COST AND FEE ALLOCATION IN CIVIL PROCEDURE:

REPORT FOR ENGLAND AND WALES

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INTRODUCTION

This short report deals with the areas set out in the questionnaire. Readers should bear in mind that in the interests of readability and concision there is a need to generalize. The system is also in a state of some flux with Lord Justice Jackson invited by the senior civil Court of Appeal judge, the Master of the Rolls, to review the system and make recommendations for reform. His preliminary report is available at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm and contains excellent summaries of the English and Welsh costs systems than can be achieved in the context of this short report. He also discusses many other systems and possible parameters of reform. The final report is due in the latter stages of 2009.

I. THE BASIC RULES: WHO PAYS?

It is commonly assumed that the basic rule in England and Wales is that the loser pays the winner's lawyers costs in civil cases. In fact, the reverse is true. Even if one confines the definition of relevant cases only to non-family cases litigated in the courts, the majority of cases are fought on the basis that each side bears their own costs (necause the majority of such cases are small claims). The loser pays principle holds true only for a limited set of cases (court based litigation of civil cases occurring outside the small claims track). In addition to small claims there are substantial elements of private/commercial litigation which take place in one or more tribunals (employment tribunals being the most important example in terms of the numbers of cases brought each year).

Even in the higher value court-based litigation, the position as to costs is in the discretion of the court (who can make different orders of costs depending on the circumstances of the case and the conduct of the parties, although the normal order would be for the loser to pay the winner's costs on a standard basis (see below)). In particular, however, responses to formal offers to settle (sometimes called Part 36 offers after the relevant section of the Civil Procedure Rules) can vary the costs orders that are mad. In broad terms, parties who fail to beat an offer to settle are responsible for their own and their opponent's costs after that offer.

The principle justifications for the loser pays rule are that the winner deserves to have the costs of successfully claiming or defending, that it protects compensation awards made to successful claimants and that it deters unmeritorious claims or defences.

As noted above 'loser pays' is not the position in the majority of cases: where the desire to protect unrepresented parties from costs awards (so as to not discourage them from bringing or defending claims) is more apparent and has led to no loser pays rules. In family cases each party tends now to bear their own costs. In cases allocated to the small claims track (defended claims under £5,000 in value, a lower limit of injuries that would receive less than £1,000 applies to personal injury cases) each party tends to bear their own costs. In employment tribunal cases,

each party tends to bear their own costs. There is also the facility for parties to be given protection from adverse costs orders, although this is rare. There are some, usually exceptional, circumstances in which a court or tribunal can be persuaded to depart from the normal rule. Similarly, success in – for example – small claims hearing can mean that certain court fees (as opposed to lawyer fees) can be recovered.

If the loser pays all, are all of the winner's costs and fees reimbursed or just a part?

Costs are usually assessed on a standard or indemnity basis. The decision as to the appropriate basis is in the court's discretion. Civil Procedure Rule 44.4(1) and (2) provide the framework for this decision. Costs awarded on the standard basis are required to be 'proportionate' to the matter in issue (a term of some controversy in the costs jurisprudence and literature, which does not mean that the costs have to necessarily be less than the matter in issue) and in deciding whether costs are unreasonable any doubt will be resolved in favour of the paying party. The normal award for costs would be on a standard basis and this would usually leave a shortfall between the costs recovered and the costs a successful client owes their lawyer. There is a practice of lawyer's not seeking this shortfall from their client although this is not universal.

Costs awarded on an indemnity basis are no subject to the test of proportionality and doubts about the amount recoverable are resolved in favour of the receiving party in deciding what the size of any award should be.

Additional costs, such as expert fees, which can be a significant part of the costs of any litigation, and other disbursements and court fees would ordinarily be ordered to be paid to the winning party, subject to an assessment of the reasonableness of those if the parties could not agree them.

Rules for appeals are similar to rules for first instance cases.

An additional, now important aspect of recoverability under the English and Welsh system is the way in which Conditional Fee Agreements work. Conditional Fee Agreements are a species of contingency fee, whereby the lawyer is typically paid nothing if they lose the case but their normal fees if they win plus a success fee, which is a percentage of their normal fee (up to maximum of 100%). The percentage fee is agreed with the client. Under current cost rules, if they are successful the lawyer then charges their normal fee plus their success fee. Success fees are typically staged to reflect the stage at which a case settles, and the riskiness of a case, but defendants complain about the level of these fees and may challenge them in costs proceedings. Furthermore, to protect claimants against adverse costs orders they may take out after the even insurance which covers them for their opponents legal costs in the event that they lose their case. If they are successful, the costs of these premiums are recoverable from their unsuccessful opponent. Again, that opponent can challenge the level of the premiums should they believe they are unreasonably high. The insurance schemes that have developed have also shielded claimants form paying the premiums if they are unsuccessful, leading to complaints that there is in effect no loser pays rule (or rather it works in only one direction: only defendants pay) and that no risk is born by unsuccessful claimants.

Settlement, Costs and Pre-action Behaviour

There is no accurate published data on the proportion of cases that settle, although it is typical to estimated that the proportion of claims which settle either without a trial or before proceedings are issues is in excess of 90% and possibly higher than 95%.

Parties seek to negotiate a settlement to the costs issues either as part of the initial settlement or as a subsequent negotiation. In civil cases, there is the possibility of issuing costs only proceedings where the parties resolve their substantive dispute but cannot agree costs.

Parties are expected to comply with a pre-action protocol as regards the conduct of a claim before it is issued at court. These typically require exchanges of basic information on a claim and provide a framework for some attempt to settle. Failure to comply with a pre-action protocol can lead to costs awards against non-compliant parties but it is not thought to be common that this occurs, partly because most cases settle in any event). There is no requirement to undergo mediation, although this is generally encouraged with the potential for parties unreasonably refusing to mediate to be punished via costs awards. The extent of such costs awards is not known, but is not thought to be extensive.

SELF REPRESENTATION

Parties are allowed to represent themselves in any civil proceedings. It is common in small claims proceedings, housing cases (rental and mortgage repossession), family proceedings and many tribunals including the employment tribunal. It is more common for defendants to be unrepresented than claimants; and for individuals to be unrepresented than businesses. Unrepresented claimants in cases where there the loser usually pays the winners costs is extremely unusual.

There is very little data on the extent of self-representation (See, Moorhead R and Sefton M (2005) Litigants in Person: Unrepresented Litigants in First Instance Proceedings, (London: Department of Constitutional Affairs, London), available at http://www.law.cf.ac.uk/research/pubs/repository/1221.pdf. Recent data received by the author from the Ministry of Justice suggest that in the last five years to 2008, in 47-51% of small claims hearings the claimant was represented and in 28-34% of cases the defendant was unrepresented.

Are the costs rules designed to inhibit litigation

Whilst the rules on pre action protocols (see above) and mediation are designed to encourage settlement over litigation, and court costs rules may also have reached a level where they sometimes discourage litigation, there is not otherwise a clear rationale for encouraging or discouraging litigation from the costs rules. As noted above there are different rules for different types of case, and for different values of case. The rules seem to be aimed at ensuring that in cases over a certain value, a lawyer can recover their fees from an unsuccessful opponent and the successful party can protect the value of any claim won.

The rules are generally designed to ensure that meritorious claims are brought, but whilst it is assumed than the absence of a loser pays rule encourages unmeritorious claims whether this is in fact so depends on the willingness of parties to represent themselves and the basis on which lawyers instructed in such cases are willing to be paid. The use of conditional fees and (in tribunals) contingency fees, may mitigate the apparently negative impacts of no loser pays rules.

COURT FEES AND UPFRONT PAYMENTS

Court costs are determined partly by case and partly by value of case. The UK government is moving towards a system of full costs recovery whereby the intention is that court fees will cover the entire costs of the court system. A public system would then be funded entirely by users: an approach which is controversial with the judiciary, with the professions and with user groups. This has led to an increase in court fees which is thought to have led, in part, to a reduction in the number of cases brought to court (although it is not possible to disentangle the effect from other policies designed to stimulate greater settlement pre-issue).

Solicitor fees are usually paid on the basis of an hourly rate multiplied by the number of hours worked. Solicitors may offer to work on a fixed fee or, in court litigation, on a conditional fee basis (and in tribunal litigation on a damages based contingency fee, see below). Barristers fees are usually on the basis of a fixed fee for particular tasks or for accepting a brief for preparing for trial with 'refreshers' payable for each extra day of the trial beyond the first. They may also work on a conditional fee basis but not on a contingency fee basis.

Experts fees are usually determined on a fixed fee basis negotiated between the solicitor and the expert, although there is a growing industry of medical reporting organisations that act as intermediaries between solicitors and experts.

Whether court and other costs are met by the claimant upfront is a matter for negotiation between the lawyer and the client and the other parties. Court fees have to be met at the prescribed stages of the litigation when they fall due but it is possible for the lawyer to meet these fees initially, possibly supported by a loan disbursement scheme.

Success-Oriented Fees

As noted above conditional fee agreements are allowed for all forms of civil litigation. The basic mechanics of such fees are outlined above. They are common in personal injury cases, and also being used in other forms of commercial litigation and sometimes in libel actions.

Contingency fees, whereby the lawyer takes a proportion of any damages if they win and nothing if they lose, are not permitted in litigation through the courts but are permitted (for solicitors) in what is termed 'non-contentious business'. Solicitors treat cases taken through tribunals, even though they are directly analogous to litigation, as non-contentious business and some use contingency fees for such cases. Barristers are prohibited from acting on a contingency fee basis even it appears in tribunal cases, but are permitted to act on a conditional fee basis.

Conditional fees are a relatively recent development having been first introduced in 1995 in personal injury, insolvency and human rights cases. This was subsequently extended include all civil cases but not family or criminal cases. As noted above success fees (and associated insurance premiums) are recoverable from a losing party. This innovation was introduced in 2000 and has come under concerted attack. It is an area where changes may be likely after Lord Justice Jackson has reported. Prior to 2000 the success fee and the insurance premium had to be met by the successful claimants. The Law Society had a voluntary cap to reduce the extent that a claimant solicitor would seek to deduct this from a client's damages set at 25% of the damages.

Success fees (and indeed base costs) are set in certain types of case (notably lower value road traffic claims where liability is not contested), but there is not system of caps on the success fees beyond the statutory limit on the success fee not exceeding 100% of the solicitors normal fee. Success fees are subject to regulation by the courts should any defendant wish to contest the level of the fee.

SELLING CLAIMS

Although debt factoring occurs on a large scale, and businesses are often usually sold with the value of their claims being taken into account, the selling of claims (through the assignment of causes of action) is not otherwise commonplace. Any assignment of claims risks being void for champerty or maintenance (although the courts are taking an increasingly relaxed view of what constitutes champerty or maintenance). Of more practical significance than the selling of claims is the increased role for third party funders, who may agree to pay (typically) a claimants lawyer up to defined limits and insure the claimant against the other side's costs, on the basis that they will receive a proportion of any successful claim. The lawyer is not paid on a contingency fee basis, but as far as the claimant is concerned the arrangements are similar. These arrangements are thought to only be taking hold in very high value claims.

COLLECTIVE ACTIONS

Group actions are not as prevalent under English and Welsh procedure as they appear to be in other jurisdictions (See the Civil Justice Council Report (2008) *Improving Access to Justice through Collective Actions*, http://www.civiljusticecouncil.gov.uk/files/Improving_Access__to_Justice_through_Collective_Actions.pdf) In general, group actions are governed by the loser pays principle. There are some particular facets of group cases which may be discussed briefly. The Civil Procedure Rules provide for "common costs". The group members are liable, severally, for an equal proportion of the "common costs" of proving the generic issues. A group member is also liable for the individual costs of his claim (e.g. quantum).

There is a general power to cap the costs recoverable in appropriate cases, although it is rarely used in ordinary litigation for fear of prejudicing the rights of either side to prosecute their case properly. Cost capping orders have been a feature of some group actions (e.g. . In *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB); [2003] Lloyd's Rep Med 355; *Various Ledward Claimants v Kent and Medway Health Authority* [2003] EWHC 2551: [2004] 1 Costs LR 101; see M Mildred, "*TheDevelopment and Future of Cost Capping*" (2009) 28 CJQ 141, 146)

LEGAL AID

There is a legal aid scheme which, as well as funding advice and representation in certain criminal and family cases, also covers certain civil cases. The emphasis of the civil scheme has shifted over recent years from funding civil litigation to a stronger emphasis on social welfare law (debt, housing and welfare benefits in particular) where there is a greater emphasis on advice, assistance and judicial review proceedings (for administrative law cases) and less emphasis on litigation. In particular, the ability to fund personal injury cases through the scheme has been severely curtailed. In broad terms the main kinds of civil litigation funded by the scheme are housing litigation (mainly housing disrepair cases); medical negligence cases (although increasingly these are being funded on conditional fee agreements); and assorted more unusual claims such as actions against the police. Business disputes and libel cases are ordinarily excluded.

In broad brush terms the scheme is means and merits tested. Applicants for assistance must fall within strict income and capital limits or be on particular state benefits to qualify. The claim must be of a type not excluded from the scheme and the merits of the case (the likelihood of success) and the outcome (in compensation cases, the amount likely to be awarded or agreed in compensation) must significantly outweigh the likely costs of bringing the claim. The scheme works by the state (through the Legal Services Commission) funding advice agencies (who usually focus on cases where litigation is not necessary) and solicitors in private practice (who more

often provide litigation services) either on the basis of fixed fees or hourly rates (significantly below prevailing commercial/private client rates).

In England and Wales there is piecemeal pro bono provision. The extent of this provision is unknown.

There are other means of support most notably, trade union membership and legal expenses insurance. Trade unions typically fund legal representation in personal injury and employment cases. Legal expenses insurance is typically purchased as an add on to home or car insurance. The level of cover varies and the extent and quality of the service is poorly researched.

ARE COSTS A BARRIER TO JUSTICE?

Litigation costs in England and Wales are sizeable both in real terms and in relation to the sums most often in dispute. Litigation costs are also unpredictable and, where the loser pays rule is in place, potential litigants are unable to control the costs of their opponent which they may face. As already noted in certain areas, personal injury litigation in particular, after the event insurance schemes have developed to overcome those problems (but have lead to significant costs being passed back to defendants who are lobbying hard to have the system altered). Court fees are also reportedly increasingly posing a problem for litigants.

EXAMPLES COSTS

We are asked to provide a set of example costs for a range of cases, but it is not in my view possible to do this. Each set of case costs is unique to the particular case depending on the facts of the case and the point at which it settles. There is also an absence of solid data on which to generalize.

IN CONCLUSION

The level of costs incurred in civil disputes, the lack of predictability and the perception that this is a significant inhibitor of access to justice has led to the costs review being carried out by Lord Justice Jackson. This means that the English and Welsh system is under a period of sustained attention and possibly about to embark on a process of significant reform.

The outcome of that review is uncertain but there are some issues in costs terms which are worth mentioning. The basic parameters of the costs rules (losers pay in bigger litigation, each side bears their own costs) will probably remain. There is some discussion in Lord Justice Jackson's report of the possibility of removing after the event legal expenses insurance from elements of the system through the bringing in one way costs shifting for certain kinds of case (e.g. personal injury, medical negligence and judicial review cases). Under such a system a claimant would retrieve his or her costs from the defendant if they won but the defendant would not retrieve their costs if the claimant lost. The logic of this approach is based on the claim that currently the costs incurred on after the event insurance, which are de facto borne by defendants, dwarf any benefit to defendants in costs actually recovered.

More generally, there is some discussion also as to whether damage-based contingency fees could be permitted in England and Wales in the context of litigation. This is a controversial proposal in the context of a general reluctance to Americanise the English and Welsh system. There is stronger consensus that the system of fixed fees

which pertains to a limited extent in relation to road traffic cases can be extended as a way of controlling the unit cost of cases. Beyond that issues such as cost capping and increased judicial management are on the agenda although there is a fair degree of skepticism that such approaches will work to limit costs or do so without creating inequality of arms between claimants and defendants. Other issues, such as increasing the use of docketing on cases and limiting disclosure of documentation are under consideration as ways of restraining costs.