JUDICIARY OF ENGLAND AND WALES

LORD JUSTICE JACKSON

"WHY TEN PER CENT?"

TENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

IBC CONFERENCE, LONDON

29 FEBRUARY 2012

"Please, sir, I want some more"[1]

1. INTRODUCTION

1.1 Recommendation ten. In paragraph 5.3 of chapter 10 of the Costs Review Final Report ("FR") I recommended that in personal injuries litigation the level of general damages for pain suffering and loss of amenity be increased by 10%. In paragraph 5.6 I recommended that general damages for nuisance, defamation and any other tort which causes suffering to individuals be increased by 10%. This recommendation is one out of a hundred and nine recommendations in the FR, all of which are collected on pages 463-471. It is recommendation ten in the list

1.2 Recommendation ten must be seen in context. Recommendation ten is intended to be part of a balanced package of reforms, which will bring to an end some of the absurdities and injustices of the present costs rules and at the same time afford reasonable protection to all litigants. No package of reforms is perfect. This one, however, is the best that I can devise. The individual recommendations in the package (if accepted) fall to be implemented by a variety of different agencies – Parliament, the Rule Committee, the Judiciary, HMCTS, the Judicial College, the Civil Justice Council, etc etc.

1.3 My role in relation to implementation. As a member of the Judicial Steering Group,[2] I have been asked to take a pro-active role in relation to the implementation of the FR recommendations, in so far as those recommendations are accepted by the various agencies to which they are directed. This role also involves explaining the forthcoming reforms for the assistance of practitioners, court users and others. My lecture to you this morning forms part of the implementation programme and is the tenth lecture in the current series.[3]

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[1] *Oliver Twist*, chapter 2. This month marks the bicentenary of Charles Dickens' birth.

[2] This group is chaired by the Master of the Rolls and oversees implementation on behalf of the judiciary.

[3] All lectures in this series can be found on the Judiciary website at http://www.judiciary.gov.uk/

1.4 Responses to recommendation ten from stakeholders.
(i) An early attack on recommendation ten came from liability insurers. At a Law Society conference on 23rd February 2010 (a month after the FR was published) a senior director of Aviva Insurance attacked the 10% increase as bringing a "disproportionate benefit" for claimants. He argued that because of this increase in damages, the overall package of FR reforms would increase the sums paid out by liability insurers.
(ii) On the claimant side, the line of attack has been very different. It is argued that a much larger increase in general damages is required, in order to ensure that no claimants lose out as a result of having to pay their own success fees.

1.5 The view taken by the senior judiciary. In January 2010 the Judicial Executive Board expressed support for the package of FR reforms as a whole. The 10% increase in general damages is, of course, an integral part of that package.

1.6 The view taken by Government. After consulting on, and deciding to adopt, the FR proposed reforms re costs and funding, the MoJ announced in March 2011:

"There will be an increase of 10% in non-pecuniary general damages, such as pain, suffering and loss of amenity in tort cases, for all claimants."[4]

1.7 The criticism to be addressed in this lecture. In this lecture I shall focus upon the argument that is being advanced in some quarters, to the effect that a 10% increase in general damages is not enough. The theme of this lecture is that, with all due respect to its proponents, that argument is misconceived.

1.8 My response to that criticism. My response to the above argument may be divided into three stages. First, the forthcoming reforms to conditional fee agreements ("CFAs") could quite properly be introduced without any increase in general damages. Secondly, the proposed increase of 10% has the consequence that most claimants will be better off under the package of reforms as a whole. Thirdly, it would not be proper to unpick this part of the package in an attempt to secure additional cash for claimants and their lawyers.

2. THE FORTHCOMING REFORMS TO CFAs COULD QUITE PROPERLY BE INTRODUCED WITHOUT ANY INCREASE IN GENERAL DAMAGES

2.1 The regime which existed prior to April 2000. CFAs operated on the basis that the success fee and after-the-event ("ATE") insurance premium would be deducted from the client's damages. To protect the client from suffering a deduction that would disproportionately reduce his damages, the Law Society issued a recommendation to solicitors that a voluntary cap should be applied to ensure that the total deduction would be limited to no more then 25% of the damages recovered. The Law Society model CFA agreement actually incorporated a provision for the 25% cap[5].

[4] *Reforming civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government's Response*, March 2011, para 7.
[5] See Napier & Bawdon, *Conditional Fees: a Survival Guide*, Law Society, 1995

2.2 At that time there was already at least one example of damages being reduced by a levy, agreed by the client as a condition of funding, namely the legal aid statutory charge, which had been in existence since the inception of the legal aid scheme. Allied to this was the provision that, at one time, required solicitors and barristers acting under a legal aid certificate, to pay a proportion (10%) of their recovered costs to the Legal Aid Board.

2.3 Benefits of CFAs under the pre-April 2000 regime. There can be little doubt that, as Parliament intended, during the 1990s CFAs enabled the "MINELA"[6] sector of society to gain access to justice that they would otherwise have been denied. There do not appear to have been complaints from clients represented on CFAs about the price which they had to pay for access to justice, namely a deduction of up to 25% from their damages. This observation has been confirmed by one of my former assessors, Michael Napier QC, who has immense experience of acting for claimants and who served as President of the Law Society in 2000-2001.[7]

2.4 APIL's evidence to the Woolf Inquiry. It is instructive to look at the evidence which the Association of Personal Injury Lawyers ("APIL") gave to Lord Woolf in 1996:

"More recently, in the final stages of the Inquiry, APIL has argued that the growing use of conditional fee agreements, since their introduction in August 1995, has provided access to justice in personal injury cases for those who previously did not litigate through fear of costs, and that there is no need for personal injury cases to be subject to the fast track since the desired increase in access to justice has been achieved. APIL contends that conditional fee agreements provide claimants with complete certainty as to costs, through the provision of insurance after the event since, if the client loses, the insurance pays all the defendant's costs and the claimant's solicitor must carry his own costs. If the claimant wins, as APIL suggests will happen in 95 per cent of personal injury cases, he/she will recover in the region of 85 per cent of his/her costs from the defendant. Successful claimants pay their own solicitor a success fee, which APIL suggests would normally be between 20 - 30 per cent of solicitor and own client costs. The Law Society recommends that, in any event, it should be no more than 25 per cent of the damages recovered."[8]

2.5 Full costs recovery is no part of the law. The four preceding paragraphs illustrate an important proposition, which has been lost sight of in the chorus of attacks upon my report. Full costs recovery is not and never has been a principle of civil justice. On the contrary, it is an urban myth of recent origin.[9] The principle of restitution is embedded in the law of damages,[10] not the law of costs. The fact that both parties have some costs liability, even if they win, has for long been accepted as imposing a necessary discipline in litigation. This is a point which I made in the first lecture in this series,[11] but to judge from recent debate, it appears to have been ignored rather than answered. There can be no sensible argument that the claimant's obligation to

[6] Middle income, not eligible for legal aid
[7] This paragraph and the two preceding paragraphs largely repeat paras 3.1 and 3.2 of chapter 16 of the Costs Review Preliminary Report: see page 168.
[8] Lord Woolf's *Final Report on Access to Justice*, HMSO, July 1996
[9] See *Cook on Costs* (LexisNexis, 2012) para 21.11, page 374
[10] If and in so far as the claimant succeeds on liability
[11] See page 5 of the first lecture, *Legal Aid and the Costs Review Reforms*: 5th September 2011.

pay a modest success fee out of damages, either before April 2000 or now, amounts to a "denial of access to justice".

2.6 Effect of the Costs Review reforms. My package of recommendations in respect of CFAs in personal injury cases,[12] essentially, reinstates the structure which existed up to April 2000. It restores a state of affairs which was regarded as satisfactory both by claimants and by their representatives, but it does so with a number of additional benefits for claimants, as set out below.

2.7 Additional benefits for claimants. In addition to restoring the pre-April 2000 basic structure, the FR proposals confer additional benefits on claimants. They will be protected against adverse costs liability by qualified one-way costs shifting ("QOCS"). Furthermore the damages which the claimants recover at trial (both general and special damages) can be substantially increased by effective claimant offers as result of the pending reforms of Part 36. In addition to all that, the maximum success fee payable by claimants to their own lawyers will no longer be 25% of ALL damages as before. Damages in respect of future care costs and future losses will be ring fenced and will be disregarded for the purposes of the 25% calculation.[13]

2.8 Conclusion. The package of reforms which I have proposed for CFA personal injury cases (as summarised above) would be a generous and sensible package of reforms without the need for any increase in general damages.

2.9 The above conclusion is confirmed by the experience in Scotland. In this regard, it is significant that in Scotland personal injury cases are conducted satisfactorily on CFAs, despite the fact that success fees are not recoverable. Indeed at the Glasgow seminar on 19th October 2009,[14] a number of speakers made the point that personal injuries litigation, which is currently being conducted under the procedures developed by the Court of Session, is the most successful part of the Scottish civil justice system. CFAs and ATE insurance operate perfectly well in Scotland, even though neither success fees not ATE insurance premiums are recoverable from opposing parties.[15]

2.10 My approach during the Costs Review. The rules governing personal injury claims brought on CFAs were but one part of a wide range of issues which I was asked to examine during the Costs Review (although many commentators seem to think that this was the only issue before me). The breadth of the issues under review[16] brought both problems of scale (in that it was not possible to flesh out every recommendation in the minutest detail) but also benefits. The main benefit was that it was possible to take a holistic view of the civil justice system as a whole. One

[12] End recoverability of success fees and ATE premiums, cap success fees recoverable from client at 25% of damages.

[13] The Personal Injuries Bar Association (PIBA) and the Bar Council have recently sent to me forceful submissions that the 25% cap should apply to ALL damages, as it did before April 2000. I can see the sense of allowing that dispensation in appropriate cases, **provided that the success fee is only payable by the client, as it was pre-April 2000.** The reason why I proposed ring-fencing damages in respect of future loss was out of deference to the vociferous submissions of PIBA, APIL and others in 2009.

[14] To mark the publication of Lord Gill's *Report of the Scottish Civil Courts Review* (2009)

[15] See Lord Gill's report, chapter 14. at para 97 Lord Gill states: "Today, however, many report that a majority of reparation actions in Scotland are funded on this basis, despite the fact that success fees and ATE premiums are not recoverable."

[16] Costs rules, funding rules, procedural rules, large commercial claims, small business claims, IP cases, housing and homelessness claims, judicial review, compliance with Aarhus, etc etc

consequence of taking a holistic view was that I could see the disastrous impact of the last round of CFA reforms[17] on areas of litigation where there was no conceivable justification for litigants to be funded by their opponents.

2.11 I was for some time attracted to the proposition that, in relation to personal injury cases on CFAs, all that was needed was to restore the pre-April 2000 regime and to couple it with the additional benefits for claimants identified in para 2.7 above. Indeed I still think that this would have been a perfectly sensible reform. However, such was the force and volume of the submissions from the "personal injuries lobby"[18] during the Costs Review, that I was persuaded to recommend that one further benefit be given to personal injury claimants as a *quid pro quo* for losing recoverability of success fees and ATE premiums. Hence my recommendation that general damages should be increased by 10%.

3. THE PROPOSED INCREASE OF 10% HAS THE CONSEQUENCE THAT MOST PERSONAL INJURY CLAIMANTS WILL BE BETTER OFF UNDER THE PACKAGE OF REFORMS AS A WHOLE

3.1 Professor Fenn's analysis. Before arriving at recommendation ten, I asked Professor Fenn, who was one of my assessors, to look at the consequences of increasing general damages. Professor Fenn concluded that if an increase of 10% is combined with certain other FR proposals (but success fees remain at the levels set out in CPR Part 45) 61% of personal injury claimants will be better off and 39% will be worse off.

3.2 My conclusions from Professor Fenn's analysis. I set out a summary of Professor Fenn's final calculations plus my conclusions from those calculations in a handout distributed during the Legal Action Group Annual Lecture on 29th November 2010. That hand out is reproduced as an appendix to this lecture.

3.3 The argument that Professor Fenn's calculations are out of date. I accept that if Professor Fenn were to embark upon analysis of another 60,000 PI cases, the figures of 61% and 39% may not be exactly the same. But that is not the end of the story. Once success fees are de-regulated, solicitors will compete on who can charge the lowest success fees, not who can pay the highest referral fees. Thus the beneficiaries of competition will be the injured claimants, rather than claims management companies, BTE insurers or other referrers. There can then be little doubt that the great majority of claimants will be better off under the forthcoming reforms than they are under the present arrangements.

[17] Under the Access to Justice act 1999

[18] I do not use this phrase pejoratively. It is a convenient shorthand term for a large and articulate group of respondents during the Costs Review who, for whatever reason, were strongly supportive of the current costs rules in personal injury cases.

4. IT WOULD NOT BE PROPER TO UNPICK THIS PART OF THE PACKAGE IN ORDER TO SECURE MORE CASH FOR CLAIMANTS AND THEIR LAWYERS

4.1 Despite initial misgivings,[19] the ABI has accepted my recommendation that general damages be increased by 10%, so long as it part of the total package of recommended reforms. When one looks at the additional burden which the reform package as a whole will impose on liability insurers,[20] the reasons for the initial misgivings of Aviva and other liability insurers are not difficult to discern. They do not welcome QOCS. They do not welcome the 10% increase in general damages or the enhanced claimant rewards under Part 36. Nevertheless, according to the ABI's public statements, liability insurers now support the package as a whole, because they believe that it will incentivise more reasonable litigation behaviour.

4.2 In my view, the package of reforms as a whole will indeed incentivise reasonable litigation behaviour (a) by creating a more level playing field and (b) by getting rid of the absurdity of recoverable success fees and ATE premiums. The price which PI defendants will pay for this necessary re-structuring of the system is a high one, but I conclude that it is appropriate, given the radical nature of the reform (in comparison to the regime of the last twelve years) and the strength of feeling and the concerns expressed by the personal injuries lobby. The FR proposals collectively will correct our present dysfunctional costs regime (which has been rejected by the rest of the world) in a fair and balanced manner. At the same time it will bring a windfall benefit to the majority of all personal injury claimants.

4.3 Conclusion. I accept, and indeed have recommended, that general damages should increase by 10% as part of the overall package of reforms. Nevertheless, having regard to the factors set out in sections 2 and 3 of this lecture, there is no conceivable justification for moving above the recommended figure of 10%.

Rupert Jackson 29th February 2012

[19] See e.g. para 1.4 above
[20] As set out in sections 2 and 3 above

APPENDIX

RUPERT JACKSON'S HANDOUT FOR THE LEGAL ACTION GROUP ANNUAL LECTURE ON 29TH NOVEMBER 2010

Professor Fenn's analysis

Following publication of the Civil Litigation Costs Review Final Report, Professor Fenn has done some further calculations re the cumulative effect of the following reforms:

- End recoverability of success fees and ATE premiums.
- Introduce one way cost shifting
- Increase general damages by 10%.

Professor Fenn has analysed a sample of 63,998 personal injury cases. These range from low value fast track claims to high value multi-track claims. However, the majority of all PI claims and therefore the majority of claims in Professor Fenn's sample are lower value.

It can seen from Professor Fenn's graphs on the following pages that 61% of claimants will be better off and 39% of claimants will be worse off, if the above reforms are implemented.

My analysis of combining the above measures with other reforms recommended in the Final Report

The next question to consider is what will be the consequence of two further reforms, viz (i) de-regulating success fees and (ii) banning referral fees.

At the moment success fees in PI cases are fixed at the levels set out in CPR Part 45. If those success fees are (a) de-regulated[21] and (b) payable by the clients rather than opposing parties, the effect will be to create competition between solicitors on the basis of which firms charge the lowest success fees. The effect will be to drive down success fees below their present levels.

The Law Society strongly recommends that the payment of referral fees should be banned. At page 31 of its Response to my Final Report the Law Society states:

> "The Law Society's view is that referral fees should not have a place in legal work for the reasons that Jackson LJ indicates in his report. We believe that they add costs and place incentives on solicitors to provide a lower level of service to their clients. The Society believes that they should be prohibited for all involved in the process, including solicitors, other legal service providers and anyone else involved in the claims process. The Society relaxed the rules under pressure from the OFT and remains uncomfortable with that decision."

At the moment a large part of the costs paid to PI claimant solicitors (sometimes more than 50%) are sucked up in referral fees. This not a sensible proportion of gross income to devote to marketing. The referrers add no discernible value to the claims process. Once solicitors are freed from the burden of paying referral fees, funds will

[21] Subject to an upper limit of 25% of damages, excluding damages referable to future losses

be freed up enabling them to charge lower success fees. Thus the beneficiaries of competition between solicitors will be the injured claimants, rather than referrers (claims management companies, BTE insurers etc) as at present.

In my view, the combined effect of all the proposals in the Final Report will be to drive down success fees to significantly lower levels than those prescribed in CPR Part 45.[22]

Thus if the whole package of recommendations in the Final Report is implemented, far more than 61% of all PI claimants will benefit as a result of the reforms and far fewer than 39% will be lose out as a result of the reforms.

Rupert Jackson 29th November 2010

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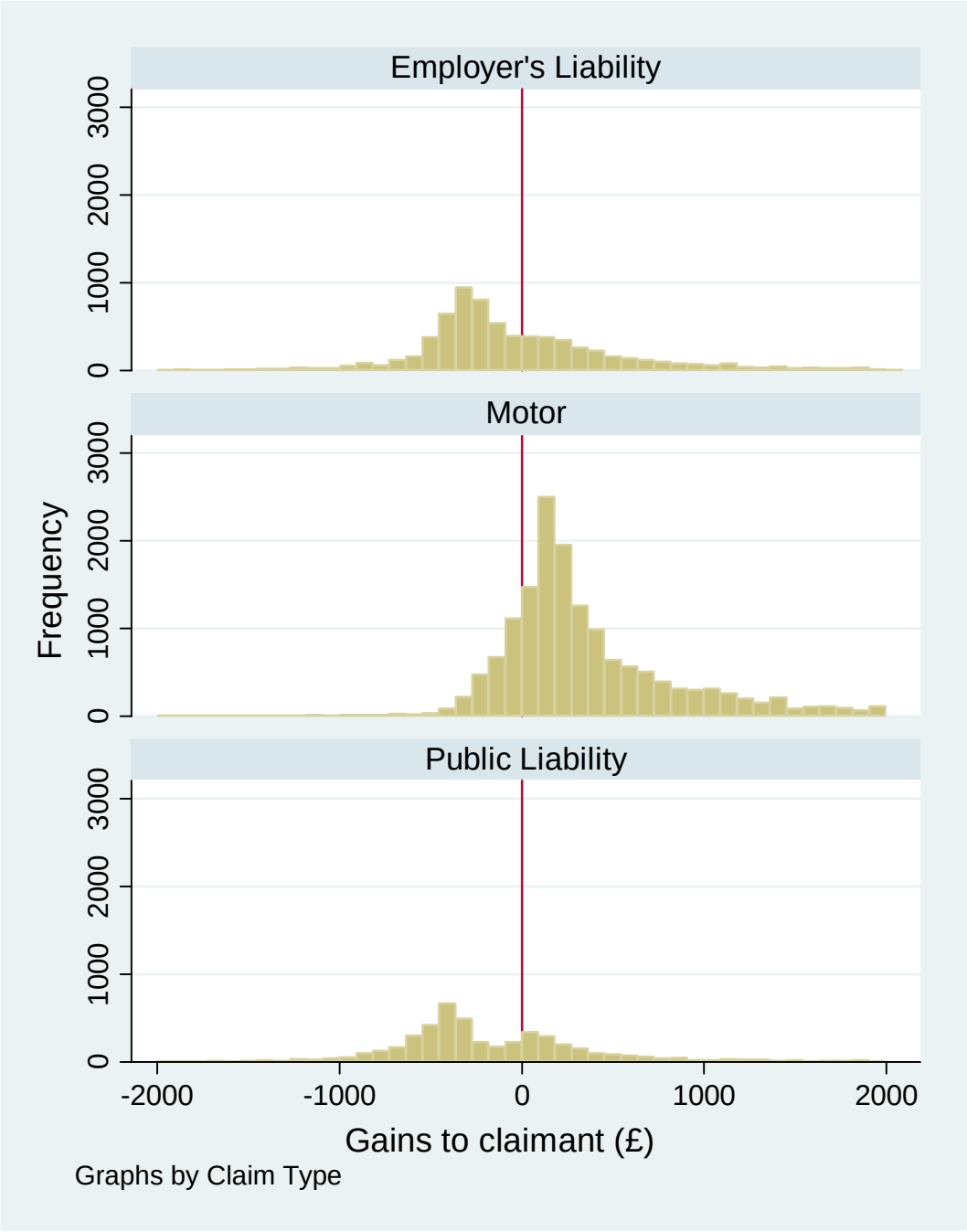
[22] See the reasoning in chapter 17 of the Costs Review Final Report

Gains and Losses arising from the combination of an additional 10% on damages, one way cost shifting, and non-recoverable success fees/ATE premiums[23]



[23] ATE premiums for disbursements only (estimated)

Total RTA, EL and PL combined