have attached estimates of the likely overall costs which should give a good guide. The court should be able to deal with such an application at a comparatively short hearing and the benefit of the doubt in respect of reasonableness of respective costs should be resolved in favour of the party whose costs it is sought to cap.⁹ In the MMR litigation Keith J expressed the view, without wishing to lay down a hard and fast rule, that a prospective costs capping order should only be contemplated where there are grounds for believing that a party may incur excessive or disproportionate legal costs and where the risk that excessive legal costs are being incurred unnecessarily will not be picked up by the court when exercising case management functions, or when conducting a detailed assessment of costs after the trial. Costs capping was a relatively dramatic course to take and would only be ordered on

⁸ *King v Telegraph Group Ltd* [2004] EWCA Civ 613 para 85. The court also referred to the judgment of Dyson LJ in *Leigh v Michelin Tyre Plc* (above) where he expressed the view that the prospective fixing of costs budgets was likely to achieve the objective of controlling the costs of litigation more effectively than estimates.

⁹ *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB) Gage J

cogent evidence.¹⁰ The Court of Appeal has stated¹¹ that Judges do have the power to limit and cap costs in advance.

14. With regard to estimates, costs capping & budgeting as a variety of mechanisms for controlling costs the CJC view is that:

- Costs in personal injury cases in the fast track should be controlled by the extended predictable costs regime recommended above.
- In non personal injury fast track and multi track cases below a value of £1m costs capping/budgeting should not apply unless the Court orders otherwise.
- In multi track cases below £1m costs should be controlled by estimates with strengthened sanctions. Estimates will need to be given on at least two occasions, first at allocation and second at a case management conference, or if no case management conference, at the pre trial questionnaire stage. At allocation the Master/District Judge should decide whether the estimate is acceptable. (A party wishing to depart from the estimate should make a prior application to vary under CPR Part 23) and the point at which the next estimate is required.
- There should be a rebuttable presumption for Costs budgeting and capping in multi track cases above £1m in group actions and in other proceedings where the court so orders, for example in family provision cases and defamation. The Judge assigned to manage the case should set a budget from the first case management conference. The Judge should sit with a Costs Judge as assessor. Alternatively, having decided in principle that there should be a budget or a cap, the Costs Judge could be directed to decide on the appropriate figures.

¹⁰ *Sayers v SmithKline Beecham* [2004] EWHC 1899 (QB) Keith J.

¹¹ *King v Telegraph Group Ltd* [2004] EWCA Civ 613

- In multi track cases above £1m where the costs are likely to be very significant costs budgeting/capping is appropriate as a means of control and proportionality. Budgets, which should apply to both parties to an action, could be agreed by stages as the proceedings progress or imposed by the court if no agreement is possible, with liberty to the parties to apply should there be a change in the circumstances on which the budget was based. The budget should set a cap for each step of the litigation and thus the budget may develop as the action proceeds. It must be borne in mind that, if as a result of seeing budgets the court sets an overall cap on costs, the protection given is merely that the paying party will never have to pay more than the cap which has been imposed. This does not prevent the paying party from arguing on detailed assessment that the actual amount of costs payable should be less than the cap. In those cases where a budget has been put in place the parties and the court will have already have gone through the process of analysing what work is reasonable and proportionate in the circumstances of the case. In those circumstances it should not be necessary for there to be further protracted detailed assessment proceedings at the end of the case, save in respect of any matters not covered by the budget.

Recommendation 6

Section 6 of the Costs Practice Direction should be reviewed when the amendments to the Practice Direction, approved in July 2005, have come into effect, to ensure that the giving of an estimate carries a sanction if the estimate is departed from significantly.

Recommendation 7

In multi track cases where the value exceeds £1 million, in all group actions and in other complex proceedings there should be a rebuttable presumption requiring the parties to present budgets, supervised by the Court at appropriate stages to ensure compliance with the proportionality provisions of the overriding objective of the CPR.

Recommendation 8

Where the parties have agreed or the court has approved an estimate or budget and/or cap, both the receiving party and the paying party should be entitled to apply for detailed assessment but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.

Benchmark costs

15. One of the ideas proposed by Lord Woolf in his Access to Justice Report was benchmark costs for proceedings having a limited and fairly constant procedure. A considerable amount of work was undertaken by the Supreme Court Costs Office at the request of Lord Woolf and the Benchmark Report, once prepared, was submitted to Lord Phillips, who was by that time (May 2002) Master of the Rolls.
16. Severe difficulties had already arisen with regard to costs, particularly on the fast track, and the Civil Justice Council was heavily involved in facilitating the agreements now embodied in CPR Part 45 Sections II, III and IV (see above) and during this time the Benchmark Report was held in abeyance.
17. When the Civil Justice Council Delegation attended the IBA Conference in New Zealand in 2004 discussions with members of the judiciary, government officials and the profession in Auckland, Melbourne, Sydney and Hong Kong again raised the question of benchmark costs. One of the problems discussed was the cost of pre-action work and the reality that since the various protocols set out the work which the parties were expected to do in any particular case it might be possible to produce figures for benchmark costs based on those protocols. (A revised pre-action protocol for personal injury claims (March 2004) has been approved by the Civil Procedure Rule Committee).

18. Pre proceedings work done in accordance with protocols falls into the category of work envisaged by Lord Woolf as having a limited and fairly constant procedure.¹² Since both parties have to comply with pre action protocols and the steps taken are set out in the protocols it should be possible to calculate appropriate benchmark figures for the various stages of this work.

Recommendation 9

Benchmark Costs

In all multi track cases benchmark costs should be provided for pre-action protocol work.

¹² Access to Justice Final Report Chapter 7 paras 35-37



C FUNDING

Payment by results

1. In its study of other jurisdictions around the world the CJC was struck by the gap in access to justice in countries where there is no legal aid so that the only means of access other than private funding is by means of some form of contingency fee or by a lawyer willing to act pro bono.

Prior to the introduction of conditional fees in 1995 (personal injury, human rights & insolvency cases) and extended in 2000 to all civil cases (excluding family) the people caught in this gap were described by the Consumers Association as ‘Middle Income Not Eligible for Legal Aid Services (MINELAS)’. It was thought that conditional fees would enable this group to obtain access to justice. However, the essential ingredient of an ATE policy to support a CFA at an affordable premium is a limitation on putting an affordable funding package in place and in the absence of the lawyer paying the premium many people simply cannot afford this. The time has therefore come again to reconsider some form of contingency legal support fund that could operate without additional costs to Government. For many years thought has been given to the idea that the gap, between lack of funding for those who are not eligible for legal aid and access to private funding for those who can afford to pay, might be bridged by some form of central fund that could give financial support to cases in return for a share of winnings recovered. Various papers that have considered this possibility have been produced over the years, originally by JUSTICE as long ago as 1978 and then in the later 1990’s by The Law Society, The Bar Council and the Consumers Association¹³. In principle the idea of a self

¹³ A report by JUSTICE “CLAF” Proposals for a Contingency Legal Aid Fund (1978)
The Bar Council’s consultation paper “An Idea Whose Time Has Come?” (August 1997)

funding contingency scheme is attractive as an additional part of the menu of funding options. The CJC believes that these ideas merit further study particularly the interesting Supplementary Legal Aid Scheme (SLAS) that has operated successfully since 1984 in Hong Kong (see **Appendix A**).

Recommendation 10

With a view to increasing access to justice and providing funding options in cases where ATE insurance is unavailable, the Legal Services Commission should give further consideration to the Conditional Legal Aid scheme (CLAS) previously proposed by the Law Society, the contingency Legal Aid Fund (CLAF) previously proposed by the Bar Council and JUSTICE, and the Supplementary Legal Aid System (SLAS) operating in Hong Kong.

Contingency Fees

2. In addition to recommendation 9, the CJC believes that it is also now time to give serious consideration to allowing contingency fees as a last resort additional means of plugging the funding gap and promoting access to justice.
3. It is often wrongly assumed that payment by results by means of a contingency fee that deducts a percentage of monies recovered does not exist in our jurisdiction. On the contrary when conducting **non contentious** business, solicitors are allowed to be paid on a no win (or no deal) no fee basis. Non contentious work is not restricted to the obvious example of commercial transactions which routinely operate on a no deal/no fee basis. It also includes the resolution of disputes that are outside contentious business as defined in the Solicitors Act 1974. These include, for example, Employment Tribunal cases where lawyers are allowed to accept

JUSTICE's response to the Bar Council's consultation paper (October 1997)
A proposal by the Law Society to link Legal Aid & Conditional Fees (December 1997)
Consumer Association policy paper "Contingency legal aid fund", (November 1997)
Preliminary feasibility study by The Bar Council (January 1998)
The Bar's response to the consultation paper by the Lord Chancellor's Dept (March 1998)

remuneration on a contingency fee basis of a percentage of compensation recovered (for other examples see Law Society 'Conditional Fees: A Survival Guide' 2nd Edition Appendix 18).

4. However, when conducting **contentious** business in England and Wales lawyers are not allowed to charge contingency fees (except for the concessionary exception that CFAs are permitted by the Courts and Legal Services Act 1990). Steyn LJ explained the position with regard to contingency fees and champertous agreements:¹⁴

“The relevance of Section 58 [of the Courts and Legal Services Act 1990] is that Parliament has, subject to the requirements of the Section, empowered the Lord Chancellor to validate by order agreements for a percentage uplift in the costs in the event of success. The ability to recover fees beyond what was otherwise reasonable was intended to be “an incentive to lawyers to undertake speculative actions”. Such agreements were, and in the absence of an order still are, unlawful as being contrary to public policy. The rationale of the common law rule is that such agreements allowed the duty and interest of solicitors to conflict with the resultant risk of use of legal procedure. Section 58 evidences a proposed modification in relation to an important species of champerty. It represents at least a concession to the view that the abuses associated with champerty are not the inevitable results of all variants of contingency fee agreements. And there is, of course, no more cogent evidence of a change of public policy than the expression of the will of Parliament.

¹⁴ *Giles v Thompson* [1994] 1 AC 142; [1993] 3 All ER 321 CA

...

Contingency fee agreements are nowadays perhaps the most important species of champerty. Such agreements are still unlawful. Yet an English solicitor may share in a contingency fee earned in foreign litigation: see Rule 8 (Contingency Fees) of the Solicitors Practice Rules 1990. This reinforces the point that the doctrine of champerty serves to protect only the integrity of English public justice. It is not based on grounds of morality but on a concern to protect the administration of civil justice in this country.

...

Ultimately it is necessary to consider the questions posed in this case in the light of contemporary public policy. The correct approach is not to ask whether in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement.”

5. The Courts appear to be moving towards a more tolerant view of maintenance and champerty, as illustrated by some recent decisions. An agreement between a claimant and a firm of accountants that they would undertake work relating to litigation on the basis that their charges would be 8% of the damages recovered was held not to be champertous because the accountants were not conducting litigation and did not themselves act as the expert witnesses. They had specifically employed independent experts whose fees they paid. They advised on and co-ordinated the evidence of loss and provided back-up services for the expert

witnesses. If the accountants had not performed those services they would have had to be carried out by the claimant's solicitors at higher rates. The agreement was not a CFA under Section 58 of the Courts and Legal Services Act 1990 since that section applies only to agreements concluded by those conducting litigation and providing advocacy services. Section 58 does not apply to expert witnesses. For an expert to give evidence on a contingency fee basis would give the expert a significant financial interest in the outcome of the case which is highly undesirable and it would be very rare for the court to consent to an expert being instructed on that basis. The Court of Appeal found that the agreement was not contrary to public policy and was not champertous.¹⁵

Contingency fees in the USA

6. American lawyers believe that a fee, wholly or partially contingent upon the outcome of litigation, is useful and professionally proper in many areas of practice.
7. In America there has always been a strong movement by the lawyers that the legal profession, although subject to controls by the courts in relation to practice and discipline, should be free, like other professions, from controls on fees.
8. American contingency fee practice may be summarised as follows:

“In general under a contingent fee arrangement the lawyer's right to a fee depends upon the success of his efforts and the amount of his fee is commonly proportional to the amount of his client's recovery or to the amount of a contribution to a common fund. Also the size of the fee is designed to be greater than the reasonable value of the services in the individual case, the difference reflecting the fact that the lawyer will realise no return for his investment of time and office expense in the cases he loses.....The size

¹⁵ *R (On the Application of Factortame) v Secretary of State for Transport* [2002] EWCA Civ 932; [2002] 1 WLR 2438 CA. And see *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (No.2) (The Eurasian Dream)* [2002] EWHC 2130 (Comm); [2002] 2 All ER (Comm) 1083; [2002] 2 Lloyds Rep 692 Creswell J. This decision was appealed to the Court of Appeal but the matter was compromised shortly before the appeal hearing

of most fees computed after services have been performed reflects the fact of success or failure and also the size of the recovery. To the extent that the lawyer plans on charging more if he wins, all fees are contingent as to size.

Another characteristic common to many fees is the relationship of the fee to the amount at issue. Many fees for legal services, while not contingent are proportionate to the value of the object of the legal services, for example fees for the probate of estates and for handling various transactions relating to real estate.

Another characteristic not limited to contingent fees is that the fee in the individual case may not accurately reflect the value of the services if in the long run the return from similar cases will be fair overall. Examples based on fairness of the fee as an average can be furnished by many of the fees recommended in Bar Association fee schedules ... such as those for drafting certain documents or for handling more or less standard proceedings such as uncontested divorces.”¹⁶

In some US States, such as New York, the court regulates the fairness of the conditional fee agreement and the percentage recoverable by the lawyer.

¹⁶ MacKinnon Contingent Fees for Legal Services Chapter 3

Contingency Fees in Canada

9. In Ontario in 2002, amendments were made to the Solicitors Act to regulate contingency fee agreements.¹⁷ The Act contains broad regulation making power relating to contingency fees and includes the following regulatory controls:

- all contingency fee agreements must be in writing;
- contingency fees are prohibited in criminal, quasi-criminal and family law matters;
- lawyers are precluded from collecting both the pre determined contingency fee and legal costs, unless approved by a Judge;
- the client may collect full payment for an award of costs even if it exceeds the amount payable under a contingency fee agreement if the award is used to pay the client's solicitor;
- the Minister is able to prescribe a maximum percentage that can be charged as a contingency fee;
- the court may review contingency fee contracts and to endorse negotiated fees above the prescribed standard where it is fair to do so.

Contingency Fees & Fee shifting – The English Rule

10. If contingency fees of the American type were introduced it is inevitable that the fee shifting rule would have to be abolished. This would return the position to before the Statute of Gloucester 1278, when there was no entitlement to recover any costs. Similarly, if fee shifting were to be abolished, contingency fees would have to be permitted in order to permit access to justice.

¹⁷ Justice Statute Law Amendment Act 2002

11. Arguments in favour of fee shifting are that it: compensates the winner; allows people without means to litigate; deters vexatious, frivolous and other unmeritorious litigation; deters delay and misconduct in proceedings and encourages settlement.
12. Arguments against fee shifting include: the amount the loser is required to pay in damages may be less than the winner's actual costs; it may deter meritorious litigation - parties who are not wealthy can be deterred from enforcing their rights or defending claims against them because of the risk that they may lose and have to pay the other party's costs.
13. In jurisdictions where costs shifting applies the most advanced regimes have all retained, to a greater or lesser extent, the indemnity principle, with its dual aims of keeping injustice (to the person wronged) to a minimum, whilst at the same time discouraging frivolous or vexatious disputes. Lord Bingham when Master of the Rolls said in 1992¹⁸ that the principle that in the ordinary way costs follow the event "is of fundamental importance in deterring claimants from bringing and defendants from defending actions which they are likely to lose".
14. Lord Woolf in his Interim Access to Justice Report¹⁹ stated in relation to the fee shifting rule that research had shown:

“... that the existing rule has the tendency to increase expenditure on cases when compared with a system where each party bears its own costs ... any propensity to litigate which our rule might encourage tends to be associated with more meritorious cases and greater expectations of success than does the American rule under which win or lose each party generally bears his own costs.”

¹⁸ Roache v News Group Newspapers Ltd, 19 November 1992 CA

¹⁹ June 1995, Chapter 25, paragraph 11

15. If fee shifting was done away with and costs did not follow the event this would render CPR Part 36 offers and payments less effective since there would be no costs sanction for failure to accept a reasonable offer. There might therefore have to be a specific rule that costs would follow the event in certain circumstances, or perhaps a rule as to the incidence of interest. The experience in the United States, where there is no fee shifting and no payment in rule, is that the incentive to settle is reduced and more cases go to trial. As against that in Germany, where costs recovery is possible, the costs are modest and the possibility of being ordered to pay the costs is one which litigants view with equanimity, with the result that there are few settlements and a very high proportion of cases go to trial.

Recommendation 11

In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario by the Solicitors' Act 2002 particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.

Protective Costs Orders

1. The problem of funding public law cases because of the fear of a costs order against an unsuccessful public interest organization has been another gap in access to the civil justice system. The desirability of granting some degree of immunity to permit such case to be brought has been addressed by the Court of Appeal in *The Queen (on the application of Corner House Research) v Secretary of State for Trade and Industry*²⁰ The decision in *Corner House Research* is concerned with the incidence of costs in

²⁰ [2005] EWCA Civ 192.

a judicial review application at first instance. The Court indicated that there was a growing feeling that access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime. Because of its importance to access to justice and costs funding the case deserves some further explanation.

2. The Court of Appeal considered, in depth, the question of Protective Costs Orders (PCOs) in public law cases. The Court stated that the general purpose of a PCO is to allow a claimant of limited means, access to the court in order to advance his case without the fear of an order for substantial costs being made against him. A fear which could dis-inhibit him from continuing the case at all.
3. The Court traced the history of the “English Rule” that costs follow the event, from the end of the 13th century. The Chancery Division tempered the effect of the English Rule principle in cases where there was a “private fund” available. This fund might be the assets of a trust²¹; the assets of a company in a minority shareholders action²²; the action of a pension scheme²³; or, the assets involved in the reorganisation of a life insurance business.²⁴ The starting point for Judges was the proposition that they must do nothing to inhibit the exercise of discretion as to costs, which would be vested in the Judge conducting the substantive hearing.
4. In relation to costs in public law litigation, the Court pointed out that official bodies would often appear or intervene in public law proceedings, on the basis that they were present to assist the court in an amicus curiae role, even if they were respondents in the proceedings, and in that capacity, in a court which traditionally ordered only one set of costs, it would neither apply for costs, nor expect an order for costs to be made against it, even if its submissions favoured one side more than

²¹ In Re: Beddoe: Downes v Cotton [1893] 1 Ch 547

²² Wallersteiner v Moir (No.2) [1975] QB 373

²³ McDonald v Horn [1995] ICR 685

²⁴ In Re Axa Equity and Law Life Assurance Plc (No.1) [2001] 2 BCLC 447

the other.²⁵ From time to time leave to appeal to the House of Lords is given to a public body, on terms that it would pay both sides costs in the House of Lords and not seek to disturb the orders for costs made in the court below.

5. The Court identified the leading authority on the topic as the judgment of Dyson J in *R v Lord Chancellor ex p. CPAG*²⁶. The case was a hearing of two applications for PCOs at the same time, one to enable the Child Poverty Action Group to continue judicial review proceedings against the Lord Chancellor, the other in relation to a legal challenge by Amnesty International UK against the Director of Public Prosecutions. Dyson J said that it was only in the most exceptional circumstances that the discretion to make a PCO should be exercised, in a case involving a public interest challenge and laid down guidelines which were further reviewed by the Court of Appeal in *Corner House*.
6. The Court considered recent developments in Ireland, Canada and Australia and set out the governing principles in Section 51 of the Supreme Court Act 1981 and CPR Parts 43 to 48. The Court distinguished public law litigation from private law and family litigation and said that there is a public interest in the elucidation of public law by the higher courts, in addition to the interests of the individual parties. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases.
7. The Court was in broad agreement with the guidelines laid down by Dyson J for making a PCO but decided to reformulate them with greater precision:
 - “1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

²⁵ see *R (Davis) v Birmingham Deputy Coroner* [2004] EWCA Civ 207 the Court cited Justices, Tribunals, Coroners and The Central Arbitration Committee as examples.

²⁶ [1999] 1 WLR 347.

- (i) the issues raised are of general public importance;
- (ii) the public interest requires that those issues should be resolved;
- (iii) the applicant has no private interest in the outcome of the case;
- (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
- (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”

8. There is room for considerable variation in the form of order to be used, depending on what is appropriate and fair in each of the cases in which the question may arise.

It is likely that a costs capping order for the claimant's costs will be required in all cases, other than one where the claimant's lawyers are acting pro bono, and the effect of the PCO is to prescribe in advance that there would be no order as to costs in the substantive proceedings, whatever the outcome. The court gave further guidance as follows:

- “(i) When making any PCO where the applicant is seeking an order for costs in its favour, if it wins, the court should prescribe, by way of a capping order, a total amount of the recoverable costs which will be inclusive, so far as a CFA funded party is concerned, of any additional liability;
- (ii) the purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and, as a balancing factor, the liability of the defendant for the applicant's costs, if the defendant loses, will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest;
- (iii) the overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate, without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must

arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.”

9. The Court did not think that it had any power to make an order that the defendants should finance the claimant’s costs at first instance as the litigation proceeded. The Court went on to set out a suggested procedure and gave an indication of the modest level of costs it would expect to see (generally not exceeding £5,000 in a multi party case).

Recommendation 12

Building on the Protective Costs Order as explained in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, to permit access to justice in public law cases, further consideration should be given to the wider import of the judgment.

Third Party Funding

1. In the search for financial support to permit access to justice the use of funding by a third party is becoming more prevalent. The approach of the court has developed since *MacFarlane v EE Caledonian Ltd (No.2)*²⁷ where a claims consultant who had maintained the action of an unsuccessful claimant was ordered to pay the costs of the successful defendant. The fact that the maintainer had not accepted liability for the successful adverse party’s costs tainted the contract with the claimant with illegality, quite apart from the additional illegality which arose from the champertous nature of the agreement.
2. Third party funding has become a feature of litigation in Australia. In our jurisdiction this developing trend has recently been examined by the Court of

²⁷ 1995 1 WLR 366 Longmore J

Appeal in *Arkin v Borchard Lines Ltd*²⁸. As with *Corner House* (above) the *Arkin* case deserves some explanation because of its importance to funding and access to justice the claimant (a man without means) had lawyers acting on a CFA with financial support provided by a professional funder at a level as high as £1.3million which they lost when the case failed.. Very substantial costs had been incurred by the defendants of nearly £6 million. The court explained that “cost shifting” under which costs usually follow the event is not a universal rule in common law jurisdictions. The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought, as a matter of justice, to indemnify that party for the costs incurred. The defendant, who has wrongfully injured a claimant and who has refused to pay the compensation due, should pay the costs that *he has caused* the claimant to incur so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant, so that the defendant is forced to incur legal costs in resisting that claim, should indemnify the defendant in respect of the costs that *he has caused* the defendant to incur. The court concluded:

- “23. ... Causation is usually a vital factor when considering whether to make an award of costs against a party.
24. Causation is usually a vital factor in leading a court to make a costs order against a non party. If the non party is wholly or party responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred ..”

The court confined its attention to cases where application for an order for costs against a non party has been made on the ground that the non party has supported the unsuccessful claimant.

²⁸ 2005 EWCA Civ 655

3. The court examined a number of authorities including *Hamilton v Al-Fayed (No.2)* [2002] EWCA Civ 665 in which Simon Brown LJ, after extensive consideration of the authorities, identified that there was a conflict between two principles: on the one hand the desirability of the funded party obtaining access to justice; on the other, the desirability that the successful party should recover his costs. He considered that where the funders were “pure funders” the former principle should prevail. There were indications that this result accorded with public policy. Simon Brown LJ recognised that one benefit of the principle that costs follow the event was that this deterred the bringing of actions that were likely to be lost. The fact that lawyers would assess the merits carefully before appearing under a CFA, and that the Legal Services Commission required a similar exercise before approving the grant of legal aid were likely to achieve the same benefit. Pure funders were less likely to exercise the same careful judgment. Nonetheless the desirability of access to justice prevailed.

4. The Court of Appeal then considered a recent Privy Council decision *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UK PC 39 which set out the principles to be derived from the English and Commonwealth authorities.

“Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of *Hamilton v Al Fayed* as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in *Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [\[1997\] 1 WLR 1613](#). Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight*, provided that he is "a real party in ... very important and critical respects" - see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406,

referred to in *Kebaro* at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (2) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

5. The Court of Appeal, having considered these principles, did not dispute the importance of helping to ensure access to justice but considered that appropriate weight should be given to the rule that costs should normally follow the event:

“... In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.”

6. The court pointed out that a funder who entered into an agreement which is champertous would be likely to render himself liable for the opposing party's costs without limit should the claim fail. The solution put forward by the Court of Appeal was as follows:

“We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the*

funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.”

7. In giving its decision in *Arkin* the Court of Appeal said:

“If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate.”

Recommendation 13

Building on the judgment of the Court of Appeal in “*Arkin*” further consideration should be given to the use of third party funding as a last resort means of providing access to justice.

Legal Expenses Insurance

1. Another species of third party funding is legal expenses insurance (LEI). Originating from Europe (particularly Germany) the introduction of LEI to our system began in the 1970's. The very slow take up of this method of litigation funding in earlier years has dramatically changed so that it is estimated that today xxx million motorists and householders have the benefits of LEI as a cheap bolt on to an existing policy. In its first Annual Report in 1999 the CJC Costs Sub Group said:

“Its priority in this first year of its existence has been to examine a much under-used alternative form of funding, namely legal expenses insurance. Discussions which we have held with various representatives of the industry; the Lord Chancellor's Department and the Consumers' Association reinforce the key problem that legal expenses insurance is a potentially valuable but untapped resource for funding litigation.

There is a marked lack of consumer awareness as to the existence of this form of funding even amongst those who have it. Yet it has many attractions as a means of funding. Firstly, it eliminates the risk element of conditional fee arrangements and its dependency on finding lawyers willing to act. Secondly, anyone who has a policy can avail himself or herself of it irrespective of their financial circumstances even if they are above the traditional legal aid limit. Thirdly, it usually provides legal cover for areas which do not automatically lead to recovery of costs e.g. industrial tribunals and small claims. Fourthly, if it is part of any add-

on to another insurance e.g. household insurance, it is relatively cheap to purchase.

While recognising that it will not be a substitute for legal aid, more particularly because those on lower incomes are the very people who probably do not have insurance cover, nonetheless it is a most valuable extra means of funding litigation. Accordingly, the Sub-Committee feels that more prominence needs to be given to the role that legal expenses can play in funding of civil litigation and are endeavouring to achieve this”.

2. The CJC believes that today, 5 years on, the case for promoting LEI is even stronger as legal aid becomes more restricted and as more people are becoming aware of the benefits offered by the policies they hold. Indeed the case for a strong LEI market is as important as the case for a strong ATE market.

Recommendation 14

Encouragement should be given to the further expansion and public awareness of Before the Event Insurance to provide wider affordable access to justice funding complemented where necessary by a strong After the Event Insurance market.

Group Actions

1. During the late 1980’s and the 1990’s the increased frequency of claims involving large numbers of claimants, often for personal injury following product liability or transport ‘disasters’ necessitated the development of new procedure to facilitate the handling of such cases by the Court and to clarify the role of the participants. Described alternatively as multi party actions or group actions the procedural issues in this developing area of litigation were addressed in a series of papers which

included “Group Actions Made Easier” (The Law Society 1995 and “Multi Party Situations: draft rules and practice directions” (consultation paper from the Lord Chancellors Department 1999). This paper was part of Lord Woolf’s Access to Justice report and led to the current Group Litigation Order provisions in Part 19 CPR.

2. As the procedural rules and guidance have developed positively to improve the handling of group actions, so the progress in the area of funding and costs proportionality has been much more difficult. The costs sharing provisions set out by the Court of Appeal in *Davies v ELI Lilly*²⁹ (the Opren litigation) and the costs/benefit ratio (the precursor to proportionality) in *AB & Others v John Wyeth & Brother*³⁰ (the Benzodiazepine litigation) have made access to the litigation process difficult for multiple claimants in group actions many of which have come to a halt without the issues being tried. Rarely can a group action be brought by large numbers of claimants without the support of legal aid. (The possible exception is the securities/shareholders financial services litigation eg Equitable Life where claimants of some means can pool together a fighting fund).
3. However, the high cost of group actions has prompted tighter control of expenditure by the Legal Service Commission which introduced new arrangements for multi party actions in 1992, followed by its report “When the Price is High” (June 1997). This report was responded to by The Law Society in its memorandum “High Finance” (September 1997). The more stringent procedures by the Legal Aid Board to control the handling and costs of group actions by those contracted firms franchised to conduct them (and having to tender competitively to do so) underwent a further shift when the Access to Justice Act 1999 removed legal aid for personal injury claims. Although clinical negligence claims and group actions escaped the total removal of legal aid the scope for claimants to obtain funding support in these two types of case become more constrained, a trend that has continued in the

²⁹ 1987 1WLR 1136

³⁰ 1996 7 MED LR 267

intervening period of 5 years.

4. The CJC recognizes the importance of clear procedural and effective cost proportionality controls in group actions which involve complex issues and potentially very high costs. Already in this report the CJC has canvassed the benefits of contingency fees (particularly the Canadian model), a contingency fund budgeting and costs capping and one way fee shifting, all of them being devices that could be particularly relevant in making it easier for claimants to fund group actions and for the Court to ensure costs proportionality. In the absence of research or other data the CJC believes that the area of group actions is a compelling one that requires particularly close attention if access to justice in terms of funding is to be improved.

Recommendation 15

The particular problems of funding group actions should be taken into account when considering Recommendations 10-13.

Experts Fees

1. During the 2002 discussions that led to the 2003 introduction of the predictable costs scheme in RTA cases below £10,000 it was acknowledged by the industry members involved that the CJC should undertake further work so that fixed fees for medical reports could be included in the predictable scheme. Following a series of preliminary meetings with stakeholders such as the BMA, representatives of medical colleges, representatives of medical reporting agencies, the Law Society, APIL & MASS on the subject of medical report fees, the CJC held a two day experts forum in November 2004. At the conclusion of the first day (the second day concentrated on the accreditation of expert witnesses) the meeting agreed the proposal that:-

- (1) There should be a rebuttal presumption that in non litigated RTA claims under £10,000 medical evidence should be obtained from a general practitioner.
 - (2) Predictable fees for the costs of obtaining such medical evidence should be the subject of an industry agreement facilitated by the CJC.
 - (3) Consideration should be given to extending such arrangements to all fast track personal injury cases.
 - (4) There should be no enquiry by the paying party into the breakdown of the cost of obtaining a medical report where the clinician does not provide the report direct.
2. These proposals were further examined at a ‘big tent’ style meeting of stakeholders in June 2005.
- Proposal 1 above was amended to substitute “appropriate medical practitioner” for “general practitioner” to recognize changes in the way that the medical profession describes its members and current trends in the way that medico-legal reporting is being provided by the medical profession. This amendment is reflected in the wording of Recommendation 4 (i) above.
 - As regards proposal 2 above the big tent syndicate groups separately produced non binding suggestions of figures that might form the basis of fixed fees for medical reports by general practitioners and consultants within the predictable costs scheme for RTA claims below £10,000. Further work is to be undertaken to ascertain data that will better inform the decision on the figures to be agreed for insertion into the scheme.
 - Proposal 3 above should be seen in the context of Recommendation 2 above.

- Proposal 4 above was not the subject of unanimous agreement at the big tent. With the exception of the representation of the medical profession the view was that a breakdown is unnecessary and adds no useful benefit. This view was particularly held by the insurance industry that is content to pay doctors and medical reporting agencies a single fee for a report.
- A further consideration yet to be resolved is whether in all cases a medical practitioner must have access to the patients medical records before writing the report. The Cabinet Office has issued guidelines that medical records are not necessary in all cases. However, the BMA and the GMC are drafting guidance that a medical practitioner who fails to refer to medical records when writing a medico-legal report could be open to disciplinary proceedings. This matter is as yet unresolved but will need a solution before agreement is reached on the fixed fee for a medical report in RTA claims below £10,000 (possibly to be extended to all personal injury cases in an extended fast track - **see Recommendation 2**).

Recommendation 16

In addition to the presumption relating to the provision of medical reports in RTA cases below £10,000 (Recommendation 4) further work should be conducted by the CJC to develop an industry based agreement for fixed/guidelines fees for medical experts in all personal injury cases in a revised fast track of £25,000 (Recommendation 2).



D COSTS LAW & POLICY

The Indemnity Principle

1. Costs in jurisdictions which once formed part of the British Colonies all have a common root (the Rules of the Supreme Court 1883 and Appendix N), but, in each jurisdiction the system of costs has developed in a different way, as those in charge of the administration of justice in the particular jurisdiction have striven to achieve a system better suited to the policy in relation to costs being pursued in that particular jurisdiction. These differences are particularly evident in Canada and Australia where individual Provinces and States have pursued similar but not identical courses.
2. In certain jurisdictions (for example Canada) the Courts have moved right away from the indemnity principle and in some circumstances treat costs as a penalty or compensation depending upon one's point of view. The principles laid down in *Harold v Smith*³¹ are said to be out of date³². In those jurisdictions the difficulties being encountered in the English system do not arise because they no longer constitute a relevant consideration.
3. There has already been a move away from the indemnity principle in the English system in respect of legally aided cases. The Civil Legal Aid (General) Regulations 1989 provide:³³

³¹ 1865 H & N 381

³² *Skidmore v Blackmore* [1995] 122 DLR (4th) 330, Cumming JA.

³³ CLA(G)R 1989 Regulation 107B(3)

“The assisted persons legal representative shall not be prevented from recovering from the paying party the sums in respect of costs to which this Regulation refers by:

(a) any rule of law which limits the costs recoverable by a party to proceedings to the amount which he is liable to pay his legal representatives. ...”

4. In such a case, the legal representatives of the assisted person are entitled to recover from the CLS Fund only the amounts prescribed by Regulation³⁴, they are however entitled to recover more than those rates on a between the parties basis, it being for the costs officer to decide what is reasonable in all the circumstances.

5. In relation to proceedings on the fast track Lord Woolf stated:³⁵

“The indemnity principle provides that a party may recover from his opponent only as much as he owes his lawyer. The indemnity principle will need to be modified so that the costs recoverable are the fixed costs, subject to any Court order on, for example, interlocutory costs. Thus the fixed costs will be recoverable even if the solicitor and own client costs would be lower.”

6. Whilst Lord Woolf's proposals for reform adopted a version of the German system (the BRAGO) in respect of fast track costs, this was a capped system³⁶, whereas the German and similar systems work on a unit cost linked to the value or difficulty of the case. The number of units is limited. The effect of capping fast track costs would be to move to a situation similar to that in New Brunswick - although the proposed system is not so flexible.

³⁴ see Legal Aid in Civil Proceedings (Remuneration) Regulations 1994

³⁵ Lord Woolf Access to Justice Final Report July 1996 Chapter 4 paragraph 57

³⁶ the proposed limit was £2,500

7. Costs on the multi track are controlled by procedural judges to the extent that parties have to give estimates of costs and obtain approval for certain steps e.g. the instruction of experts, or else run the risk of not recovering any costs in respect of those matters. The assessment of those costs are carried out in much the same way as they were before the introduction of the CPR. In respect of those costs the indemnity principle continues to apply.
8. The introduction of CFAs with success fees has brought about a departure from the indemnity principle and allowed a type of champerty both of which are permitted by statute, provided the conditions are complied with.
9. In those jurisdictions where a decision has been taken to limit between the parties costs, the measures range from: (a) simple fixing (eg, CPR Part 45)); through (b) sophisticated fixing regimes based on different scales and usually on the amount involved (British Columbia, New Brunswick and New Zealand); to (c) fixed unit priced regimes (Germany). The indemnity principle is affected in different ways by these different regimes.
10. Under the simple type (a) scheme, in England and Wales the fixed costs are recoverable, without regard to the terms of the retainer between solicitor and client, and also without regard to what it actually costs the solicitor to undertake the work.
11. Type (b) is intended to be no more than a partial indemnity and in the normal case is likely to be only about 40% of the solicitor and own client costs.
12. Type (c) may be more than this but again is not intended to provide a full indemnity.
13. In this jurisdiction a full indemnity is only attainable under the costs regime for multi track cases, provided that those costs are reasonable and proportionate.
14. The ability to make a substantial recovery of costs is an important factor in persuading foreign litigants to bring their disputes before the English Courts. Foreign litigation of this kind, particularly in the Commercial Court, generates

substantial hidden earnings³⁷ and has a significant impact on the balance of payments figures. Because of this, decisions concerning the development of the indemnity principle cannot be taken on purely legal grounds, there will inevitably be a political element to be considered.

15. Sir Richard Scott³⁸ suggested that although Lord Woolf's reforms might lead to "some amelioration of the intractable problem of costs", more radical solutions were necessary. With regard to the "loser pays" rule Sir Richard commented on the fact that it did not apply in reality to legally aided parties and suggested there was a good deal to be said for a rule under which a loser was not liable to pay the winner's costs to the extent that his conduct in the case had been reasonable. Where losing plaintiffs had been unreasonable and lawyers had assisted them by arranging legal aid or by agreeing to work on a conditional fee basis those lawyers should perhaps be responsible both for their own and for the loser's costs.
16. The introduction to this report records the wish of the first costs forum in 2001 that the indemnity principle be abolished. This has still not happened amid differing views on the need for primary legislation to do so and the view that if abolished it must be replaced by some provision that would control what a paying party must pay. In the absence of any likelihood of primary legislation and in recognition of the need to simplify the criteria for costs recovery, removing the risk of technical challenge and satellite litigation the CJC recommends the establishment of a Costs Council to determine between the parties rates not dependent on rates agreed between solicitor and client.

³⁷ The Hon. Mr Justice Colman does not believe that any analysis of the amount of invisible earnings has even been undertaken. This is understood to be because no distinction is made between litigation and administration. A vast amount of invisible earnings is engendered by arbitration work for foreign clients in addition to the work of the Commercial Court; letter from Colman J. to the Senior Costs Judge 8 April 1997.

³⁸ Vice-Chancellor and Head of Civil Justice (now Lord Scott of Foscote) addressing the Law Society's Oxford Conference in April 1997

Recommendation 17

Between the parties costs should be payable on the basis of costs and disbursements reasonably and proportionately incurred and should be assessed at hourly rates determined from time to time by the Costs Council (Recommendation 19) without prejudice to the ability of solicitors (and barristers) to agree other rates on a solicitor/client basis.

Regulation of claims management companies

1. It is generally recognised that the activities of claims management companies (sometimes called claims farmers) such as Claims Direct and The Accident Group, have not been of benefit to claimants. Although both those companies have ceased to exist many other claims management companies have come into existence. They are at the moment unregulated. A number of jurisdictions, notably New South Wales and Hong Kong, are also experiencing difficulties with claims farmers even though in those jurisdictions success fees and after the event insurance premiums are not recoverable from a paying party.
2. Following a speech by the Lord Chancellor in 2004, when he said “So if the claims management sector does not put its own house in order we will consider how new formal regulation could be introduced.”, the Government announced in the Queen’s speech in May 2005 two new Bills to address the alleged “compensation culture” and to regulate the supply of legal services to the public. The CJC will be monitoring closely the progress of these Bills to ensure that provisions to control the behaviour of CMC’s and to eradicate the perception of the myth of the compensation culture are implemented in a manner that extends rather than restricts the options for people to fund their legitimate claims and gain access to justice in a system that guarantees proportionality of costs.

Recommendation 18

The CJC endorses the proposed legislation announced by the Government to regulate Claims Management Companies and urges that this be introduced with as much speed and rigour as possible so as to protect consumers and reduce if not remove opportunities for “technical” costs litigation that have bedevilled the Courts at all levels.

Litigants in Person

1. The number of litigants in person using the courts is on the increase. This is the experience in a number of jurisdictions around the world. The more difficult and problematic litigation funding becomes, the more litigants are forced to rely on their own resources. CPR 48.6 has recently been amended to clarify that the amount of costs to be allowed to a litigant in person shall be, where the litigant can prove financial loss, the amount that he can prove he has lost for the time reasonably spent doing the work, or, where that financial loss cannot be proved, an amount for the time reasonably spent doing the work at the rate set out in the Costs Practice Direction (currently £9.25 per hour). Under the Employment Appeal Tribunal Rules 2004, which are in similar form to CPR 48.6, the prescribed rate is £25 per hour which increases automatically by £1 on 6 April in each year from 2006.
2. Following a review announced by May LJ, then Deputy Head of Civil Justice, the Senior Costs Judge chaired a Working Party that recommended a single flat rate for litigants in person. The amount of judicial time spent dealing with the issue of financial loss is disproportionate.³⁹ Moreover data collected in the SCCO indicate that in approximately 85% of cases in which litigants in person are receiving parties the attempt to establish financial loss fails.
3. The view of the CJC is that if the decision is taken to allow only limited costs recovery litigants in person should be allowed to recover the scale figures,

³⁹ see *Mealing-McLeod v CPE* [2000] 2 Costs LR 223 at 226

rendering unnecessary arguments whether there has been a financial loss. The alternative is the introduction of a single flat rate for Litigants in Person.

Recommendation 19

Successful litigants in person should be entitled to a simple flat rate (or fixed fee in a scale scheme) whether or not they have sustained financial loss.

A Costs Council

1. The development in recent years of what has been described as a “costs industry” is an undesirable barnacle on the civil justice system. Litigation that now extends to “arguments about the costs of arguments about costs” brings the civil justice system into disrepute. The ingenuity of participants in litigation to develop novel arguments about entitlement or non entitlement to costs will continue to spawn further satellite costs litigation unless steps are taken to bring control, simplification, proportionality and predictability to the current system.
2. The recommendations of the CJC in this report should go a long way to bringing control, simplification, proportionality and predictability to the areas we have addressed, but there needs to be a closer, continuous and permanent means of overseeing these requirements, monitoring the costs system and undertaking regular review. In the last four years of its life the CJC has spent a considerable (even disproportionate) amount of its time on the priority issue of costs. With the production of this report, at the conclusion of this stage of its programme, in order to improve access to justice by analysing funding options and promoting proportionality, the CJC believes that the time has come to establish a new specialist body to oversee the introduction, implementation, monitoring and review of the new costs framework regime that we recommend.
3. This organization should have responsibility for deciding annually after consultation and by reference to objective economic criteria, appropriate guideline

hourly rates allowable between the parties on a fair and reasonable basis, thus rendering redundant the need for the indemnity principle that could then be allowed quietly to “go to sleep”. This new body should be called ‘**The Costs Council**’ that should either be a free standing body or should remain under the auspice of the CJC as a committee that would be chaired by a judge and have a membership that includes a broad range of interested parties.

Recommendation 20

A Costs Council should be established to oversee the introduction, implementation and monitoring of the reforms we recommend and in particular to establish and review annually the recoverable fixed fees in the fast track and guideline hourly rates between the parties in the multi-track. Membership of the Costs Council should include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary.

Recovery of costs in Pro Bono cases

The CJC is aware of work initiated by the Attorney General’s Pro bono co-coordinating committee, supported by the DCA in its report “Making Simpler CFA’s a Reality” to establish a mechanism whereby a successful litigant who is assisted pro bono should in the normal way be entitled to recover costs. The proposed vehicle for this arrangement is a CFA supported by an antecedent agreement between the pro bono lawyer and client that any costs recovered will go, not to the lawyer, but to a recognized pro bono charitable organization or a central charitable foundation fund. The CJC supports this concept and encourages the DCA and the professional bodies to bring it to fruition.

Recommendation 21

That the DCA and the professional bodies (Law Society and Bar Council) should work together with the Attorney General's pro bono co-ordinating committee to introduce a pro bono CFA.



THE APPROACH IN OTHER JURISDICTIONS

This appendix sets out the findings of the Civil Justice Council survey of costs and litigation funding in different jurisdictions. The appendix is divided into Common Law and Civil Law jurisdictions. Within those sections are set out, details of places visited, as well as those in respect of which further research has been carried out.

Common Law Jurisdictions

Australia

- Overview

In Australia the traditional rule is that costs follow the event. The rule is of wide application, although it has been modified in respect of small claims, industrial matters in the Federal Courts, appeals to the Administrative Appeals Tribunals and Family Proceedings.⁴⁰ This system, known as the "costs indemnity rule", evolved in the equity jurisdiction to meet concern that a person should not suffer loss as a result of having to assert or defend his or her rights.⁴¹ It is now recognised that the rule:

- compensates successful litigants for at least some of the costs they incur in litigating;

⁴⁰ see Australian Law Reform Commission Issues paper 13 October 1994 paragraph 1.4

⁴¹ Op cit paragraph 3.2 and see B.C. Cairns Australian Civil Procedure 3rd Edition, The Law Book Company Limited Sydney 1992 487

- allows people without means to litigate;
- deters vexatious, frivolous or other unmeritorious claims or defences;
- encourages settlement of disputes by adding to the amount at stake in the litigation;
- deters delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct.⁴²

Under the costs indemnity rule an order for costs entitles a party to claim reimbursement for the costs of legal representation and expenses incurred in the course of preparing and conducting litigation. The amount of costs is determined either by agreement or by submitting a bill of costs for taxation or assessment in accordance with the rules of the relevant Court. The rules of Federal, State and Territory Courts specify the work which is to be taken into account when determining what costs are payable by the unsuccessful party. The rules include scales which specify the amount payable for each item of work.

The exception to this is New South Wales where scales have been replaced by a system which allows a successful party to recover the reasonable costs of all work that was reasonably done.⁴³ Because most Australian Courts are able to exercise some federal jurisdiction there is a wide range of laws and practices governing the awarding of costs. Costs regimes vary according to the forum and type of matter being litigated. The regimes vary in relation to the types of case that come before Federal, State and Territory Courts and Tribunals.

The Australian Law Reform Commission

In 1994 the Australian Law Reform Commission considered what, if any, reforms would be justified and in particular looked at:

⁴² Op cit paragraph 3.2

⁴³ see Legal Profession Act 1987 (NSW) Part 11 Div 6,7. Op cit paragraph 4.26 and para 0.6 below.

- abolishing the costs indemnity rule;
- reversing the costs indemnity rule so that each party bears his or her own costs subject to certain exceptions;
- one way costs shifting where a successful plaintiff is entitled to a costs order but a successful defendant is not;
- keeping the costs indemnity rule but making it subject to guidelines on how it should be applied;
- developing special rules for particular situations such as public interest cases, disadvantaged litigants, criminal proceedings and unrepresented parties.⁴⁴

The ALRC issued its Report No.75 "Costs Shifting - Who Pays for Litigation?" in September 1995. Its recommendations in respect of civil and judicial review proceedings were that the general rule that costs should follow the event should be retained subject to certain exceptions. What the Commission envisaged was a regime which reinforced the Court's control of proceedings by way of disciplinary and case management costs orders. It also wished to ensure that litigants were able to pursue meritorious claims or defences regardless of their resources. Finally it was concerned that those who wished to pursue public interest litigation should not be discouraged from doing so and recommended public interest costs orders. The Commission also recommended that Courts should continue to be able to order costs against non parties in appropriate cases.

With regard to litigants in person it was considered that an unrepresented litigant should be able to recover the costs of preparing and conducting the litigation⁴⁵.

The Report recommends:

“A party who is awarded costs should be entitled to recover the reasonable costs that he or she has incurred in the

⁴⁴ Op cit paragraph 6.2 and see paragraphs 6.4 - 6.35 for a discussion of the possible reforms.

⁴⁵ Australian Law Reform Commission Report No.75 Appendix C

course of preparing and conducting the litigation or that part of the litigation specified in the costs order. The reasonable costs are those reasonably required to prepare and conduct the litigation.”⁴⁶

The Commission felt that in determining whether or not costs are reasonable there should be taken into account, the amount and complexity of the issues that need reasonably to be resolved, to ensure that the costs are proportionate to the case and the claim, but without regard to the resources and stature of the parties or to the extent of legal services actually employed.⁴⁷ The Commission's recommendations include the power to make interim orders as to costs enforceable immediately; the power to make disciplinary (wasted costs) and case management costs orders; the power to make orders having regard to the fact that the risk of having to pay the other party's costs if unsuccessful would materially and adversely affect the ability of a party to present his case properly or negotiate a fair settlement. The Report recommends that there should be no right of appeal against an order for costs although such an appeal could be made with leave of the appellate court, leave being given only where there is some manifest error or because of consideration of irrelevant matters.

Further recommendations include the power to order lawyers to inform their clients of the costs incurred, the basis on which the amount has been determined and an estimate of the future costs that will be incurred if the matter proceeds. Apart from making the obvious recommendation, that there should be uniform costs allocation rules in all Federal, State and Territory Courts and Tribunals, the Commission also recommended that the costs allocation rules should be adopted as part of a package of procedural controls, case management systems and other mechanisms for controlling the conduct and thereby the costs of litigation.⁴⁸

The most interesting aspect of the ALRC Report is that, after an exhaustive review of a number of options, it rejected those options in favour of the costs indemnity rule and

⁴⁶ Australian Law Reform Commission Report No.75 Recommendation 2

⁴⁷ Op cit paragraph 2.30 no recommendation was made as to whether reasonable costs were to be determined by reference to scales, market rates or some other measure.

⁴⁸ For a complete list of recommendations see Op cit Appendix F.

made proposals which are in many respects echoed in Lord Woolf's Access to Justice Reforms. There is no doubt that the reformers in both jurisdictions benefited from the knowledge and experience of those in the other jurisdiction.

“Throughout the common law world there is acute concern over many problems which exist in the resolution of disputes by the ... Courts. The problems are basically the same. They concern the processes leading to the decision made by the Courts rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.”⁴⁹

Although the different States approach the question of costs in different ways the Federal Court awards lump sum costs which can be quite large. The parties are permitted to make submissions but there is no contested assessment.

In the Federal Court the process has been carried a step further and, working only with the bill (the form of which has been copied from the New South Wales Supreme Court) and the Court file, estimates of costs are prepared which are usually accepted by the parties. The Federal Courts have their own statutory scales.⁵⁰ The Federal Costs Advisory Committee recommends an increase to the statutory scale periodically having heard submissions. The Federal scales do not increase each year.

Areas visited:

1. New South Wales (Sydney)

In New South Wales taxation has (since 1994) been replaced by a system of costs assessment in which an assessor examines the successful party's bill of costs and

⁴⁹ Op cit paragraph 2.3 quoting Lord Woolf Access to Justice Interim Report June 1995.

⁵⁰ High Court SR223 of 2002, Federal Court SR281 of 2002, Family Court SR241 of 2002

determines an amount of costs that is fair and reasonable.⁵¹ Costs Assessors have powers similar to Costs Judges in England and Wales and have the power to determine who shall bear the cost of the assessment. Their decisions are reviewable by appeal to the Supreme Court.⁵²

In assessing what is a fair and reasonable amount the costs assessor may have regard to all or any of the following matters:

- whether the barrister or solicitor complied with any relevant Regulation, barrister's rule, solicitor's rule or joint rule;
- whether the barrister or solicitor disclosed the basis of the costs or an estimate of the costs and any disclosures made;
- any relevant advertisement as to the barrister's or solicitor's costs or skills;
- any relevant costs agreement;
- the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter;
- the instructions and whether the work done was within the scope of the instructions
- the complexity, novelty or difficulty of the matter;
- the quality of the work done;
- the place where and circumstances in which the legal services were provided;
- the time within which the work was required to be done.⁵³

⁵¹ Legal Profession Act 1987 (NSW) Div 6,7. Costs Assessors are practising barristers or solicitors appointed by the Chief Justice of the Supreme Court: Section 208S and Schedule 7. Taken from Australian Law Reform Commission Issues paper 13 October 1994 paragraph 4.35.

⁵² Legal Profession Act 1987 (NSW) Sections 207-208

⁵³ *ibid* Section 208B

There are further provisions in respect of the assessment of party and party costs. In such a case the assessor must consider: (a) whether or not it was reasonable to carry out the work to which the costs relate; and (b) what is a fair and reasonable amount of costs for the work concerned.⁵⁴ The assessor is required to determine the costs payable by assessing the amount of costs that, in his or her opinion, is a fair and reasonable amount. The Court or Tribunal may order that the costs are to be assessed on an indemnity basis in which case the assessor must assess the costs on that basis⁵⁵ having regard to any relevant rules of the Court or Tribunal⁵⁶. The costs assessed include the costs of the assessment which in turn include the costs of the assessor. It is open to the assessor to determine by whom and to what extent the costs of the assessment are to be paid.⁵⁷

The costs assessor is also required to take into account additional matters when assessing costs ordered by a Court or Tribunal, that is to say:

- the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter;
- the complexity, novelty or difficulty of the matter;
- the quality of the work done and whether the level of expertise was appropriate to the nature of the work done;
- the place where and circumstances in which the legal services were provided;
- the time within which the work was required to be done;
- the outcome of the matter.⁵⁸

Although the way in which the assessment of costs is conducted is now considerably different from the system in use in England and Wales the factors to be borne in mind are

⁵⁴ *ibid* Section 208F(1)

⁵⁵ which does not appear to be defined

⁵⁶ *ibid* Section 208F(2) (3)

⁵⁷ *ibid* Section 208F(4)

⁵⁸ *ibid* Section 208G

very similar to those set out in CPR 44.5, except item (vi) above which requires the use of hindsight. The form of bill which is submitted (on a claim form) has seen a move away from lump sum time claims to a simple chronological itemisation of all the attendances undertaken. Such bills are more time consuming to prepare but this format allows those concerned to see at a glance exactly what has been done and why. The format similarly precludes large discretionary claims for skill, care and responsibility as all the attendances are claimed for directly.

The procedural rules require the parties to prepare written objections in advance in order to identify the issues. This has meant that it is possible to resolve the majority of assessments without the need for the parties to be present.

Barristers and solicitors are required to disclose to the client the basis of the costs of legal services to be provided. The legal representative is required to disclose the amount of costs if known; the basis of calculating the costs; the billing arrangements; the client's rights in relation to review of costs; the client's rights to receive a bill of costs; and any other matter required to be disclosed by Regulations.⁵⁹

Legal representatives are also required to disclose estimated costs and where an estimate is given must inform the client of any significant increase.⁶⁰

In 1997 the Legal Profession Act was amended with a view to curing various defects. The amendments permit the recovery of lump sum costs for obtaining and enforcing default judgments and other fixed costs. A costs assessor must make an assessment in accordance with the rules of the relevant court that made the order for costs. The costs which are assessed must include the costs of the parties to the assessment and the costs of the costs assessor. A costs assessor is permitted to have regard to a costs agreement but must not apply the terms of the agreement for the purpose of determining fair and reasonable costs when dealing with an application for assessment of party and party costs.

⁵⁹ Legal Profession Act 1987 Section 175

⁶⁰ *ibid* Section 177

Since 1999 costs assessors must provide reasons in every case where an application has been lodged. Provision has also been made for review of the costs assessor's decision by a panel of two assessors.

In New South Wales over the last 20 years there has been a move away from legal aid. Plaintiffs now rely on law firms using no win no fee agreements. There is very little legal aid. Commercial cases may be funded by the client or by litigation funders who are entitled to charge a percentage of recovery for funding but they tend to fund large cases not small cases. Trade union membership is dramatically declining. Trade unions very rarely fund litigation since they do not have the money to do so.

There is no ATE insurance and no funding in respect of adverse costs. Lawyers acting on a no win no fee retainer may charge up to 25% of the time charge as a premium but this is not recoverable from the paying party.

Tort law reform in New South Wales, which restricts proceedings for personal injuries to cases in which the claimant has sustained a permanent disability of more than 15%, has had a chilling effect on litigation.

District courts are now running at 40% of their previous levels and revenue has dropped, although the number of Judges remains the same. 22,000 cases were issued in 2001/2002, 8,000 cases in 2002/2003.⁶¹ In New South Wales there is not full recovery of court fees, the Attorney General's Department estimates the recovery at approximately 50%, although in commercial courts this is greater since commercial companies have to pay double fees.

In addition to the 15% threshold there are limitations on costs recovery in cases under \$100,000. Where the disability is between 15% and 32% the award of damages is limited. If the claim is under \$100,000 there is a limit on the amount that can be claimed as costs from the defendant.

⁶¹ Lynda Muston Assistant Legal Services Commissioner

The Chancery Court, when dealing with applications for provision for family and dependants, ascertains the size of the estate and requires an affidavit of the expected costs from each side. If the costs appear disproportionate to the size of the estate the court caps the costs.

Rules of Court require pleadings to be verified and there must be evidence to support assertions made in pleadings, not just in respect of allegations of fraud. It is a professional offence or may be contempt of court if pleadings contain material which is untrue.

It is generally thought by Judges, legal representatives and government officials in New South Wales that the tort reforms have gone too far and that some relaxation is required.

2. Victoria (Melbourne)

In this state there are three levels of court. It is up to the claimant to select the appropriate court in which to commence proceedings. The Magistrates' Court has a civil jurisdiction. In personal injury matters the jurisdictions are:

- Magistrates' Court up to \$40,000 (shortly to increase to \$100,000)
- County Court – unlimited for personal injury cases, up to \$200,000 in other cases
- Supreme Court – unlimited.

Every court has its own statutory scale. The court, through the Legal Costs Committee, fixes scales in consultation with the profession. The Costs Co-Ordination Committee is chaired by the Chief Justice and contains representatives of all courts, the Legal Costs Committee, the Victoria Government, the Victorian Bar and the Law Institute of Victoria. The Victorian Bar prepares a very short submission to the Committee based on one index in the Australian Bureau of Statistics (ABS). The Law Institute of Victoria prepares a longer submission based on ABS figures and some market place costs. The scales of costs are reviewed annually and take effect from 1 January in each year. Because the

system has been in operation for a considerable number of years there is little need for discussion or negotiation and the legal representatives normally request an increase based on the rate of RPI and a little more. In making their submissions they look at a basket of items. A report is prepared by the Law Institute for the Legal Costs Committee which is normally passed without lengthy discussion. There is normally one short meeting annually. Once the Legal Costs Committee has approved the suggested scale it becomes a statutory rule taking effect from 1 January in every year.⁶²

In a County Court or Supreme Court case, if a claimant is awarded damages of less than half the jurisdictional limit the recoverable costs will be at the level of the lower court scale and the claimant will be ordered to pay the difference in costs to the other side. The court controls lawyers by means of costs sanctions.

This system appears to work without undue difficulty and is accepted by practitioners. The main reason for its success appears to be that the rates are reviewed annually without fail. Although not specifically stated, the amount recoverable between the parties under the scales is equal to approximately two thirds of the solicitor and client costs.

Conditional costs agreements

A legal representative and client may make an agreement whereby the payment of some or all of the legal costs are conditional on the successful outcome of the matter.⁶³ If the client has a successful outcome, a premium may be charged on legal costs of not more than 25% in a contentious matter. Conditional costs agreements are not permitted in relation to criminal proceedings or family proceedings.

The Law Institute of Victoria's Professional Conduct Rules provide that a successful outcome must be one where the client has some money in the hand after all liabilities are met, including a liability to another party in the proceedings. If "successful outcome" is

⁶² see Magistrates Civil Procedure Rules 1999 SR144/2003; County Court Rules of Procedure in Civil Proceedings 1999 SR138/2003; Supreme Court General Civil Procedure Rules 1996 SR142/2003

⁶³ Sections 97 to 99, Legal Practice Act 1996

to be defined in some way other than this, the agreement must be very specific to say this and the legal practitioner must ensure that the client understands this.⁶⁴

Costs between the parties

The method used to determine the costs payable by an unsuccessful party to a successful party are the statutory scales. The generosity of the indemnity varies, the test being necessity (as in party and party costs in England and Wales pre 1986) and reasonableness (similar to the standard basis pre 1998). The most generous basis is similar to the indemnity basis. The indemnity principle applies throughout. The procedure in the Federal Courts is the same.

Different types of claim

In employer's liability cases, unless the claimant has sustained more than a 30% disability, he/she cannot sue in negligence but must use the Workman's Compensation Scheme.

Road traffic accidents are dealt with under an entirely separate arrangement which does not normally involve the courts.

The use of ADR is compulsory and the courts are keen to ensure that it is used. The Victorian representatives were dismayed to learn of the English Court of Appeal decision in Halsey⁶⁵ to the effect that the court could only encourage ADR rather than enforce it.

The Victorian Civil and Administrative Tribunal (VCAT) was established in July 1998 and replaces and consolidates 12 separate Boards and Tribunals. The Tribunal deals with a wide range of matters including consumer matters, credit, discrimination, domestic building works, guardianship and administration (Court of Protection), tenancies, planning and various decisions of government agencies. Within the designated fields the Tribunal has unlimited jurisdiction but no costs are awarded.

⁶⁴ Professional Conduct and Practice Rules 2003, rule 2A

⁶⁵ Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576

In 1989 a scheme of arbitration for small claims was introduced into the Magistrates' Court for claims for less than \$5,000, all costs were abolished and lawyers excluded. Because of political difficulties the scheme did not go through as originally intended and a simplified procedure with an arbitrarily fixed level of costs was introduced and lawyers were not excluded. The figures for costs were set arbitrarily by the executive and there was no consultation with the profession. There was no attempt to work out an acceptable figure for professional costs. When first introduced the costs were \$575 for the scale relating to claims up to \$3,000 and \$690 for those between \$3,000 and \$5,000. Since July 2003 the amounts have been \$1,005 and \$1,083. There is presently a bill before Parliament which will increase the level of a small claim to \$10,000.

Further Research:

Queensland

In Queensland no win no fee is not used. Percentage fees are prohibited but contingency fees are permitted across the board. Proceedings are frontloaded and, it is said, are often settled to the detriment of the client because the lawyer is keen to recover the fee. There is a statutory regime in personal injury and small claims with statutory scales. ATE insurance would probably be regarded as illegal.

In commercial disputes disclosure was a big growth industry generating up to 30% of the total costs in litigation in 1992/93. Queensland dropped the Peruvian Guano test, the test now being that a document must be relevant to the matter in issue. This has led to a great reduction in discovery applications.

Canada

- Overview

There is no single costs system in Canada, the procedures vary from Province to Province. It seems, however, that the applicable principles are, for the most part, the same.

The overall system in Canada is that the loser pays. There is no after the event insurance although it is not unlawful. Contingency fee agreements are said to be so complex that this frightens the clients away. Although there is a no fault scheme for RTA claims and employers' liability claims are dealt with under a Workers Compensation Scheme, tort actions are still available in respect of road traffic accidents over a certain level, and in respect of slips and falls which are pure tort. The Workers Compensation regime only operates in limited circumstances, e.g. where the injury is caused by a co-employee.

The Supreme Court of Canada has from time to time made pre-emptive costs orders and also orders limiting the level of costs if the case is lost. Judges will require the Government to fund litigation and to supervise litigation where there is an important point of principle. Where the Canadian Government is involved in litigation, Judges take it upon themselves to award costs against the Government if an important point of principle is involved. There is no effective test case funding. The Supreme Court of Canada has stated, in relation to ordering the Government to fund litigation: "It is a function of the Judges' common law responsibility".

Province visited:

Ontario (Toronto)

The Attorney General of Ontario announced that he had decided to introduce compulsory mediation in all non-family civil law suits, a measure which to be introduced over four years from mid 1997. Cases are automatically referred to mediation after a statement of defence is delivered and parties are permitted to opt out of mediation only with leave of the Master or Judge if their case is inappropriate for the mediation process. A pilot scheme had already demonstrated that a significant number of cases could be resolved before having recourse to the Courts.

Ontario used to operate a tariff system but this became out of date and meaningless because the figures were not updated. Successful parties did not recover an adequate amount, usually between a quarter and one half of their costs. The tariff system was changed to a “costs grid”⁶⁶ which is effectively hourly rates times hours spent. This system has led to awards of costs which are both inconsistent and unpredictable. The costs grids have not achieved what was intended. For example, the suggested rate for a half day motion was \$2,500 and for one day \$5,000. The Court of Appeal took matters into its own hands, awarding costs of \$8,000 to \$10,000 even in a case where the costs claimed were as high as \$50,000 to \$60,000.

A Practice Direction of 2004 requires the court to carry out a summary assessment whenever possible rather than a detailed assessment. This works reasonably well. Rule 49 of the Ontario Rules contains an offer procedure similar to CPR Part 36, but contemplates a claimant who makes a recovery. Any offer which is made must specify the costs element separately.

Following the perceived failure of the costs grid the Civil Rules Committee set up a Costs Sub Committee to attempt to find possible solutions to the problems which had arisen.⁶⁷ The Costs Sub Committee issued a consultation paper seeking views concerning a possible block fee model for fixing the costs of proceedings. The Sub Committee

⁶⁶ Ontario Rules of Civil Procedure Rule 57 and Tariff A Part 2

⁶⁷ Costs Grid Consultation Paper 10 February 2004

proposed to develop a model that would be fair, consistent, predictable and efficient. There was no suggestion of any change from the requirement that Judges should fix costs in all but exceptional cases. The Sub-Committee's mandate was to report back to the Civil Rules Committee as to whether it was possible to establish a block fee structure which would have regard to the indemnity principle, reflect regional differences, have sufficient flexibility and discretion and have due consideration for the observation and concerns of the Superior Court report which had itself led to the setting up of the Costs Sub Committee.⁶⁸ The proposal put forward by the Sub Committee for consultation was: a block fee structure which would have due regard to the indemnity principle, reflect regional differences, have sufficient flexibility and discretion and have due consideration for the observations and concerns in the Superior Court report. The proposal was intended to replace the costs grid based on an hour's times rate approach. The proposed block fee structure was intended to reflect approximately 60% of the reasonable solicitor client cost to the winning party in most cases. The court was to retain the discretion to fix a block fee outside the prescribed ranges in appropriate cases. There was to be no change in the practice of referring the issue of costs to assessment only in exceptional cases. The recoverable costs are described as a "partial indemnity". In fixing the fee the Judge is required to have regard to: the principle of indemnification, the amount that the losing party could reasonably be expected to pay to the winning party in that kind of proceedings, the hours spent, rates charged and experience of counsel, regional differences in the cost of legal services and the factors set out in rule 57 of the Ontario Rules of Civil Procedure.

In 2002 amendments were made to the Solicitors Act to regulate contingency fee agreements.⁶⁹ The Act contains broad regulation making power relating to contingency fees and includes the following regulatory controls:

- all contingency fee agreements must be in writing;
- contingency fees are prohibited in criminal, quasi-criminal and family law matters;

⁶⁸ Fixing Costs An Alternative Approach, 15 October 2002.

⁶⁹ Justice Statute Law Amendment Act 2002

- lawyers are precluded from collecting both the pre determined contingency fee and legal costs, unless approved by a Judge;
 - the client may collect full payment for an award of costs even if it exceeds the amount payable under a contingency fee agreement if the award is used to pay the client's solicitor;
 - the Minister is able to prescribe a maximum percentage that can be charged as a contingency fee;
 - the court may review contingency fee contracts and to endorse negotiated fees above the prescribed standard where it is fair to do so.

Further Research:

British Columbia

Until recently the legal principle that costs are intended to indemnify not to punish or to teach, was generally adhered to in British Columbia. The principle was endorsed in 1979 by the Court of Appeal of British Columbia in *Kendall v Hunt (No.2)*⁷⁰ and in that decision Justice Craig quoted and relied on the dictum of Bramwell B. in *Harold v Smith*⁷¹:

In 1995 the British Columbia Court of Appeal stated:

“In any event the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated. A review of Rule 37, which deals with offers to settle, reveals that in certain circumstances a party may be entitled to costs or double costs⁷² or to no costs at all ... thus although it is true that

⁷⁰ 1979 16 BCLR 295

⁷¹ 1860 5H and N 381 at 385 see para 1.15.

⁷² Double and Treble Costs were abolished in England by 5 & 6 Victoriae Cap 97 .

costs are awarded to indemnify the successful litigant for legal fees and disbursements incurred it is also true that costs are awarded to encourage or to deter certain types of conduct.”⁷³

From early in the 20th century until 1990 British Columbia had, in various forms, tariffs of costs fixing amounts that were allowable for the usual litigation steps, with caps determinable by reference to amounts involved. The stated rationale for the tariffs was the need to predict the costs liability or recovery, on the theory that sensible litigation decision making would follow. It was also believed, at least when the regime was first introduced, that lawyers would make their charges in accordance with the amounts their clients could recover in costs as between parties. This hope was not realised. Further the amounts prescribed by the tariffs were not increased to reflect inflation. As a result the gap between what had to be spent for the required legal services and what could be expected from unsuccessful opponents widened to the point that it was common for counsel in ordinary cases to advise their clients that they should not expect to recover more than about 20% of the fees they would incur. In bigger cases the percentage was often much lower. Provision was also made, but only where an opponent had acted scandalously or outrageously, for indemnity at a higher level, usually about two thirds to four fifths of the actual expense. Orders for costs at the higher level were quite rare.

In 1990 changes were made following a rather perfunctory investigation into the need for costs reform. The product of the enquiry was a tariff aimed at producing costs recovery equal to 50% of actual liability to one's own lawyer. Five scales were created and the applicable scale was determined by the difficulty and importance of the proceeding. There were now no caps dependent on amounts involved. The actual level of indemnity was in fact less than 50% in most cases and counsel in ordinary cases tended to advise their clients that they should not expect more than about a 30% recovery. In July 1998 the allowable amounts were increased by 20% above the 1990 levels.

⁷³ Per Cumming JA giving the judgment of the Court in *Skidmore v Blackmore* 1995 122 DLR (4th) 330 at 337.

The Court in *Skidmore v Blackmore* went on to allow the successful litigant in person costs in excess of disbursements. That decision was explained on the basis that:

“under the indemnity approach a successful self represented lay litigant would be entitled to the costs of doing what a solicitor would do to prepare and present the case.”

Any perceived difficulty with this notion was explained as follows:

“... in this Province costs are assessed as a Tariff in App B of the (Supreme Court) Rules. Thus the difficulty in valuing the time and effort which a self represented lay litigant expends in the preparation of his or her case would be avoided by making an order that costs are to be assessed by the Registrar. The Registrar can then determine what those costs ought to be, as is done where the successful litigant is represented by counsel. The concern in the United Kingdom, that a self represented lay litigant may be over compensated, does not arise in this Province because the Tariff provides significantly less than the amount actually payable by a party to his or her solicitor. Also, the Tariff is flexible enough to allow the Registrar to find a proper balance between the amount required to indemnify for solicitors' services and those things done by lay litigants. The Tariff is flexible in providing for different scales of costs, and for minimum and maximum units. Also, the trial Judge has an overall discretion to exercise which may permit a flexible measure.”⁷⁴

⁷⁴ *ibid* at 340

The general rule in British Columbia is that costs are assessed as party and party costs under an appendix⁷⁵, unless the Court orders that they be assessed as special costs.⁷⁶ The basis on which costs are assessed is that they were proper or reasonably necessary to conduct the proceeding.⁷⁷

“Special costs” are those which would formerly have been called solicitor and client costs. Such costs are ordered “only when some form of reprehensible, scandalous or outrageous conduct is proven, “either in the circumstances giving rise to the cause of action, or in the proceedings””⁷⁸. Where special costs are ordered the limited costs allowable under the Appendix do not apply and the Registrar is required to allow those fees which are considered proper or reasonably necessary to conduct the proceeding. In exercising the discretion the Registrar is required to consider all of the circumstances including:

- the complexity of the proceeding and the difficulty or novelty of the issues involved;
- the skill, specialised knowledge and responsibility required of the solicitor;
- the amount involved in the proceeding;
- the time reasonably expended in conducting the proceeding;
- the conduct of any party that tended to shorten or to unnecessarily lengthen the duration of the proceeding;
- the importance of the proceeding to the party whose bill is being assessed and the result obtained;

⁷⁵ Appendix B to Rules of Court BC Reg 221/90

⁷⁶ *ibid* Rule 57(1)

⁷⁷ *ibid* Rule 57(2)

⁷⁸ *op cit* 566 and see *Stiles v Workers Compensation Board of British Columbia* 1990 38 BC LR (2d) 307 CA at 311

- the benefit to the party whose bill is being assessed to the services rendered by the solicitor.⁷⁹

Where an order for party and party costs is made the Court may fix a scale of costs under the Appendix ranging from scale 1 for matters of little difficulty to scale 5 for matters of unusual difficulty or importance. If no scale is fixed the middle scale (3) is used.⁸⁰ If the Court feels there would be an unjust result if costs were assessed under scales 1 to 5 it may order that they be assessed as increased costs. In those circumstances the assessing officer is required to fix the fees that would have been allowed for special costs (under Rule 57(3)) and then to allow one half of those fees, or such higher or lower proportion as the Court may order, together with all proper expenses and disbursements.⁸¹

The assessment of costs is governed by a Tariff listing 36 items of work in respect of which a certain number of units is prescribed. In relation to certain items a minimum and maximum are given. The value of each unit is fixed by the Appendix and rises from \$20 per unit on scale 1 to \$100 per unit on scale 5. In assessing costs, where the Tariff indicates a range of units, the Registrar is required to have regard to the principle that one unit is for matters upon which little time should ordinarily have been spent and that the maximum number of units is for matters upon which a great deal of time should ordinarily have been spent.⁸²

New Brunswick

In 1978 and 1979 committees were set up to review and revise Rules of Court governing civil procedure in both New Brunswick and Ontario. The Ontario Committee (the Williston Committee) produced a preliminary draft of new rules which the New Brunswick Committee adopted as a working model.⁸³ The proposal was that Judges would be authorised to fix an amount for party and party costs using a tariff scale which

⁷⁹ Rules of Court, Rule 57(3)

⁸⁰ Rules of Court Appendix B paragraph 2

⁸¹ Rules of Court Appendix B paragraph 7(1) and (2)

⁸² Rules of Court Appendix B paragraph 3 and Tariff

⁸³ see Party and Party Costs: The New Approach: The Honourable Mr Justice R C Stevenson 1992 Advocates Quarterly Volume 14 No.2 p.129.

tied costs more closely to the amount involved in the action. In the event the Ontario Bar did not support this proposition and it was abandoned. However in New Brunswick the idea was adopted and new Rules of Court were promulgated with effect from 1 June 1982.⁸⁴

Under the new Rules costs are fixed by reference to a tariff⁸⁵ and the traditional item by item tariff is used only in limited instances (for example where proceedings are discontinued or settled before judgment or where a plaintiff fails to improve upon an offer of settlement).⁸⁶

The Court is required to fix the costs relating to fees for solicitors' services in accordance with Tariff A on rendering a decision or making an order:

- after trial of an action;
- on motion for judgment;
- disposing of a proceeding commenced by notice of application, or;
- after hearing an appeal.

The Court is also required to direct by whom and to whom costs are to be paid.⁸⁷ The Court has a general discretion with respect to costs and may fix costs with or without reference to the tariff and without requiring assessment. The Court may also allow or refuse costs, may order costs on a solicitor and client basis and order set off of costs where parties are entitled to costs from one another.⁸⁸

Tariff A is divided into five scales, scale 3 being the basic scale. The fees prescribed are linked to the amount involved in the case on a rising scale between \$1,000 and \$100,000. Over \$100,000 a percentage of the amount above \$100,000 is added, the percentage

⁸⁴ New Brunswick Reg.82/73

⁸⁵ Tariff A

⁸⁶ see Party and Party Costs: The New Approach. The Honorable Mr Justice R C Stevenson 1992 Advocates Quarterly Volume 14 No.2 p.130. The item by item tariff is known as Tariff C, Tariffs B and D provide for party and party costs on default judgments and for disbursements.

⁸⁷ New Brunswick Rule 59.08(1)

⁸⁸ New Brunswick Rule 59.01(2) Op cit pages 131 and 132.

ranging from 1% to 5% according to the scale. On an appeal the fees allowed are 40% of the sum determined in accordance with the scale. It appears to be an accepted principle that the party and party costs are intended to afford a successful party only a partial indemnity for the costs payable to his own solicitor.⁸⁹ The basic scale is intended to represent 40% of what the New Brunswick Committee perceived solicitor and own client costs to be in average cases.⁹⁰

The way in which the amount involved is ascertained is set out in the Rules⁹¹:

“In the tariffs the “amount involved” shall be:

- (a) where the main issue is a monetary claim which is allowed in whole or in part an amount determined having regard to:
 - (i) the amount allowed,
 - (ii) the complexity of the proceedings,
 - (iii) the importance of the issues;
- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
 - (i) the amount of damages provisionally assessed by the Court, if any,
 - (ii) the amount claimed if any,
 - (iii) the complexity of the proceedings, and
 - (iv) the importance of the issues;

⁸⁹ Orkin the Law of Costs, 2nd Edition (Aurora, Canada Law Book inc, 1987) para 102.1

⁹⁰ see Party and Party Costs: The New Approach. The Honourable Mr Justice R C Stevenson 1992 Advocates Quarterly Volume 14 No.2 p.132. It is not clear whether this percentage is based on any solid research.

⁹¹ New Brunswick Rule 59.09(1)

- (c) where there is a substantial non monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
 - (i) the complexity of the proceeding, and
 - (ii) the importance of the issues; or
 - (d) an amount agreed upon by the parties.

The fixing of costs ... is a three step process. First it requires a decision whether the case involves a monetary claim or a substantial non monetary issue. Second, the Court must determine the “amount involved”. Third, and of equal significance, is selection of the appropriate scale.”⁹²

Although initially there was apprehension that awards would vary widely between Judges, experience has shown that a consistent approach has emerged:

“It is now accepted in New Brunswick that "a trial Judge is the person best able to assess all matters relevant to the question of costs"⁹³ and that "the whole purpose of permitting a trial Judge to fix the amount involved ... is to give the trial Judge flexibility when he determines costs"⁹⁴.

Supporters of the New Brunswick system point to the fact that Judges quickly adapted to the system and the fixing of costs routine to them and because there were few if any appeals to the Court of Appeal with regard to a trial Judge's award of costs.⁹⁵

“Other advantages of the tariff A regime include:

⁹² Op cit page 133. For a discussion as to the selection of the appropriate scale see Op cit pages 133-137.

⁹³ Williams v St John New Brunswick 1985 66 NBR(2)(d)10 at 40, 34 CCLT 299 (CA); Sabattis v Oromocto Indian Band 1986 32 DLR(4th) 680 at 686, 76 NBR(2)(d) 227, 14 CPC (2d) 46 (CA).

⁹⁴ Newcastle (Town) v Mattatall 1988 52 DLR (4th) 356, 87 NBR (2d) 238, 33 CCLI 96 (CA) Op cit page 137.

⁹⁵ Op cit page 137

- (a) the elimination of solicitors' time involved in preparing and taxing a bill of costs and the consequent expense to the client;
- (b) the elimination of applications for increases in discretionary items such as counsel and brief fees;
- (c) the speedier closing of files; and
- (d) the saving of the time of assessment officers.

As well solicitors are able to give clients fair approximations of the amount of party and party costs which may be awarded against unsuccessful litigants either at trial or on appeal.⁹⁶

Assessment of costs by motions and trial Judges will end the tradition of painstaking analysis of each step in the litigation with dockets presented and then attacked on cross examination. Inevitably there will be a more general approach to costs returning, to some extent, to the process of 30 years ago when the weight and "feel" of a file and issue indicated the appropriate assessment."⁹⁷

⁹⁶ Op cit page 138

⁹⁷ Ontario Annual Practice 1991-92 Carthy Millar & Cohen (Aurora, Canada Law Book inc 1991) comment on section 141 of the Courts of Justice Act 1984 at p.CJA/105, Op cit p.138.

The tariff A scheme, although similar in a number of respects to that used in British Columbia, is a capped scheme and not an open ended unit scheme. To that extent therefore it is more closely akin to the Woolf Fast Track proposals than to the German system. It does however retain considerable flexibility.

Nova Scotia

In 1982 the Nova Scotia legislature amended the 1967 Costs and Fees Act which was said, by the Attorney General, to be very much out of date in respect of the fees which it prescribed. The amendment to the Act provided that costs and fees would be dealt with by Regulation.⁹⁸ The amendments established a statutory Costs and Fees Committee, whose function was to determine the level of party and party costs.⁹⁹ The Committee having examined a number of costs regimes in use in Canadian jurisdictions eventually adopted the New Brunswick rule and tariffs. The new rule and tariffs apply to proceedings commenced on or after 1 January 1989.¹⁰⁰

“The recovery of costs should represent a substantial contribution towards the party's reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity”.¹⁰¹

Hong Kong (Visited):

Hong Kong applies the English rule that costs follow the event, i.e. loser pays. The losing party is generally required to meet between 60% and 70% of the opponent's fees on party and party issues. The system of costs is similar to that in England and Wales before 1986 (party and party, common fund and indemnity). The indemnity principle operates as it does in England and Wales.

⁹⁸ see Party and Party Costs: The New Approach. The Honourable Mr Justice R C Stevenson 1992 Advocates Quarterly Volume 14 No.2 p.130.

⁹⁹ Costs and Fees Act RSNS 1989 C 104 ss 2(3),(5)

¹⁰⁰ The Royal Gazette December 21st 1988 pages 4832-40. See Party and Party Costs: The New Approach. The Honourable Mr Justice R C Stevenson 1992 Advocates Quarterly Volume 14 No.2 p.131.

¹⁰¹ letter from JWS Saunders of the Nova Scotia Committee on Costs and Fees to members of the Nova Scotia Barristers Society 14 December 1988.

Hong Kong is at the same stage as England and Wales in about 1985, although the courts are making greater use of summary assessment (known as gross sum assessment). In addition the courts, through Practice Directions, have imposed a regime, coupled with attempts at case management, of fixed costs on interlocutory matters in certain circumstances.

Although proportionality is an acknowledged principle, and whilst some personal injury litigators are keen advocates of cost effective litigation, it is not expected that proportionality is likely to succeed, given the fees that lawyers are used to in Hong Kong. It was suggested that the introduction of costs capping and proportionality would result in lawyers being unwilling to undertake personal injury work, resulting in no access to justice. The introduction of a system similar to the German BRAGO would have a similar effect.

There is no before the event legal expense insurance in Hong Kong since insurers do not think that there is a market for the product. At the moment such insurance is simply not available. After the event insurance does not exist.

Legal aid and SLAS

The legal aid system in Hong Kong is good but eligibility is low (20%). The Legal Aid Board itself takes on personal injury litigation. There are some 20 lawyers. Legal aid is subject to a means and merit test in civil and criminal cases. It seems that now, because of cut-backs, the Legal Aid Board is loath to grant legal aid. Claims farmers are moving in and taking up to 40% of damages.

There is a supplemental legal aid system (SLAS) which has a higher eligibility level and has a claw back of damages. There is interest in expanding SLAS to other causes of action if it can be made self funding. SLAS is almost unique. If a case goes to trial the deduction from damages is 12%, if it settles the deduction is 6%, if the case is lost both legal aid schemes will pay the defendant's costs.

The majority of people are able to obtain SLAS, even if they are well to do, provided that their case is a good one. Practitioners state that SLAS could be much expanded and

much improved. Currently decisions are made by legal aid staff who are always very worried that a case may be lost and wipe out part of the budget, but SLAS is working pretty well. The Hong Kong Jockey Club provided the money to seed the SLAS which, when it began, covered cases up to \$1 million but which can now cover cases up to \$100 million.¹⁰²

The SLAS scheme was established in 1984 with a loan of \$HK1,000,000 from the Jockey Club of Hong Kong lottery fund. The whole of this amount was never drawn on and operated as an overdraft facility. Money flowed in relatively quickly. (\$HK 1,000,000 in 1984 was a substantial capitalization). By 1989/90, all of the overdraft facility was paid off and the scheme was self-funding.

The scheme was originally established as a personal injury scheme only and was based on cases being admitted into the scheme, which would have been admitted into the normal Legal Aid arrangements but which were refused on the grounds of means.

The scheme was capable of being modelled because there was a history of average costs and details of the turnover of cases from the existing legal aid scheme. In relation to both these items (cost and turnover) no difference has been detected between the data arising from cases within the normal legal aid scheme and that within the SLAS. The operational model of the SLAS was that personal injury cases in Hong Kong operated on a 90% success rate and a relatively quick turnover. The average lifespan of a personal injury case is between 2 and 3 years. If a case is taken on, on the basis of it having a reasonable prospect of success then the SLAS support can be discharged if the prospects decline. At that point SLAS will pay the defendant's cost to that stage. The defendants are happy with the SLAS scheme because they are able to recover the costs if they win, which may not be possible if they win against a private client.

Applicants pay to the SLAS a maximum contribution, which is the same as under the legal aid scheme together with a \$HK1,000 application fee. This is important because it avoids frivolous claims.

¹⁰² Patrick Burke solicitor, Colin Cohen solicitor, Neville Sarony QC SC, Ruy Barretto SC – meeting 2 November 2004, Offices of Lunning & Chan, solicitors, Hong Kong.

If a case is taken on by SLAS and it settles, then the supported person has to pay 6% of their recovery to SLAS. If the case proceeds to trial (or delivery of the brief) then 12% has to be paid. The effects of this are to encourage settlement. (These figures are currently subject to review. Because the scheme is financially healthy the winning at trial “take” is being reduced to 10% while the settlement figure stays at 6%).

In 1995, the Hong Kong Government put in an extra \$HK27,000,000 in order to extend the scheme so that it now covers professional negligence, medical and dental negligence. Experienced lawyers who deal with all applications decide the merits test.

The question as to whether a case will be handled in-house or by a panel depends on two factors. Firstly, the capacity of the in-house provision and, secondly, the desire of the client for his or her own lawyer to deal with the case. Although, the lawyer must be on the Legal Aid Panel, if the client wishes to use that lawyer, then they will be instructed.

Once a lawyer is given a case by SLAS there is a requirement that the lawyer reports to SLAS with the current cost position and estimates of the prospects of the case. Legal Aid will normally be granted in stages.

In principle, all cases have to satisfy the same merits test, whether the potential costs involved are small or very large. In practice, the SLAS monitoring committee keeps a very close eye on the cases to make sure that such cases do not go wrong and create a crisis for the fund. However, they do not look at the file but look at reports from the lawyers, the pleadings, medical reports, and Counsel’s opinion. They try not to be bureaucratic but simply focus on the question as to whether the case is likely to win.

In the area of personal injury, there is a no fault workers’ compensation scheme but this only covers cases up to a financial limit and therefore there are common law cases which operate above that limit and these will come into the scheme. The scheme also covers employers’ compensation, medical and dental negligence, and legal professional errors. In the area of medical and dental negligence, the scheme will be prepared to fund an expert before looking at the case further.

Data shows that in 2003 a total of 106 applications were processed under the SLAS scheme and 79 Legal Aid Certificates were issued. In 2003 the scheme had an operational surplus of the \$HK7.7million (a decrease of 18% as compared with 9.4 million in 2002). The net assets of the fund stood at \$HK87.2 million as at 30 September 2003 and these appear to have increased to \$HK90 million by 2005.

New Zealand (Visited) (Auckland)

In New Zealand there is no personal injury litigation. All claims for compensation are handled by the Accident Compensation Corporation (ACC) which, contrary to the commonly held belief in England and Wales, has settled down and is working well.

A review of legal aid is currently being undertaken, including an eligibility review since the levels have not been changed since 1969. It is hoped to increase eligibility limits and to give more money to the legal aid fund. The Government hopes to increase recovery of the “legal aid loan” (equivalent to the statutory charge).

The Lawyers and Conveyancers Bill presently before Parliament has reached its second reading and it is expected that it will be a further 2 years before the rules are implemented (2006). Part 11 of the Bill contains provisions allowing lawyers, in limited circumstances, to enter into conditional fee agreements, also known as contingency fee agreements. The provisions will enable a lawyer and client to agree that either the entire fee or an agreed proportion of the fee will only be payable on the success of the client’s matter. Family court, criminal and immigration cases are excluded from conditional fee arrangements.

In litigation other than for personal injury the costs are governed by scales of tariffs fixed by the Rule Committee. The scales are described as A, B, C in respect of steps taken, and 1, 2, 3 in respect of complexity. Counsel are required to state which band is applicable. The decision as to where any particular case falls within this matrix is made by a judge, in effect in case management, rather than a judge or court officer assessing costs after the event. The costs follow the event rule applies but the key difference is that

costs are based on complexity and the significance of proceedings rather than the time spent in any detail. The daily recoverable rate is applied to the time which is decided is reasonable for each step, both in the main proceedings and any pre-trial application. The aim of the exercise is for the winning party to recover two-thirds of their costs so that the balance of unrecoverable costs excises a regulatory effect by giving the client an incentive to ensure that their own lawyer's charges are kept under control.

The rules set out three categories of proceedings. Firstly, cases of a 'straight forward nature', secondly cases of 'average complexity' and thirdly cases of 'complexity or significance requiring counsel to have special skill and experience'. The arrangements do not interfere with the retainer between the client and solicitor. In an article 'Costs and Case Management Changes'¹⁰³ the author notes that there are some disadvantages about the system, namely arguments about what the right band is, the extent of discretion and the ability of the court to depart from the guidelines and issues of variation of judicial decision as to the guidelines. However, the author notes that it is generally assumed there will be greater uniformity of awards and predictability of outcomes and this results in a client being aware of the downside from a losing case or what balance of costs will have to be paid to the solicitor if the case is won.

These Rules apply in all trial courts. The Rules can be applied prospectively: 'The court may at any time determine in advance an applicable category in relation to the proceedings. If it does the category applies to all subsequent determinations of costs in the proceedings unless there are special reasons to the contrary'. The practice is for costs to be considered at an early stage in the proceedings and for the court to fix the scale and category of costs, the steps to that stage and up to the trial. However, a party may apply at any time for costs to be adjusted for a particular step in the proceedings. Costs are fixed and payable at the conclusion of any pre-trial applications, generally by an order tied to a scale.

This scheme usually results in approximately two thirds costs recovery. It is considered to be a very much easier system since there is no detailed assessment and no appeal.

¹⁰³ Beck, New Zealand Law Journal,

Singapore (Visited)

Until 1992 costs in the High Court of Singapore were dealt with on an itemised scale basis similar to RSC Appendix 2. In 1992 all scale charges were done away with and bills are now presented for assessment in two parts, the first part consisting of professional charges and the second part detailing the disbursements. The professional charges are set out in a gross sum format with a narrative and single charge at the end. The amount of the charge is entirely discretionary. Costs are assessed by the Registrars and Assistant Registrars of the Court who have the difficult task of arriving at a fair and reasonable figure without any precedents or guidance. This has led to diverging decisions and the professional bodies representing legal representatives (there is a fused profession) complain that the system is too vague and unpredictable and discussions are sought with a view to establishing a more formalised system, possibly based on the current English pattern.¹⁰⁴

United Kingdom

Northern Ireland (Visited)

Costs in Northern Ireland follow the event in the same way as in England and Wales. Costs both in the High Court and in the County Court are governed by scales. These scales suffer from the disadvantage that they have not been updated and effectively have become a cap on costs. As a result of this failure to update the scales the Belfast Solicitors Association developed and published a scale of solicitors' costs which were accepted by a number of firms of solicitors and a number of insurance companies, as benchmarks in the agreement of solicitors' costs in run of the mill personal injury cases. If solicitors are unable to agree their costs in accordance with this unofficial scale the only recourse is to have the bill taxed (assessed) which will be done in accordance with the statutory scales. A similar scale, known as the Comerton scale, exists in respect of counsels' fees in personal injury cases. This unofficial scale was published by the Bar Council after discussions with the Law Society. The Comerton scale, which has

¹⁰⁴ Per Valerie Thean Assistant Registrar High Court of Singapore 8 May 1997

received judicial backing¹⁰⁵, is also used as a yardstick in respect of counsels' fees in non personal injury cases.

Scotland (Visited)

Judges in Scotland have explained the approach to costs:

“The principle on which the Court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it.”¹⁰⁶

“If any party is put to expense in vindicating his rights he is entitled to recover it from the person by whom it was created unless there was something in his own conduct that gave him the character of an improper litigant in insisting on things which his title did not warrant.”¹⁰⁷

Until 1992 the Court regulated not only the level of fees recoverable from a paying party but also the level of fees a solicitor could charge his client in the litigation. Since that date it is only the inter partes charges which are regulated by the Court. Solicitors are free to charge their clients at whatever reasonable hourly rate they consider to be appropriate.¹⁰⁸ The rates recommended by the Law Society of Scotland are generally considerably in excess of the prescribed judicial rate.

In addition to the difference between the judicial rate and the rate charged to the client there is also a substantial gap between judicial expenses and real expenses because of rules preventing the successful party from recovering, in a judicial account, expenses prior to the raising of proceedings. This is known as the “Process Rule” which

¹⁰⁵ Boyd v Ellison & Anor, 29 June 1995, Carswell LJ (unreported)

¹⁰⁶ per Lord President Robertson, Sheppard v Elliot (1896) 23 R 695.

¹⁰⁷ per Lord Jeffrey, Kirkpatrick v Irving (1948) 10 D 367

¹⁰⁸ See table of fees for conveyancing and general business recommended by the Law Society of Scotland.

circumscribes the area of expenses properly recoverable from the paying party.¹⁰⁹ The Scottish Rule provides:

“The expenses to be charged against an opposite party shall be limited to proper expenses of Process without any allowance (beyond that specified in the table of fees) for preliminary investigations, subject to this proviso that precognitions, plans, analysis, reports and the like (so far as relevant and necessary for proof of the matters in the record between the parties), although taken or made before the bringing of an action or the preparation of defences or before proof is allowed, and although the case may not proceed to trial or proof, may be allowed.”¹¹⁰

The Law Society of Scotland suggested that these rules were an anachronism which should be removed. It recommended changes:

- to allow the solicitor a greater latitude in communicating with his client;
- to allow consultation with counsel to take place on the pleadings whether that
- comes before or after the Record has closed;
- the costs of medical reports obtained to deal with offers to settle in personal injury
- cases before litigation commences; and discussions and negotiations with

¹⁰⁹ See *Shanks v Gray* (1971) SLT at 26. In the English Courts costs incurred prior to the commencement of proceedings may be allowed on taxation. Disputes antecedent to the proceedings which bear no real relation to the subject of the litigation cannot be regarded as part of the costs of the proceedings but disputes which are in some degree relevant to the proceedings as ultimately constituted and other parties' attitude make it unreasonable to apprehend that the litigation would include them may be allowed on taxation. per Sir Robert Megarry VC in *Re: Gibson Settlement Trusts* 1981 Ch 179.

¹¹⁰ General Regulation 6. The equivalent rule in the Court of Session Rules 42.10(1) is: "only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed".

- defenders or their insurers before litigation commences.¹¹¹

The paper argued that it was inequitable that such charges were allowed after litigation had commenced but were not allowed before litigation had commenced.

Scottish fees do not bear an uplift for care and conduct although the Court of Session Rules and the General Regulations of the Sheriff Court Rules provide for the allowance of an "additional fee" in cases of complexity or exceptional circumstances.¹¹² The Scottish Law Society submitted that these rules led to forum shopping by Scottish litigants who would be disadvantaged compared with the English counterpart.

It was also argued that the Court table of fees gave unsuccessful parties no incentive to offer early settlement and might in fact operate as a disincentive. It was argued that full costs would provide a substantial incentive to early settlement.¹¹³

The basic party and party expenses are regulated by the Court which can award an additional fee bracket on certain criteria:

- the complexity of the cause and the number, difficulty or novelty of the questions raised;
- the skill, time, labour and specialised knowledge required of the solicitor;
- the number or importance of any documents prepared or perused;
- the place and circumstances of the cause or in which the work of the solicitor in
 - preparation for and conduct of the cause has been carried out;
 - the importance of the cause or the subject matter of it to the client;
 - the amount or value of money or property involved in the cause;

¹¹¹ Law Society of Scotland submission to the Lord President's Advisory Committee 1996.

¹¹² Court of Session Rules Rule 42.14, Sheriff Court Rules General Regulation 5.

¹¹³ Law Society of Scotland submission to the Lord President's Advisory Committee 1996.

- the steps taken with a view to settling the cause, limiting the matters in dispute or
- limiting the scope of any hearing.¹¹⁴

Whilst these factors are similar to the factors set out in CPR 44.5 the award of an additional fee is not the same as an allowance for care and conduct. The Auditor of the Court has stated:

“... in recent years the Court has more frequently granted an additional fee (but) it is by no means invariably done and the solicitor is more often than not left with only the basic or A factor.”¹¹⁵

United States of America

Overview

The American rule is that each party to civil proceedings must bear its own fees and costs except where the litigation is vexatious or an abuse of process.¹¹⁶ The Supreme Court of the United States has explained its support of the rule as follows:

“ ... since litigation is at best uncertain one should not be penalised for merely defending or prosecuting a law suit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing including the fees of their opponents’ counsel ...”¹¹⁷

¹¹⁴ Rule 42.14(3)

¹¹⁵ letter Auditor of the Court of Session to the Senior Costs Judge 12 March 1996.

¹¹⁶ *Arcambel v Wiseman* 3 Dall 306 1 L Ed 613 (1796)

¹¹⁷ *Fleischmann Distilling Corp v Maier Brewing Co* 386 US 719, 87 sup Ct 1404, 1406 (1967)

Since the 1960's both Congress and State legislatures have introduced laws that provide that a successful plaintiff can recover his or her costs but a successful defendant cannot.¹¹⁸

The level of litigation in the United States is sometimes attributed to the costs regime in operation there but it has been suggested that it is in fact the product of a number of factors.¹¹⁹

New York State (Visited)

Normally in a personal injury case the court will not interfere in the agreement between the client and the lawyer as to the lawyer's remuneration but in some States (particularly in New York) the position is regulated through the court. The lawyer is required to file with the court a schedule setting out who referred the case to the lawyer and the basis of the contingency fee agreement. In personal injury the "lodestar" approach (time x rate) is sometimes used. This is similar to the English system and suffers from the same problems of rewarding the indolent and penalising the expeditious. The courts have therefore gone back to judicially approved rates, i.e. a percentage, but lodestar records are still required by the court as a check. The court looks at the value of the case and authorises a percentage.

In class actions the court will use the lodestar approach as a starting point adding a multiplier for expedition, complexity, etc.

American lawyers expressed the view that the loser pays system inhibits litigation and results in slow development of access to justice within common law systems. Retaining a fee shifting system ignores globalisation. The experience of American lawyers is that it is frequently necessary to sue in the American courts as there was no access to justice in other courts, also the level of damages in US courts is far higher. Costs capping and costs budgeting was thought to be desirable. In some States there is no regulation other than ethical restraints.

¹¹⁸ This is one way fee shifting see e.g. Civil Rights Attorney's Fees Awards Act 42 US CA 1988 (1982); Equal Access to Justice Act 20 US CA 2412 (1988).

¹¹⁹ see "Litigation Mania in England, Germany and the USA: Are we so very different?" Professor Markesinis, Cambridge Law Journal 49(2) July 1990 pp.233-276.

Defence lawyers accept that all claims are brought on a contingency fee basis. The only penalty for losing a case is that the lawyer is unable to recover any payment for the work done. The contingency fee system does provide access to justice.

Since World War 2 the scale of damages awarded in the US has exceeded inflation largely because of non economic damages in personal injury cases.¹²⁰ Medical malpractice is the most expensive form of litigation. Small lawyers cannot afford to develop a case because they cannot bear the cost of disbursements and therefore do not achieve a satisfactory result. Many mass torts involve coupon settlements resulting in claims being settled without there being any proof of damage. Without contingency fees these claims would never be brought, although the loser pays system does restrict unmeritorious defences. The problem in the US is “strategic litigation” rather than frivolous litigation. It is possible to apply to strike out the case with an order for costs in favour of the defendant against the lawyer.

Clients shop around, not because of the contingency fee, but to obtain the highest estimate of damages from the lawyer.

A sole practitioner US lawyer¹²¹ expressed the view that contingency fees allowed the little guy to take on the big guy. The loser pays system would have prevented the bringing of claims known as the US litigation “unsafe at any speed” and the Bjork Shiley litigation.

Difficulties with the contingency fee system are caused by abuses such as ambulance chasing. Fees should be calculated on damages, less disbursements, with the percentage fee based on the net amount. It is an abuse to take the figure on the gross amount and then to deduct disbursements from the damages. The lodging of the retainer details at court means there is a significant amount of court supervision in New York State. The lawyer is also required to file a closing statement dealing with costs and to swear that it is true.

¹²⁰ Professor Anthony Sebok, Brooklyn Law School, 23 February 2004

¹²¹ Stephen Peskin, 24 February 2004

Advertising has produced the greatest problems. Lawyers are actually buying cases but put it down as advertising. In order to acquire sufficient finance to run a contingency practice it is necessary to take on other claims at an hourly rate. The first contingency fee cases are likely to be low value and therefore low risk. If the claim is successful the contingency fee should provide something towards the contingency fund. There is a real pressure to settle at below value in order to maintain cash flow but if the lawyer can hang on, a better settlement will be achieved and therefore a greater fee.

There is factoring in the US but the factors charge high rates of interest. The lawyer cannot advance money to the clients since this is prevented by champerty rules. Factors effectively buy the case from the lawyer and charge usurious rates of interest. The alternative is either not to bring an action or to pay hourly rates. Most clients cannot afford to do this and therefore contingency fees and no fee shifting are the answer.

Further Research:

Republic of South Africa

The law relating to costs in the South African Supreme Court appears very little different to the costs regime in England and Wales in the mid 20th century. The substantive law is Roman Dutch law. All costs are governed by the Supreme Court Scale of Costs and there are tariffs of costs for the Appellate Division, Magistrates' Courts, the Legal Aid Board and non litigious matters. The costs regime does not appear to have developed, for example: perusal of documents is calculated on a folio basis or in some instances on a page count basis. To all intents and purposes costs are taxed against a tariff which is the equivalent of Appendix N which governed the amount of costs in England and Wales from 24 October 1883.¹²²

¹²² information supplied by Mr Registrar Hartley-Wiley, Registrar of the South African Supreme Court

Civil Law Jurisdictions

Europe

Overview

The basic rule prevailing in European countries having a civil law jurisdiction is that the losing party must pay, not only his or her own costs, but also those of the winner. Rules differ in each country in respect of the exceptions and qualifications to this rule. Broadly there are three classes of exception:

- those that focus on the conduct or state of mind of the successful party;
- those that recognise special situations in which the unsuccessful party's good faith
- seems to deserve special recognition such as justifiable doubts about the
- interpretation of a document or statute; and those that recognise differences in the
- economic position of the parties and seek to prevent economic hardship.¹²³

Germany (Visited) (Munich)

The German system appears to work satisfactorily and German lawyers generally appear content, provided the figures are kept up to date.

So far as lawyers' costs recoverable from their own clients are concerned (contingent fees not being permitted), the fees are fixed according to the value of the matter in dispute as determined by the court. A detailed scale is laid down. The figures are valid for proceedings in courts of first instance only. They are increased if the case is brought before a Court of Appeal or before the Federal Supreme Court. In addition to the fee the

¹²³ Australian Law Reform Commission Issues Paper 13 October 1994 paragraph 2.11

lawyer can claim a variety of expenses and outlays e.g. travel expenses, post and telephones.

The question of inter partes costs is dealt with by the Code of Civil Procedure¹²⁴. The basic rule is that "the losing party has to bear the costs of the litigation especially the costs incurred by the opponent in so far as they were necessary for an appropriate pursuit of justice". The Code sets out the items comprised in these costs: reimbursement of necessary travel expenses, compensation for loss of time, (the rules for compensating witnesses apply mutatis mutandis), reimbursement of lawyers' fees plus other expenses and outlay.

Where a plaintiff is only partly successful the costs are split i.e. each party pays one half.

The order for costs does not spell out the details i.e. the single items which are recoverable, and it is necessary to make an application for the costs to be fixed. The decision fixing the amount of costs is made by an officer of the court¹²⁵ who is experienced but not necessarily a lawyer. The officer is under the supervision of the Judge although quite independent in actual practice. The decision of the court officer is subject to review by the Judge of first instance if one of the parties so requests and the decision of the Judge of first instance may be appealed to a higher court. Once the decree as to payment of the costs becomes final it can be enforced against the debtor in the same manner as any other final judgment. This procedure resembles assessment in the English Courts.

The remuneration of German attorneys for any form of legal assistance either in litigation or in other matters is prescribed by the Federal Statute on attorney's fees¹²⁶. There are different scales for Germany and the former East Germany, although it is intended to unify the rates in due course.

The types of fees contained in the BRAGO are (1) fixed fees or; (2) fees within a fixed range; or (3) negotiated fees. So far as fees within a fixed range are concerned the

¹²⁴ Zivilprozessordnung (ZPO) paragraph 91 ff

¹²⁵ Rechtspfleger

¹²⁶ Bundesrechtsanwaltsgebührenordnung: BRAGO

attorney is free to determine the amount within the range at his own discretion and in an equitable manner. Negotiated fees may be agreed between attorney and the client at a figure which deviates from the statutory fee, although the fee may not be below the minimum statutory fee which would be a professional offence. An agreement on fees is effective only when expressed in writing in a separate document.

In the absence of agreement, fees are calculated on the basis of (a) the subject of the legal matter (e.g. claim for purchase price, inheritance settlement, criminal defence etc); and (b) the legal work performed. This work can be divided into two separate categories for which fees differ considerably: (1) rendering advice to the client and; (2) representing the client's interest (usually vis a vis third parties).

In civil, administrative, labour and tax matters the first criterion of fee calculation is the value of the matter. This is the objective monetary value or the client's economic interest in the matter. In non pecuniary claims e.g. divorce, contract, etc the value of the matter can be derived from special statutory provisions or from case law. In court proceedings the value is fixed by the court depending on the value of the matter. A specific fee unit is established.

The second criterion for fee calculation is the actual work performed. Depending on this the fee can be a whole fee, a fraction or a multiple of the fee unit. The way in which the fee unit is arrived at is by identifying the type of work undertaken namely: whether it is advising the client or representing the client; there are then somewhat complicated provisions as to the proportion of the statutory fee chargeable. Thus for oral or written advice to the client the attorney receives a fee within the range of one tenth to ten tenths of a fee unit. In an "average" case there will be an average fee i.e. five tenths.

Where the attorney is engaged to represent the interests of the client vis a vis a third party different rules apply, depending on whether the matter involves out of court activity or litigation. There are complex provisions for calculating the fees in respect of out of court activity. If a disputed matter, which was handled out of court, is subsequently litigated, the general fee for out of court work is credited against the general fee for court proceedings.

If the attorney represents his client's interests in court he generally receives between one and three complete fee units for the first instance according to the value of the matter which is fixed by the court. Whether a fee is incurred or not depends on the fulfilment of certain conditions; (a) a ten tenths general fee for court proceedings arises upon submission to the court of a claim or filing of the defendants initial response and covers all subsequent written submissions to the court during the litigation; (b) a ten tenths hearing or discussion fee arises when a controversial motion is filed in a hearing or when the judicial situation or the position of the case is discussed in court; (c) a ten tenths fee for evidential proceedings arises when the court, in collaboration with the attorney, participates in taking of evidence throughout the litigation. A settlement fee may be earned when the litigation is settled with the assistance of the attorney.

In appeal proceedings the fee is thirteen tenths instead of ten tenths. In the case of an appeal before the "court of last resort" the fee is twenty tenths, if the parties can only be represented by a lawyer admitted to the Federal High Court of Justice.

There is provision for an increase if more than one party is represented and for a fixed standard allowance of 15% of the fee value up to a fixed maximum for incidental expenses such as postage, telephone and telex.

The amount of the final bill is determined by adding the various fee units which arise plus expenses and value added tax. There are also specific provisions as to costs relating to criminal matters and social insurance litigation.

The level of costs allowed is modest and this, coupled with the wide availability of litigation insurance, make it relatively easy for a German citizen to sue and then think, if at all, of a possible compromise. However one result of this appears to be that only approximately 15% of cases settle before trial. The discovery process is significantly weaker than it is under English law.

Although the fixing of attorneys' fees is done by non qualified staff it may be necessary for there to be judicial input in respect of two matters. First, the value of the matter in controversy (there is no difficulty if the claim is liquidated but some classification has to

be determined to enable unliquidated claims to be allocated to the appropriate value band, to enable the costs to be calculated). The second factor to be decided is the actual amount of the costs. There are numerous factors to be taken into account in coming to a final figure and this function is carried out by the Rechtspfleger whose decisions are reviewable by a first instance Judge.

Sweden (Visited) (Stockholm)

1. There are similarities between the Nordic systems, especially between those of Sweden and Finland. The insurance market is small with few companies, three to five in each country (Royal Sun Alliance owns the third biggest Swedish insurance company). Most companies are Nordic companies and each company has a large share of the market. The statistics relating to car ownership are similar to those for the rest of Western Europe (452 cars per 1,000 people).
2. Under the Traffic Damage Act the Swedes have developed an efficient system in which cases can be settled at low cost. The Traffic Damage Act came into force in 1976, it also contains provisions for compulsory insurance which includes “everybody” and damage to other vehicles. It is a no fault system and is effectively just motor traffic insurance. Everybody is insured, only 0.99% is uninsured. In 1978 it was a criminal offence to be uninsured, punishable with a fine. Now the MIB may send a bill to the owner of the car who must pay. The MIB collect SEK 350 million per year (approximately £30 million). The sanction is a civil action for debt. There are approximately 1,500 cases per year.
3. The MIB has access to a database which states, on a daily basis, how many vehicles are insured and uninsured. This information comes from the equivalent of the DVLA. There are some inaccuracies in that some vehicles may have been scrapped or abandoned. There is a match between the insurance companies and the

database daily. There are thought to be some 50,000 uninsured vehicles. The Swedes are very used to using personal identity information and they do not experience the difficulties seen in the UK over e.g., identity cards.

4. The Swedish MIB has to cover the costs for those who have no insurance. However very few vehicles are unregistered. Swedish third party motor liability costs less than 10% of US premium. The Swedish taxes are high to cover the social security costs. The assumption in Sweden is that you are a good driver. However, if you have two accidents in two years the cost of your insurance may rise. The insurance companies keep accident records on those they insure.

5. For those vehicles that are insured the cover is for material damage and personal injury. The Traffic Damages Act is valid worldwide. Where Swedish citizens injured with a Swedish vehicle they have access to Swedish compensation. (the car must be Swedish and have Swedish registration). The right to compensation extends to the driver, the passengers, the pedestrians and the cyclists. Legally the compensation for traffic damage comes under the traffic damage act, tort liability act, and case-law. Very few cases go to court every year although there are around 60,000 personal injury cases. Only 150 – 200 cases are brought to court every year. Legal aid is provided by the insurer to the claimant during the claims settlement and when a case is brought to court.

6. It is difficult to reduce the compensation given. It could be reduced 1) if the driver was drunk and negligent; 2) if the injured person has caused his injuries with intent; 3) if the injured person has caused the injuries by showing gross negligence. The drunk driver reduction is no more than 10% for loss of income although the non economic loss can be reduced by up to 50%. There are very few fraudulent claims.

7. Under the compensation system structure (TDA), loss of income is covered by social security (where everyone is covered and entitled to compensation), occupational insurance (under collective agreements the employer has a duty to pay this) and motor insurance. The Swedish system is successful because the insurance company doesn't have to cover the whole cost of the claim. The base amount from which the insurance system begins is 48,000 kr. If the income is at 30,000 kr the claimant will receive 60-65% of it from the social security if they are no longer able to work. Most of the 60,000 injuries a year are minor. Only 20-25% will have loss of income and very few have a life long permanent disability.
8. Many different tables are used to calculate different compensation. They guarantee that the compensation is fair and equally calculated. The Supreme Court has approved the model of calculation and there is an annual review of them. However, the tables are not used often in specialist cases.
9. For non economic loss under the traffic damages act, all payments are tax free. There are three different categories. For pain and suffering in acute time (i.e.: straight after the accident) the person will receive something even if they only ache. For permanent pain and suffering where there is a disability there is a chart which is referred to where the % of medical disability and age are calculated. The final category is special inconveniences. This category is rarely used.
10. Economic loss covers loss of income, loss of alimony and costs. This is a problem for a very young person who is injured. What profession would they have chose. Often this is based on the average income of 300,000-350,000 kr. They receive very little from the social security system in these cases. A periodical payment is often put in place for them. There is also a delicate system in place for loss of pension. This is adjusted once a year according to inflation. For those who can prove they would have been promoted their prospects are taken into account. There

will be a debate in Sweden about reassessment in the future as some foreign companies feel that the system is too complicated.

11. To make a claim those who are involved in an accident go directly to their own insurance company. They are not required to prove that the other party was negligent, only that an accident took place. The claimant is not involved in the recovery of costs from the negligent party. It is between the insurance companies. Many minor cases are dealt with over the phone and companies ask that the claimant returns to them if they are not cured. Those who make claims may lose their bonus or possibly face a higher premium.
12. The Road Traffic Injuries Commission was established in the 1930's. Cases must be referred to it if the permanent disability is more than 10% and where the loss of income is more than 20,000kr a year. There is free access for the injured party and the commission makes a recommendation. The insurance company follows this recommendation in 95% of all cases. The chairperson is appointed by the Government and the statutes are approved by the Government. In order for a claimant to take their case to court, there is a two year wait. However, the RTIC deals with cases in six months. The commission is staffed by around 20 people and the participants are laymen, judges and insurance representatives. The RTIC is part of the MIB and is financed by the insurance industry. If a claimant is not happy with the outcome they are able to take their case to court following review at the RTIC.
13. The Swedish system allows immediate commencement of settlement and minor cases are settled quickly. In principle the insurance company provides legal aid free of charge during the claims settlement. However, compensation for loss of income is linked to compensation from social security. The system could be improved in a number of ways. It may speed up settlements if the insurance company paid the

whole loss of income. Rehabilitation is not used as much as it could be as no one takes responsibility for it. Fewer claims should be brought to the commission under the compulsory system and the use of schemes and table should be more rational.

Professor Jan Kleineman:

14. In Sweden after the war there was a move to set up a welfare state with social service but there was no debate about it. Sweden is not really a civil law system it is a mixed system. There was no Tort Act until 1976. Too many academics were involved and there is too much detail. Specific rules for personal injury were required. The general part of the Act deals with tort law. There was PI tort reform in 1975 and the Traffic Act at the same time.
15. It was decided that deterrence was necessary, there could be no compensation for intentional injury. Professor Kleineman thought that the reforms went too far.
16. Because the system is a no fault system not many lawyers are needed. Economic loss is compensated but not much is paid for non pecuniary loss. This was not considered in the 1970s. Now the demands being made are bigger.
17. In the 1970s low compensation on a no fault basis was funded by mandatory public insurance. It was intended to cover all loss for life.
18. In the New Zealand system it became very expensive and New Zealand could not afford it, Sweden is in the same position today.

19. In 1975 everything was going well, the only adjustment to compensation was if there was gross negligence. This approach is not popular in Europe and the insurers do not like it. When the book, Compensation for Personal Injury, was published in 1988 the system was in its heyday. A Royal Commission in 1979 (?) showed that there would be a deficit of billions of kroner in the future. That is now the position. Sweden suffered a financial crisis.

20. There was a change of Government and in 1992 money saving cuts were introduced to cut the cost of working damages insurance. The problems did not disappear, the left wing Government would not change it. The original idea was perfect for an affluent country but now that Sweden is not affluent it needs to impose increased taxes. Income taxes are already about 50%. The choice is to change the system or to increase tax. The public is now resistant to more tax increases. It is necessary to change both public and private insurance.

21. Professor Kleineman sits on the Whiplash Commission. Claims have increased greatly. There are some 40,000 whiplash claims of which some 4,000 never return to work. The Government has shifted the cost of house insurance onto employers, which is very unfair. This brings problems for small firms, e.g. an employer had to pay for an employee's breast implants.

22. The system is still waiting for a big blow in respect of RTA. It is possible to claim in negligence under the Damage Act or to go under the Traffic Act. Where, for example, a bus load of party goers is in collision with a drunk driver the employer will have to pay for the injured passengers at least three weeks loss but cannot claim this loss from the drunk driver. There is no political will for change.

23. The Commission proposal is that the State should reclaim costs from the traffic insurer, this would result in increased premiums. The Government resisted any change. The costs are not increasing as rapidly as they have but neither are they reducing. The Chairman of the Commission (a respected senior Judge) stated that he could not understand why employers should pay costs for which they were not responsible. People are tending to over use the system particularly young women.
24. Professor Kleineman has made a proposal: (1) strengthen the system to reduce costs; (2) reduce people's rights (this needs a tough political decision); (3) improve the system.
25. There is discontent and increased attacks on doctors. There is always tension between claimants' or defendants' doctors and it is not possible to get complete objectivity.
26. Should there be special courts for traffic damages? There are 50,000 claims per year but people have a right to proper representation, court delays are increasing.
27. The Traffic Injuries Commission says that the insurers are best at assessing risk and costs but they should not be fixing and approving compensation. If damages are too high that is a matter for the Government. Insurance companies are now run by businessmen not by lawyers.

Further Research

France

28. French civil procedure is predominately written rather than oral. A party to litigation does not have access to anything equivalent to the English system of disclosure of documents. There are two distinct procedures relating to documentary evidence. The New Code of Civil Procedure ensures that a party is furnished with a copy of any document which is to be relied on by the other party, such documents to be supplied without the necessity of an application to the Court. Secondly a party may ask the Court to order production of a document, which, although apparently similar to disclosure in the English Courts, is in fact different.¹²⁷ Traditionally, however, French law has always been hostile to procedures which make parties to civil cases produce evidence contrary to their own interests, even where this is in the interests of truth.¹²⁸ The Judge is given a discretion as to the type of order to be made, but in order to succeed the party seeking the production of a particular document must be able to identify the document in question and show its relevance before its production is ordered.¹²⁹ In fact therefore it is rare for orders of this nature to be pursued.¹³⁰
29. In relation to expert evidence no expert evidence, which might potentially conflict is given in French Courts; rather the Court itself commissions its own expert or experts to report on any issue which it considers necessary. The results of such investigations are not usually heard at the time of the hearing but are considered in the form of a written report. The parties themselves have no right to bring evidence before the

¹²⁷ see New Code of Civil Procedure Articles 138 to 142

¹²⁸ see Couchez Procédure Civile page 229

¹²⁹ J-J Daigre La Production Forcé de pièces dans la Procès Civile (Paris 1979) pages 170 - 173

¹³⁰ J Beardsley "Proof of Fact in French Civil Procedure" 1986 34 AM J COMP L page 474. Dr Simon Whittaker, St Johns College, Oxford, Principles of French Law, Bel, Boyron & Whittaker OUP 1998.

Court, simply the possibility of requesting that a particular investigatory measure be ordered.¹³¹

Costs and legal aid

30. Dr Whittaker suggests that, in general, civil litigation in France is considerably less expensive than in England, and in each jurisdiction a case may be more or less expensive to run depending on such contingencies as the relative number of issues involved, their complexity (both as to fact and to law) and the resulting need to have recourse to expert and other evidence, whether this comes from witnesses (as in England) or deposition and expertise as in France.

“This relative cheapness results principally from the general features of the French civil process ... viz its reliance on (relatively) restricted documentation, its use of judicial expert witnesses and its very short hearings. The honorarium of avocats in respect of court work is not the subject of a tariff but any dispute between them and their clients about fees are settled by a court officer (the bâtonnier) according to settled criteria. If some of these [general features] can be criticised on the basis that they do not encourage the revelation of all relevant facts ... it may be countered that civil justice is relatively more accessible to citizens.”¹³²

31. There are three central features of the treatment of the recovery of costs (frais) in civil litigation by French law. First there is the relatively short list of expenditure which count as dépens including expenses incurred by witnesses, and the remuneration of the emoluments of officiers publics. The remuneration of a party's

¹³¹ Bel, Boyron & Whittaker Principles of French Law

¹³² Bel, Boyron & Whittaker Principles of French Law OUP 1998 Civil Procedure - Costs and Legal Aid

avocat only counts as a dépens if the remuneration is a regulated one and where recourse to an avocat before the court in question is compulsory. The second principle is that it is the loser who pays the dépens of the other side (as well as his own) but the court has a discretion to place either all or part of them onto another party to the litigation.¹³³

32. The third feature of costs is those which do not count as dépens, such as the cost of legal advice, consultation, avocat's fees, where resort to an avocat is not compulsory, these costs may be recovered in one of two ways. If the losing party's behaviour has been unfair or vexatious he may be held liable in damages for the loss which this causes to any other parties to the litigation¹³⁴, otherwise the court has a discretion taking into account what is equitable and the economic situation of the person to be submitted to an order for costs to make no order or a reduced order.¹³⁵ It may be therefore that a person who is successful in litigation may still find that he has to bear a good deal of the cost of bringing it.¹³⁶

Japan

33. The general rule is that the loser pays the winner's costs. These costs however do not include attorney's fees except where they are part of the damages award. Thus although costs may be awarded they tend to be of a modest nature and are rarely enforced. The recoverable items include court fees and disbursements. The Judge has a discretion as to the amount of costs that will be allowed in the costs award and can apportion the costs according to the level of success of either party.

¹³³ New Civil Procedure Code article 696

¹³⁴ see for example New Code of Civil Procedure articles 32.1 (dilatory or abusive suit) article 559 (dilatory or abusive appeal) article 629 (abusive pourvoi en cassation).

¹³⁵ new Code of Civil Procedure article 700

¹³⁶ see further Procédure Civile 7th Edition Sirey 1992 Gérard Couchez and Procédure Civile 23rd Edition Dalloz 1994 Jean Vincent and Serge Guinchard

34. The Japanese system is based on a Franco German system dating from approximately the Second World War. The family law provisions emanate from the USA and grew up later. There are approximately 15,000 lawyers serving a population of 120 million, dealing with litigation, business contracts and international securities agreements. There is little or no litigation by ordinary people and the obstacle to that is perceived to be lack of clarity about charging in a system which is not clear even to lawyers. Japan has fee standards based on the amount involved, that is to say a percentage standard fee based on the amount in dispute together with a further percentage success fee.
35. Apart from the limited costs recovery mentioned above, each party to litigation bears its own costs, as in the United States. In 1993 a committee was set up examining attorneys' and lawyers' fees with a view to amending the standards, the aim being to reduce the percentage on the standard fee and increase the success fee.
36. The Japan Federation Bar Association is required by the Lawyers Law to provide Regulations regarding standards of attorneys' fees. The fees vary depending on the type of case or matter involved. Generally in a civil claim an initial retainer fee is payable at the time of engagement and a success fee is payable at the time of completion of the case or matter in proportion to the degree of success achieved. It is also possible for the attorney and the clients to agree to attorney's fees based on hourly charges.
37. The Regulations Concerning the Standards for Attorneys' Fees, prescribe fees for legal counselling and legal opinions in writing (on an hourly or assignment basis). The Regulations set fees for legal counselling (oral), legal opinion in writing and legal research. In addition percentage fees are prescribed for preparation of documents and in respect of contract negotiation an initial retainer fee is prescribed with a percentage uplift. The initial retainer fee for civil matters is calculated upon

the “economic value of the subject of the matter” and the success fee upon the “economic value of the benefit secured” upon the disposal of the matter.¹³⁷ In the event that the value cannot be determined a deemed value of 5 million yen is utilised¹³⁸ but this may be increased or decreased “considering the complexities of the matter, the importance of the matter, the time and effort involved and the benefit obtained by the client”.¹³⁹

38. The Regulations also specify the initial retainer fee and success fee for litigation, non contentions procedures, family procedures, administrative adjudication and arbitration. These percentages are again based on the amounts involved ranging from 15% (for both initial retainer and success fee) for cases involving 500,000 yen or less to 2% for matters over 1 billion yen. The scale is regressive, the appropriate percentage being charged against each slice of the value.¹⁴⁰ The initial retainer fee and success fee may be increased or decreased to the extent of 30% depending on the contents of the case. However a minimum initial retainer fee of 100,000 yen is prescribed.¹⁴¹
39. Even this brief summary of the Japanese Regulations demonstrates that it is extremely complicated and quite unlike any system examined elsewhere in this paper. It seems that the sheer complexity of the costs provisions forms an effective barrier to ordinary people seeking access to justice. In addition to this the number of lawyers in relation to the size of the population demonstrates a completely different approach to lawyers and litigation by the Japanese people who are not litigious and will, in nearly every case, particularly in commercial matters, resolve their differences by agreement.¹⁴²

¹³⁷ Regulations Concerning the Standards for Attorneys Fees Article 15. Published by the Japanese Federation Bar Associations.

¹³⁸ *ibid* article 17

¹³⁹ *ibid* Article 17(2)

¹⁴⁰ *ibid* Article 18(1)

¹⁴¹ *ibid* Article 18(1.2)

¹⁴² Information and Regulations supplied by Gotaro Ichiki of Hamada & Matsumoto, Tokyo.

European Court of Justice

The relevant costs

40. The European Court of Justice is not concerned with the question of costs between the legal representative and the client; such matters are essentially matters of contract and are dealt with under the jurisdiction of the national courts. Where cases are referred in accordance with CPR Part 68¹⁴³, to the European Court of Justice costs remain a matter for the National Court.

41. In proceedings between the Communities and their servants the Institutions must bear their own costs¹⁴⁴. The Court is therefore only concerned with inter partes costs and then only on certain occasions. If the institution is successful it will recover its costs, but these are normally minimal because the institutions only rarely employ outside lawyers. It is only where the institution is ordered to pay costs or where a losing private party is ordered to pay the costs of an intervener, that the issue of costs becomes relevant.

42. If there is a dispute concerning the costs to be recovered, the Chamber to which the case has been assigned will, on application by the party concerned and having heard the opposite party and the Advocate General, make an order from which there is no appeal¹⁴⁵.

¹⁴³ i.e. under EC Treaty Article 234, Euratom Treaty Article 150 or ECSC Treaty Article 41.

¹⁴⁴ Article 70 Rules of Procedure of the Court of Justice of the European Communities (19 June 1991) [CJRP]; Article 88 Rules of Procedure of the Court of First Instance of the European Communities (2 May 1991) [CFIRP].

¹⁴⁵ *ibid* Article 74 (1). *IBID* Article 92(1).

Awards of costs

Preliminary rulings and other references for interpretation

43. Where a national court or tribunal refers a case for a preliminary ruling or interpretation¹⁴⁶ it is for that court to decide as to the costs of the reference¹⁴⁷. If another Member State or Community Institution has submitted observations but is not a party to the proceedings, the national court is only empowered to deal with the costs of the parties to the original action¹⁴⁸.
44. Article 104(5) CJRP is to be interpreted as meaning that the costs of obtaining a preliminary ruling are governed by national law, as the rules of procedure do not lay down any specific costs rules for preliminary rulings, and reference proceedings are only a step in the action pending before a national court.¹⁴⁹ The principle of equivalence requires that the rules on the costs of preliminary rulings should not be less favourable than those governing domestic actions, and the principle of effectiveness provides that the matter of costs should not render the exercise of community law excessively difficult.¹⁵⁰ It is for the national court, having direct knowledge of domestic law actions, to determine whether the principle of equivalence is satisfied.¹⁵¹

Intervention

45. Member States and Institutions which intervene in the proceedings must bear their own costs¹⁵². When a party applies to intervene¹⁵³ the Court will normally order the

¹⁴⁶ Under IBID Article 103

¹⁴⁷ Ibid Article 104 (6).

¹⁴⁸ Case 62/72 Bollmann v Hauptzollamt Hamburg-Waltershof 1973 ECR 269.

¹⁴⁹ See Bollmann v Hauptzollamt above

¹⁵⁰ See case 279/96 Ansaldo Energia SpA v Amministrazione delle Finanze dello Stato [1998] ECR I-5025; case 326/96 Levez v TH Jennings (Harlow Pools) Ltd [1999] All ER (EC) 1

¹⁵¹ Case 472/99 Clean Car Auto Service GmbH v Stadt Wien [2003] 2 CMLR 40

¹⁵² CJRP Article 69(4); CFIRP Article 87(4).

¹⁵³ Under IBID Article 93; IBID Article 115.

intervener to pay the costs. If the intervention is successful and the party being supported by the intervener is also successful, the Court will normally award the intervener costs against the losing party¹⁵⁴. On the other hand, if all the arguments put forward by the intervener fail, then, notwithstanding that the party supported by the intervener is successful, the Court may order the intervener to bear his own costs¹⁵⁵.

46. If the party supported by the intervener is unsuccessful the intervener will be ordered to bear his own costs and also to pay the costs of the successful party attributable to the intervention¹⁵⁶.

Principles of the award of costs

47. The unsuccessful party must be ordered to pay the costs if they have been asked for in that party's pleadings. Where there are several unsuccessful parties the Court will decide how the costs are to be shared¹⁵⁷. If there is no application for costs in the pleadings each party will bear its own costs¹⁵⁸. The Court may be persuaded to award costs even if they had not been asked for in the proceedings if they are claimed at the hearing¹⁵⁹.
48. Where each party succeeds on some and fails on other heads *or where the circumstances are exceptional* the Court may order that the costs be shared or that the parties bear their own costs. The Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused

¹⁵⁴ Case 130/75 Prais v EC Council 1976 ECR 1589.

¹⁵⁵ CJRP Article 69(4); CFIRP Article 87(4); and see case 792/79 R Camera Care Limited v EC Commission 1980 ECR 119.

¹⁵⁶ e.g. case 118/77 ISO v EC Council 1979 ECR 1277; Case 119/77 Nippon Seiko KK v E C Council and E C Commission 1979 ECR 1303; Case 120/77 Koyo Seiko Ltd v EC Council and E C Commission 1979 ECR 1337; Case 121/77 Nachi Fujikoshi Corporation v E C Council and E C Commission 1979 ECR but see also Case 24/71 Meinhardt v E C Commission 1972 ECR 269 and Mrs P v EC Commission 1981 ECR 361.

¹⁵⁷ CJRP Article 69 (2); CFIRP Article 87(2).

¹⁵⁸ e.g. Case 139/79 Maizena GmbH v EC Council 1980 ECR 3393.

¹⁵⁹ Case 1137 NTN Toyo Bearing Co v EC Council 1979 ECR 1185.

the opposite party to incur¹⁶⁰. Similarly, the costs of examining witnesses may fall to be paid by the party who loses on the issues in respect of which the witnesses were examined¹⁶¹.

Exceptional circumstances

49. It is a matter entirely for the Court, what circumstances it will regard as exceptional, but the circumstances may include: the impossibility of apportioning costs equitably¹⁶². An order that each party bear their own costs may be made because of the complexity of the questions raised in the action¹⁶³.
50. If the defendant's behaviour induces or encourages an applicant to bring an action this may amount to exceptional circumstances, so that if the applicant is unsuccessful the parties can properly be left to pay their own costs¹⁶⁴. Each case must be decided on its own circumstances, but it does not appear that "where the circumstances are exceptional" requires the same quality of being out of the ordinary as is expected in relation to, for example, claims for enhancement in legally aided cases in England and Wales. The provision appears rather to be a device to enable the Court to arrive at a just decision between the parties by dividing the liability for costs appropriately.
51. The provision that the Court may order, even a successful party, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur¹⁶⁵, is an extension of the discretion given to the Court in

¹⁶⁰ CJRP Article 69 (3); CFIRP Article 87(3) and see e.g. Case 265/82 Usinov v EC Commission 1983 ECR 3105 and 322/81 Nederlandse Banden-Industrie Michelin NV v EC Commission 1983 ECR 3461.

¹⁶¹ e.g. Cases 40-48, 54-56, 111, 113 and 114/73 Suiker Unie v EC Commission 1975 ECR 1663.

¹⁶² e.g. Cases 275/80 and 24/81 Krupp v Stahl AG v EC Commission 1981 ECR 2489.

¹⁶³ e.g. Cases 2 and 3/60 Niederrheinische Bergwerks AG v High Authority 1961 ECR 113; and on a question of "general interest" case 175/73 Union Syndicale, Massa and Kortner v EC Council 1974 ECR 917.

¹⁶⁴ Cases 783 and 786/79 Venus and Obert v EC Commission and EC Council 1981 ECR 2445; case 230/81 Luxembourg v European Parliament 1983 ECR 255.

¹⁶⁵ i.e.. under CJRP Article 69 (3); CFIRP Article 87(3).

respect of costs, thus the Court may still award costs against a successful defendant if it was reasonable for the applicant to institute proceedings¹⁶⁶. It has been argued¹⁶⁷ by the Advocate General that a test of reasonableness was appropriate but only if the commencement of proceedings was unreasonable should the party who brought them about (either plaintiff or defendant), be saddled with the costs. However, once an applicant ought reasonably to have known that the proceedings were pointless the applicant runs the risk of being condemned in costs if the proceedings are not discontinued¹⁶⁸. Conversely where the applicant has been misled by the defendant or induced into commencing proceedings unnecessarily, the defendant may be ordered to pay all or part of the costs¹⁶⁹.

52. This rule of procedure again appears to be designed to give the Court a wide discretion as to costs and enables the Court to deal with cases where costs have been unnecessarily incurred and where there has been an abuse of process or other behaviour meriting reproof. Given the wording of the rule the unreasonable or vexatious act of the successful party must have caused additional costs to be incurred¹⁷⁰.

Discontinuance and failure to proceed to judgment

53. A party who discontinues or withdraws from proceedings will be ordered to pay the costs if they have been applied for in the other party's pleadings. However, on application by the party who discontinues or withdraws from the proceedings, costs will be borne by the other party if this appears justified by the conduct of that party. If the costs are not claimed, each side bears their own costs¹⁷¹. There is an argument as to whether this particular rule refers to the discontinuance of the entire

¹⁶⁶ Cases 53 and 54/63 Lemmerz-Werke GmbH v High Authority 1963 ECR 239.

¹⁶⁷ In the Lemmerz-Werke case (above).

¹⁶⁸ Cases 35/62 and 16/63 Leroy v High Authority 1963 ECR 197.

¹⁶⁹ e.g. Case 49/64 Stipberger v High Authority 1965 ECR 521; Case 282/81 Ragusa v EC Commission 1983 ECR 1245; Case 122/77 Claes v EC Commission 1978 ECR 2085; and Case 40/71 Richez-Parise v EC Commission 1972 ECR 73.

¹⁷⁰ Case 31/71 Gigante v EC Commission 1976 ECR 1471.

¹⁷¹ CJRP Article 69 (5); CFIRP Article 87(5).

proceedings or merely the withdrawal of certain heads of claim. The English translation of the Rules of Procedure appears to favour the interpretation that the entire proceedings must have been terminated, but that view is not confirmed by e.g. the German translation. The situation is clearer where there are a number of joined cases, an order for costs can be made in respect of each case discontinued, even if all the cases are against the same defendant¹⁷². The parties may of course reach whatever agreement is appropriate in respect of costs¹⁷³.

54. Where a case does not proceed to judgment the costs are in the discretion of the Court¹⁷⁴. The effect of this rule is intended to cover those cases where the proceedings are not discontinued or withdrawn. In such circumstances the Court must terminate the proceedings, usually by finding that there are no grounds for proceeding to judgment¹⁷⁵. Where the proceedings are terminated by the Court, it has an unfettered discretion on the question of costs and will take into account the behaviour of the parties.

The costs which are recoverable

55. Costs may be recovered both by the Court in certain circumstances and by a party in whose favour an award of costs is made.
56. Proceedings before the Court are free of charge except that:
- a. where a party has caused the Court to incur avoidable costs, the Court may, after hearing the Advocate General, order that party to refund them;

¹⁷² Cases 39, 43, 85/81 Halyvourgiki Inc v EC Commission 1982 ECR 593.

¹⁷³ 16-18/59 Geitling Ruhrkohlen-Verkaufsgesellschaft GmbH v High Authority 1960 ECR 17.

¹⁷⁴ CJRP Article 69 (6); CFIRP Article 87(6).

¹⁷⁵ e.g. 256/81 Paul's Agriculture Limited v EC Council and EC Commission 1983 23 CMLR 176.

- b. where copying or translation work is carried out at the request of a party, the cost will, in so far as the Registrar considers it excessive, be paid for by that party on the appropriate scale¹⁷⁶.

57. Also regarded as recoverable costs are sums payable to witnesses and experts¹⁷⁷ and expenses necessarily incurred by the parties for the purpose of the proceedings, in particular travel and subsistence expenses and the remuneration of agents, advisers or lawyers¹⁷⁸. Witnesses and experts are entitled to reimbursement of their travel and subsistence expenses which may be paid in advance by the Court¹⁷⁹. Witnesses are entitled to compensation for loss of earnings and experts to fees for their services. The compensation or fees are paid by the Court after they have carried out their respective duties or tasks¹⁸⁰. Travel and subsistence expenses of the party personally are only recoverable if his presence at the hearing was necessary¹⁸¹.

- i. “As Community Law does not contain any provisions laying down a scale of costs, the Court must undertake a free appreciation of the circumstances of the case having a regard to the subject matter and nature of the dispute, its importance from the point of view of Community Law, the difficulties of the proceedings, the amount of work which the litigation may have caused the lawyers and the financial implications for the parties.”¹⁸²

¹⁷⁶ CJRP Article 72 (a) and (b) the appropriate scale of charges is obtainable from the Registry pursuant to Article 16 (5); CFIRP Articles 90(a),(b) and 24(5).

¹⁷⁷ Under CJRP Article 51; CFIRP Article 74.

¹⁷⁸ CJRP Article 73 (a) and (b); CFIRP Article 91(a),(b).

¹⁷⁹ *ibid* Article 51 (1); CFIRP Article 74(1).

¹⁸⁰ *ibid* Article 51 (2); *Ibid* Article 74(2).

¹⁸¹ Case 24/790 Oberthur v EC Commission 1981 ECR 2229.

¹⁸² P Dumortier Freres SA v Counsel of the European Communities Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 1982 2 ECR 1748.

58. The Court will also have regard to new and important questions of Community Law raised, and to their financial importance; the extent of the lawyer's work, and the number and diversity of the procedural steps which it has been necessary to take.

ii. "As regards to the remuneration for the activities of lawyers before the Court of Justice, Community Law contains no provisions as to scale fees on which to base a calculation of the amount up to which such remuneration must always be regarded as recoverable costs, within the meaning of Article 73 of the Rules of Procedure.

iii. Therefore, in order to settle this question in each instance the Court must be free to consider the facts of the case, taking particularly into account the importance of the action from the point of view of Community Law, and the volume of work involved for the lawyer in proceedings before the Court."¹⁸³

Legal aid

59. A party who is wholly or in part unable to meet the costs of the proceedings may apply for Legal Aid at any time¹⁸⁴. The question of Legal Aid is outside the scope of this work, but it may be noted that the application need not be made through a lawyer¹⁸⁵ and the decision as to whether or not Legal Aid shall be granted is reached after considering the written observations of the opposite party and after hearing the Advocate General. If Legal Aid is refused the Chamber making the order will not give reasons and there is no appeal from a refusal¹⁸⁶. Where Legal Aid is granted the cashier of the Court will advance the funds necessary to meet the

¹⁸³ Ernst Hake & Co v The Commissioner of the European Communities Case 75/69 1970 ECR 901

¹⁸⁴ CJRP Article 76(1); CFIRP Article 94(1).

¹⁸⁵ *ibid* Article 76 (2); *Ibid* Article 94(2).

¹⁸⁶ *ibid* Article 76 (3); *Ibid* Article 94(2).

expenses¹⁸⁷. The Court of First Instance is required to adjudicate on the lawyer's disbursements and fees; the President may, on application by the lawyer, order that he receive an advance¹⁸⁸. In its decision as to costs the Court may order the payment to the cashier of the Court of the whole or any part of the amounts advanced as Legal Aid. The Registrar will take steps to obtain the recovery of these sums from the party ordered to pay¹⁸⁹. The Chamber may at any time, of its own motion or on application, withdraw legal aid if the circumstances which led to its being granted alter during the proceedings¹⁹⁰.

Assessment of costs

60. If there is a dispute concerning costs to be recovered, the Chamber to which the case has been assigned will, on application by the party concerned and after hearing the requisite party and the Advocate General, make an order from which no appeal lies¹⁹¹. The Rules of Procedure do not lay down any particular requirements in relation to the claim for costs but the rules governing written procedure will apply¹⁹². There is no time limit for the application to have the costs taxed, though the party entitled to costs should send details of the claim to the party liable to pay within a reasonable time¹⁹³. Before an application for taxation can be made there must be a dispute between the parties, in other words attempts must have been made to agree the costs. If there is no dispute the Court will dismiss the application as inadmissible.¹⁹⁴

61. The application for taxation may be made by either the paying or the receiving party although it will usually be the receiving party who makes the application. The party

¹⁸⁷ *ibid* Article 76 (5); *Ibid* Article 97(1).

¹⁸⁸ CFIRP Article 92(2).

¹⁸⁹ CJRP Article 76 (5); CFIRP Article 97(3).

¹⁹⁰ *ibid* Article 76(4); *Ibid* Article 96.

¹⁹¹ CJRP Article 74 (1); CFIRP Article 92(1).

¹⁹² See CJRP Article 37 and 38; CFIRP Article 43 and 44.

¹⁹³ See case 126/76 Gebruder Deitz v EC Commission 1979 ECR 2131.

¹⁹⁴ See Case 25/65 Simet v High Authority 1967 ECR 113; and Case 6/72 Europe Europemballage Corporation and Continental Can Company Inc. v EC Commission (No. 2) 1975 ECR 495.

making the application will normally ask the Court to fix the sum due in respect of costs as a specified amount. From the point of view of practitioners in England and Wales this is most easily done by drawing a bill in the same way as under RSC Order 62. This provides a narrative, details of the work done, the amount sought in respect of each item and the total amount sought in respect of the whole bill. The Court will require evidence in support of the claim for costs and will also hear argument from the applicant, the opposing party and the Advocate General as to whether or not the costs have been “necessarily incurred”¹⁹⁵.

62. The Court may permit the opposing party to make written submissions but there is no formal hearing as such. The Advocate General delivers his opinion direct to the Chamber, it is not circulated to the parties and they do not have the opportunity to comment upon it. Once the Chamber has considered the various submissions an order will be made against which there is no appeal¹⁹⁶. The parties may, for the purposes of enforcement, apply for an authenticated copy of the order¹⁹⁷.

63. The amount allowed is entirely in the discretion of the Court. There are no scales of costs relating to the Court, nor does the Court have to have regard to any scale in operation in a member country¹⁹⁸. Nor does it appear that the Court has to reach its decision in accordance with any agreement between the party and its lawyers¹⁹⁹. This is contrary to the normal indemnity principle observed by the English Courts.

- iv. “...the Court must undertake a free appreciation of the facts of the dispute having regard to its object and nature, its importance, from the point of Community Law and the difficulties of the proceedings, the amount of work which the

¹⁹⁵ see Case 238/78 Ireks-Arkady GmbH v EEC 1981 ECR 1723.

¹⁹⁶ CJRP Article 74 (1); CFIRP Article 92(1).

¹⁹⁷ *ibid* Article 74 (2); *Ibid* Article 92(2).

¹⁹⁸ Ireks Arkady GmbH v EEC above.

¹⁹⁹ Case 4/73 Nold Kohlen-Und-Baustoffgrosshandlung v EC Commission 1975 ECR 1985.

litigation may have caused the lawyers and what the dispute may have meant to the parties in financial terms”²⁰⁰.

64. Where costs are awarded to a number of joint applicants or where cases have been joined, the Court may award a global figure to be divided between the parties in whose favour the order is made²⁰¹.

²⁰⁰ Ireks Arkady GmbH v EEC above.

²⁰¹ Cases 241, 242, 246-249/78 DGV v EEC 1981 ECR 1731.

APPENDIX B

A list of organisations who have contributed to Civil Justice Council events and meetings in relation to the development or analysis of costs law and policy

England and Wales

Abbey Legal Protection	Edwin Coe	Norwich Union
ABI	Fairmays	Nottingham Law School
Accident Group	First Assist Group Ltd	Pattinson & Brewer Solicitors
Accident Line	First Legal Indemnity Ltd	Personal Injury Bar Association
Amelans Solicitors	Geoffrey Parker Bourne Solicitors	ReIntra Ltd
Amicus - MSF	Girlings	Rowe Cohen
AMICUS Legal	Greystoke Legal Services	Royal and Sun Alliance
APIL	Groupama Insurance Ltd	Russell Jones & Walker
Association of Costs Draftsman	Institute of Advanced Legal Studies	Silverbeck Rymer
Bar Council	Iron Trades	Supreme Court Costs Office
Beachcroft Wansbrough	Irwin Mitchell	Temple
Berrymans Lace Mawer	Keystone Legal Benefit	The Association of Law Costs
Bolt Burdon	Law Commission	The Law Society
CAB	Law Club Legal Protection (now called Alliance Cornhill Legal Protection)	Thompsons Solicitors
Churchill Insurance	Law Society	Thornycroft & Co.
Civil Courts Users Association	Litigation Funding	TUC
Claims Direct	Litigation Protection Ltd	Underwoods Solicitors
Consumers' Association	Legal Services Commission	University of Surrey
Cornhill Insurance	Legal Services Debt Div	Vizards Wyeth
Crutes Solicitors	Litigation Protection Ltd	Weightmans
CW Consultancy	London Solicitors Litigation Association	Zurich Commercial
DAS Legal Expenses Insurance Company Ltd	MASS	39 Essex Court
Davis Lavery	NHS Litigation Authority	Norwich Union
DCA	NIG	Nottingham Law School

Other Jurisdictions

Sweden	Germany
Folksam Insurance Group	University of Munich
Liman and Partners	DAS International Department of the Legal Protection Insurance
Road Traffic Injuries Commission	Munich Law Society
Swedish Motor Insurers Bureau	Institut fur Anwaltsrecht
University of Stockholm	Various Rechtsanwalt & Solicitor
New York	Auckland
Cohen Milstein Hausfeld and Toll	Ministry of Justice
Judges of the Supreme Court of New York State	
Saiber, Schlesinger, Satz and Goldstein	Sydney
Skadden Arps	Department of the Attorney General
Speiser Krause	Judges of the Supreme Court of New South Wales
Toronto	Hong Kong
Aviva Insurance	Avia insurance
Costs Grid Sub Committee	Deacons
Crown Law Office	Boase Cohen Collins
Judges of the Court of Appeal	DLA
Law Society of Upper Canada	Department of Justice
Members of the Rules Secretariat	Judges of the Court of Appeal
Ministry of the Attorney General	Law Society of Hong Kong
Osgoode Hall Law School	Lunning Chan
	Richards Butler



**CONSULTATION ON BUDGETING
AND COST CAPPING
CONSULTATION RESPONSES**

Professor John Peysner

Introduction

This is a note of the replies from consultees to the Civil Justice Council's consultation on Budgeting and Cost Capping. That consisted of an article 'Predictability and Budgeting', together with five questions which were put out for consultation.

1. How practical is budgeting?
2. Will budgeting increase the workload of courts pre trial/settlement, save it by reducing post settlement/trial detailed assessment or be neutral?
3. Should all cases in the Multi Track and/or all or part of the Fast Track be subject to a budgeting process?
4. Will budgeting deflate or inflate costs?
5. Should there be a pilot of budgeting and if so what type of cases should it cover?

Question 1: How practical is budgeting?

A wide variation of responses was received.

In the personal injury field the Federation of Insurance Lawyers (FOIL) whose membership acts for defendant insurers, stated that they found budgeting to be practical and suggested that the way to proceed was to break the budget up into chunks, for example, a budget only for experts. The Association of Personal Injury Lawyers (APIL) whose members act for claimants felt that it was unlikely, without historical data, that lawyers would be in a position to accurately budget for the needs of a case. They recalled the comments in the Woolf Report in relation to budgeting that the legal profession rejected it as unworkable and that it was likely to give away confidential planning matters within a case. APIL was particularly concerned about variation between judges considering a budget based on their members experience of summary assessment.

The Law Society felt that budgeting would require the expansion of the Supreme Court Costs Office to create a network of experienced, trained and specialist cost judges throughout the country and that unless this was done there was a danger of variability because some judges, particularly circuit judges, would have the experience of costs work. In general the Law Society was not able to come to firm conclusions about budgeting but welcomed further discussion.

Whilst accepting that in litigation there would always be imponderable and unforeseen developments which would make budgeting difficult, particularly in complex cases, judicial comment received offered a cautious welcome with some emphasis on technical difficulties and the comment that budgeting was neither more nor less practical than preparing estimates of costs, but that as very few practitioners were obeying the requirements to prepare estimates the task of persuading practitioners to prepare budgets would be difficult. One complicating factor was that solicitors may specify an hourly rate in advance but reserve the question of the uplift until the end of proceedings, giving assurance to clients that the uplift and/or the full amount of the rates would only be charged if the case was won and the opponent paid these rates. A full indemnity arrangement is made with the client but it may well be possible that, in the event the case is wholly or partially lost, the whole of the costs are not charged against the client. To switch to a system whereby costs are transparent, both in hourly rate and quantum, both to the client and the other side, would make this approach more difficult and introduce a measure of inflexibility. Whilst the CPR and the Cost Practice Direction discourage this old method of fixing hourly rates at the conclusion of the case, this still leaves open the question of proportionality. There remains a danger in the current system that clients can be asked to pay costs which are found to be disproportionate and not recoverable from the opponent who has lost the case. This is likely to create difficulties between solicitors and litigants.

Opinion amongst cost draftsmen was divided. Whilst, some opinion was that that budgeting was impractical because of lack of interest both from solicitors and judges there was a contrary position which was that Practice Rule 15 should be altered so that a

client is presented with a budget in every case which will be the basis for the budget to be set by the court. This would then be used as the basis for a cap in low value cases. The cost cap should potentially be variable but only for persuasive reasons and, perhaps rather rarely, in simple cases. In larger more complex cases a more detailed budget would be required but this could still be succinct and practical. The budget should state its assumptions and be set out in stages: in effect, a 'rolling budget'. This should be scrutinised at every stage and cost capped or amended as necessary by the case managing court. If the cap is exceeded then the client may have to pay the balance, or not, according to the agreement between the solicitor and client and the state of the legal market. For example, in road traffic cases backed by 'before the event' insurance it is highly unlikely that the insurer would pay. Such a system would give more transparency to clients and reduce challenges to the retainer.

Law firms gave a variety of responses. One firm, acting for both plaintiffs and defendants and in personal injury and commercial work, stated that it was impractical in a complex case to budget. Budgeting would require a court review at each and every evidential turn and it was impossible for a court to consider proportionality under CPR 44. (3) and *Lownds*²⁰² before the relevant issues have arisen. For example, in relation to conduct how would it be possible to determine prospectively if the other side was going to misbehave? There was also concern about giving away important confidential tactical information about the case. A firm specialising in commercial litigation stated that prospective budgeting within the context of proportionality, was possible only if damages were predictable, for example, in personal injury work but not in commercial work. This firm notes that judges who are tasked with carrying out summary assessment tend to shy away from this and put cases off for detailed assessment or they carry out summary assessment on an arbitrary basis. They felt that this indicated lack of experience which would cause problems if the same judges were then asked to calculate budgets. They noticed that there was considerable restraint on court resources, meaning that IT to support the process was unlikely to be available. This view was supported by the City of London Law Society who stated that budgeting would be impractical in commercial

²⁰² Home Office v Lownds [2002] EWCA Civ 365, [2002] 1 WLR 2450

litigation because of unpredictability and that a flexible estimating system and detailed assessment was sufficient to control costs. They noted that the judiciary and counsel were not equipped by experience to have the necessary skill to cap costs and that as damages in commercial cases were unpredictable at the start the cases, therefore, to use a cap emphasising proportionality would be impractical. They further felt that budgeting would require disclosure of privileged information. Another commercial litigation firm felt that budgeting was not possible in complex litigation. They noted that costs have increased after the introduction of the Civil Procedural Rules but felt that this was because of frontloading. Absent this costs in complex cases were not disproportionate and that, therefore, budgeting as a cost control measure was irrelevant and that estimates and active case management would keep costs under control. In other words, budgeting was a solution looking for a problem. The London Solicitors' Litigation Association (LSLA), representing largely commercial solicitors, as well as one of its members, responding separately, felt that the court has no role in budgeting, which should be a solicitor and client matter only where it was accepted that it was practical and commonly utilised. While there was some difference of opinion amongst some members of the LSLA there was a general view that if budgeting were to be adopted then it should not be presented to the court as part of the case management process but only used as a basis for estimates as required by the Rules and to retrospectively justify those estimates at detailed assessment.

A firm practicing commercial and insurance litigation responded that budgeting should be second nature between client and solicitor but that this has been adversely affected by conditional fees as clients became less interested in costs having been given the perception, incorrectly, that in no circumstances would they have to pay costs. Budgeting was relatively easy and most solicitor and client work in practice was done on estimates given at the start of the matter and then regularly reviewed.

The final word goes to an insurer client who note that good and successful firms already project manage their cases and their expenses.

Question 2: Will budgeting increase, decrease or be neutral on the workload of courts?

FOIL responded that judges currently do not look at estimates and there is concern that any move in this direction might cause a switch from telephone hearings (which are increasing and save costs) to more personal hearings which will increase costs. However, budgeting would have a compliance function if the receiving party has exceeded the budget then they might not wish to pursue detailed assessment, taking the view that they would be unlikely to recover more than the budgeted figure.

APIL responded that if a defendant was able to comment or oppose a claimant's budget this would inevitably increase court time and costs. Currently very few cases going to detailed assessment post-trial or settlement. In an arrangement where very many cases are subjected to budgeting, then this would be bound to increase the amount of court time spent on costs. Also, budgets simply could not be agreed between the parties but must, at the very least, be considered by the court. Further, there would be additional court time involved in varying applications.

The Law Society responded that introducing budgeting would put more pressure on court resources on the basis that, currently, very few cases are subject to detailed assessment and, therefore, there is the possibility that more cases would require budgeting. They also felt that budgeting was bound to be contentious and could cause satellite litigation and that applications in or around the budgeting process could be used tactically, for example, to attack a head of costs in order to prevent an opponent using those costs to accomplish a litigation task. In that event the decision on the budgeting application issue becomes determinative in the litigation.

Judicial opinion reflected a variety of views as to the impact on the work of the courts. Based on his local experience one judge felt that the effect of budgeting would be to increase the pressure on courts and would not save time at the later stage of detailed assessment. In contrast one judge felt that there would be a short term increase the

pressure on courts as in most cases both sides' costs would need to be budgeted, whereas up to now only the receiver's bill was assessed, and there may be some arguments about retrospective testing of work actually done, which would increase time spent. However, pressure on the courts should not be the determinative factor and the essential issue was whether budgeting satisfied a cost benefit test for litigants. Another judge responded that budgeting should focus on group litigation order cases and some high value multi-track cases only. In these cases there would be time saving because there would be no need for detailed assessment because costs would be controlled throughout. One judge who consistently budgets cases against a cost cap, reports that in his experience budgeting reduces the requirement for detailed assessment and therefore, overall, saves time, particularly in relation to arguments over proportionality. Therefore, budgeting is "worthwhile because it increases the amount of proportional costs". He reports that in his view estimates simply don't work.

From the perspective of the costs draftsmen, one opinion was that court time will Another was that there was a danger of time being spent on budgeting becoming disproportional to the gain made but that this could be ameliorated by the recruitment of a new species of court costs officers who would deal with budgets, taking the pressure off district judges.

Solicitors responding were virtually unanimous that budgeting would, overall, increase the amount of time which courts devoted to costs. One firm dealing with critical injury cases were concerned that if a budget did not include a heading for interlocutory applications there will be applications to lift the cap to deal with interlocutory applications and this will create more work. They contrast this with a welcome reduction in interlocutory matters since the introduction of the Civil Procedural Rules. They are concerned that district judges will not be experienced enough to control budgets. Another firm dealing with both commercial and personal injury work respond that out of one thousand cases by that firm only seventy proceed to detailed assessment and, therefore, to introduce cost budgeting will inevitably increase the courts' workload and would require them to look at complex issues, such as proportionality; the correct hourly rate; funding issues; time spent; disbursements and counsel fees prior to trial or

settlement. A commercial litigation firm responded that budgeting would create a substantial increase in court work and no reduction in time spent in detailed assessments because of arguments over the out-turn budget in the light of events. From the same perspective was a response that the effect on court time would be neutral at best but was likely to increase because of satellite litigation. A firm dealing with commercial and insurance litigation responded that there was likely to be an increase in court time pre-trial but a slight reduction post-trial and active case management would be required to keep matters under control. However, the process would offer greater transparency and challenges as to the reasonableness of costs would be reduced. The City of London Law Society responded that because most cases settle pre-trial or settlement there would be an adverse impact on court resources. They also note that even where there is a detailed assessment many of these matters settle before the hearing.

Question 3: Should all cases in the Multi-track and the Fast-Track be budgeted, or some, or none?

FOIL's position is that all personal injury cases in the fast-track should be conducted on a fixed-cost basis and the balance of cases in a fast-track and all cases in the multi-track should be budgeted. APIL's view was that detailed assessment is a sufficient cost control and no cases should be subject to budgeting. Their position is that cost control is not demanded by all parties but only by insurance companies defending personal injury claims. APIL's view is that large corporate clients do not appear to be overly worried about legal costs in commercial litigation. They are particularly concerned that for an opponent to see a budget gives too much information about the strategies of a firm. They are also concerned that if a budget is agreed then there is no incentive not to spend up to the limit and they do not feel that the suggestion made in the original article is a practical one to "reward" solicitors for not spending up to the limit.

The Association of Law Costs Draftsmen (ALCD) suggested that in the fast-track there should be fixed costs in every case, but not in the multi-track because cases are so

variable. They were particularly concerned about the position with publicly funded cases where they perceive an imbalance with non-publicly funded parties being able to spend as much as they want whilst the publicly funded client must seek permission if the cost limit is exceeded and such costs may not be recoverable. Budgeting and cost-capping could be a way of resolving this by limiting the costs on both sides. An independent response from cost draftsmen was that budgeting was unnecessary and judges should enforce control via estimates. A cap imposes excessive control and every time there is an attempt to lift the cap this costs money.

Amongst most judicial respondents there was agreement that there should be fixed costs in all fast-track cases. One judge suggested that if progress is not made on this then benchmark costs should be looked at again and in the meantime estimates should be strictly enforced. One judge felt that estimates should be dispensed with and there should be a reintroduction of county court scales, that is, in effect a cap based on value together with an element of discretion. One judge was more concerned about the introduction of fixed costs for all fast-track cases than other members of the judiciary responding. His particular concern was that the continued existence of the indemnity principle had the potential to challenge the basis of fixed costs. His preference was for a *benchmarking* system of costs in stages similar to the German BRAGO²⁰³ system. However, from a minority position he felt that some fast-track cases, as well as multi-track cases, needed to be subject to the discipline of budgeting. There was more disagreement on the multi-track. One judge felt that with regard to the multi-track, estimates should be enforced and a budget cap should be made only in high value complex litigation. Another, felt that budgeting should be the norm in all multi-track cases unless the court was satisfied that it was impractical or unreasonable. Only in group litigation order cases should a budget be enforced from the initiation of the case. This was supported by another respondent who stated that budgeting incorporating project management is too complex and would simply increase costs and district judges do not have the time to administer this procedure.

²⁰³ For a full description see See J. Peysner 'Costs in Personal Injury Cases: Searching for Predictable Costs' [2002] *Journal of Personal Injury Law*. Issue2/02 pp.166-179 and 'Finding Predictable Costs' *Civil Justice Quarterly* Vol 22 Oct. 2003 pp 349-370

Budgeting should be limited to a few complex cases, for example, group litigation order cases.

Opinion amongst practitioners varied, as has been indicated earlier in this paper. One firm stated that in catastrophic injury cases where the damages outweighed costs by many times, and the cases take a long time, no precipitous changes should be made in the cost regime that might adversely affect the assumptions made when these cases were taken on or in their preparation prior to the introduction of budgeting. A firm handling both defendant and claimant personal injury and commercial work felt that fast-track cases should be decided on a fixed costs basis and that proportionality was not a major issue in multi-track cases. However, in exceptional cases (possibly triggered by figures revealed by estimates) the court should intervene using the *Smart*²⁰⁴ guidelines: that there should be a real and substantial risk that without budgeting costs will be disproportionate or unreasonable and cannot be limited by case management and that any doubts should be reconciled in favour of the capped party and the cap should be variable upwards if unforeseen circumstances arise. A commercial litigation firm felt that in ordinary run-of-the-mill cases there was a danger of disproportionality and in cases where damages were predictable (for example, personal injury cases where the Judicial Studies Board Guidelines on Damages apply), then budgeting was possible, but in more complex cases budgeting would be difficult or impossible. An insurance and commercial firm felt that the cost of budgeting would be prohibitive on the fast-track and focus should be kept on the multi-track. The City of London Law Society said that budgeting should be limited to group litigation order cases only and in these cases be subject to the discretion of the judge. Herbert Smith felt there should be no budgeting in the multi-track and had no comment on fast-track. The LSLA reported divergent views from their members.

²⁰⁴ *Smart v East Cheshire NHS Trust* (QBD) [2003] EWHC 2806

Question 4: Will budgeting increase or reduce solicitors' costs?

FOIL make the point that there are very few statistics about cost levels and, therefore, it is very hard to make predictions as to what the effect of any change in procedure will be on cost levels. They respond that estimate levels may increase as that process is taken more seriously and becomes more detailed, but in turn judges would be in a position to examine and control estimated costs backed by budgets on the grounds that they are unreasonable or disproportionate. APIL make the point that in the absence of historical data there is no evidence that costs have increased. The introduction of budgeting will mean that more detailed bills will be required, which will have to be drawn up by a specialist, adding to the costs.

ALCD respond that in event costs have, in their view, increased after the introduction of the Civil Procedural Rules over and above the rise in hourly rates. Where, as frequently, estimates are not produced the court could require them to be produced but rarely does do. On occasion allocation questionnaires are dispensed with and, therefore, there is no estimate at that stage. The introduction of budgets will cause a short term increase in costs because of the additional expense of preparing the budget, but overall, in their view, costs will be reduced by encouraging efficiency in case planning and preparation. In particular budgets will assist the court in exercising case management powers more effectively than with estimating. A response from individual cost draftsmen was that budgets will increase costs to take account of the fear that judges will reduce cost levels.

This was mirrored by one judge who was concerned that there was a risk of inflation because solicitors would set their budgets too high. Another responded that experience will reduce the time spent by solicitors in preparing budgets and submissions and that overall costs will be reduced because the time spent in attending detailed assessments will be reduced.

Amongst practitioners with experience in Legal Services Commission case plans there was concern that these can take between three to six hours and some 20%-25% of fee

earners time is spent revising case management and checking that the LSC budget has not been overshot. Thus, more general budgeting in the non public funded sector would increase costs. For example, take a case where issues arise late in the day and this involves urgent work: if the matter was subject to a budget, then the need to make an urgent application to lift the cap. Such activity would require senior staff who are likely to be more expensive than the more junior staff used in preparing bills for detailed assessment. There was also concern that a client who had agreed a budget with his solicitor would probably recover less of the client's outlay even if the case was successful because the solicitor would be paid on the agreed budget which might be less than the budget decided by the court and, therefore, access to justice would be affected. The City of London Law Society responded that budgets will cause an increase in costs because they will be set high to cover all contingencies. One commercial firm was concerned that costs will increase because of satellite litigation and the preparation of the budget but another felt that this could be ameliorated by using simplified forms and procedures and that the danger that solicitors may budget for every eventuality could be dealt with by active case management.

The Law Society believes that costs will increase through budgeting because of a need to put in a leeway for safety and they draw this experience from the operation of LCS case plans. They also note the cost of preparing budgets.

Full blown project management approach outlined in the original article offers both predictability and certainty there is a danger that either, because of the cost of preparing the documentation or because of applications which take the detail disclosed in the plan, the process could become disproportionately expensive.

Question 5: Should there be a pilot of budgeting?

FOIL felt that there should be. APIL, whilst opposed in principle to budgeting, felt that any moves towards budgeting must be piloted and such a pilot must include the collection of objective cost data.

ALCD saw no need for piloting and proposed that following allocation the court should consider if it wishes to impose a cap and if it does it should direct each party to file a budget and case plan (similar to the LSC case plans in high cost cases) and then cap if appropriate. A response from independent cost draftsmen was that while they objected in principle to budgeting if it was introduced it should be confined to a sample of cases over £100,000 of any variety

All judicial opinion was that budgeting should be piloted. One judge proposed a pilot in ten courts not based on case type but on value e.g. Multi-track cases from between £15,000 or £20,000 and £100,000. Another stated that piloting was essential and should start in cases with GLOs or cases in the Commercial, Mercantile or Technology and Construction Courts which have specialised judges and sophisticated clients which will assist the process. Another supported a pilot and referred to the successful pilot of new ancillary relief applications prior to their introduction.

Amongst practitioners, including those opposed in principle to budgeting, felt that if there was a move towards it then this must be piloted either of standard, non complex, non commercial cases or of a sample of a range of Multi-track cases, alongside a wider examination of a series of case management initiatives.