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## THE JACKSON REFORMS

Lord Justice Jackson's review of  
Civil litigation costs and the impact  
on insurers

Nicola Billen

 Stevens & Bolton LLP



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## The Jackson Reforms

- The current civil justice system
  - Costs generally
  - Funding models available
- Reforms to be introduced changing current position
- Conclusions - what will the reforms mean in the long term?

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## The Current Position

- General rule – winner pays the loser's costs in multi-track claims (over £25,000)
  - Small claims track (up to £5,000 [£1,000 for PI cases]) no costs
  - Fast track (claims up to £25,000) fixed advocacy fees, balance summarily assessed
- Standard / indemnity basis:
  - Standard – 60 to 70%
  - Indemnity – 90%
- Proportionality of costs:
  - Do not need to be proportionate to value of claim
  - Must just be reasonably incurred
  - Damages of £20,000 and costs of £50,000 OK

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## Civil Procedure Rule Part 36

- Effect of settlement offers
- Considered after Judgment
- Offer a sum, costs follow event
- Consequences of non acceptance
  - Beat by just 1 pence
  - 'More advantageous' amount

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## Conditional Fee Agreements (CFAs)

- “No win no fee”
- Discounted fee – 50% base costs
- Success fee uplift up to 100%
- Win – recover all from opponent
- Lose – pay disbursements and opponents costs only

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## After the Event Insurance (ATE)

- Covers adverse costs order up to a limit of indemnity - £100,000
- Stepped premium
  - Early stages – 20%
  - Trial - 50%
- Win - recover premium from opponent
- Lose – premium is self insured

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## The Current Position

### Normally

	Win	Lose
Own solicitor's costs	Pay (recoverable)	Pay
Other side's costs	No	Pay

### Using a CFA and ATE policy

	Win	Lose
Own solicitor's costs	Pay (recoverable)	No (or limited)
Success fee	Pay (recoverable)	No
ATE Premium	Pay (recoverable)	No
Other side's costs	No	No (paid by ATE up to level of indemnity)

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## Claim Example

So for example: a claim of £300,000 with costs of £100,000 on each side

### Normally

	Win	Lose
Own solicitor's costs	£100,000 (recoverable)	£100,000
Other side's costs	No	£100,000
	<b>£100,000 (recoverable)</b>	<b>£200,000</b>

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## Claim Example

### Using CFA + ATE

For example: a full CFA in place with 100% uplift and ATE premium of £50,000

	Win	Lose
Own solicitor's costs	£100,000 (recoverable)	No
Success fee	£100,000 (recoverable)	No
ATE Premium	£50,000 (recoverable)	No
Other side's costs	No	No (paid by ATE up to level of indemnity)
	<b>£250,000 (Recoverable)</b>	<b>Nil</b>

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## Third Party Funding

- Relatively new - available since 2005
- Funder takes a percentage of recoveries
  - Claims with value of £3 million plus
- Must not control litigation
  - Liability equivalent to amount invested

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## Before the Event Insurance (BTE)

- Add on household / motor policies
- Covers certain types of disputes
- Limited cover
- “Usually just big enough for the client to get into serious trouble”

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So why the need for reform?

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## The Need for Reform

*“In some areas of Civil Litigation, costs are disproportionate and impede access to Justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to Justice”*

Jackson LJ

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## Access to Justice

*“Litigation is a labour intensive process carried out by professionals in the face of skilled opposition. The costs of such process will always be substantial. It is not my function to devise ways of slashing costs as an end in itself, but to make recommendations ‘to promote access to justice at proportionate cost.’ ”*

Jackson LJ

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## Main Points for Reform

- Recoverability of CFA success fees from opponent abolished entirely
- Recoverability of ATE premium abolished
- Qualified One way costs shifting (QOCS)
- 10% damages uplift to increase costs protection
- Contingency Fee / Damage Based Agreements (DBAs) allowed
- Increase in use of BTE / third party funding
- Part 36 – beat any offer & costs sanctions
- Proportionality rule changes

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## Abolition of Recoverability of CFA Success Fees & ATE Premium

- Legal Aid, Sentencing and Punishment of Offenders Bill
- October 2012? (not retrospective)
- CFAs and ATE still available:
  - CFA success fee capped at 25% for PI claims
  - Any success fee / premium out of client's damages cheque
- Returns to 1990s position

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## Costs Post Jackson

### Normally

	Win	Lose
Own solicitor's costs	Pay (recoverable)	Pay
Other side's costs	No	Pay

### Using a CFA and ATE policy

	Win	Lose
Own solicitor's costs	Pay (recoverable)	No (or limited)
Success fee	Pay ( <b>not</b> recoverable)	No
ATE Premium	Pay ( <b>not</b> recoverable)	<b>Yes</b> (self-insurance abolished)
Other side's costs	No	No (paid by ATE up to level of indemnity)

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## Qualified One Way Costs Shifting (QOCS)

- PI claims (including clinical negligence)
- Claimant will have no liability for opponent's costs in the event of losing
- Control:
  - subject fraud / frivolous or unreasonable behaviour
  - means tested or court discretion? All PI?
- Will even the most dubious Claimant sue – speculative claims?
- Satellite litigation? Challenge entitlement?

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## Damages Uplift

- In PI cases, non-pecuniary general damages (such as pain, suffering and loss of amenity) will be increased by 10%.
- Compensation to allow for payment of success fees in CFAs so does not come out of damages award
- Effect?

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## Contingency Fees / Damage Based Agreements (DBAs)

- 'No win no fee' - charges based on % damages recovered only
- Costs awarded usual way – set against % agreed
- Same regulation as for CFAs - maximum 25% cap for PI claims
- Used in all proceedings, whether commenced or contemplated
- Large value claims only?
- Satellite litigation likely?
- What if claim settles in early stages?

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## Third Party Funding

- Jackson advocates use
- High value claims
- Transparency:
  - Fully liable for all adverse costs, not just % funded
  - Voluntary code of conduct
    - effective capital adequacy requirements
    - Restrictions on ability to withdraw funding

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## Fixed Recoverable Costs on Fast Track

- New extended process by April 2012:
  - Fixed costs £12,000 plus trial advocacy fees
- County Court consultation:
  - Increase small claims from £5,000 to £15,000 (keep £1k for PI / housing disrepair)?
  - Increase fast track financial limit from £25,000 to £35,000?

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## Proportionality Changes

- Avoid disproportionate costs – seen as a long stop control
- Court are now to assesses reasonableness of work done and amount on item by item basis; only then
- Consider proportionality of resulting total costs and further reduce the total amount if still disproportionate.
- Struggle to recover more than 50%?
- Only bite in a minority of cases to reduce overall costs

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## Costs Estimating

- Need to consider costs from the start
- Detailed costs estimates for the first Case Management Conference with the Court actively managing costs
- Judge will consider whether reasonable and if not, identify ways of cutting costs
- Costs within the estimate will be ordered without detailed assessment
- Pilot scheme Mercantile Court and TCC and defamation cases

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## Changes to CPR Part 36

- CPR Amended in October 2011
- Makes it clear that sanctions will apply when offer beaten, however small margin (1 pence)
- Good news for all – incentives to accept reasonable offers
- New Additional sanction:
  - Part 36 reward available to Claimants increased
  - Also recover a percentage of their damages if they beat their own offers (equivalent to 10% of claim).
  - Significantly strengthens Claimant's offer
  - Expected to be implemented in 2012

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## How Will Reform Be Implemented?

- Statutory reform – Legal Aid, Sentencing and Punishment of Offenders Bill
- Secondary legislation
- Amendments to Civil Procedure Rules
- Change in judicial attitude

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## Result of Reforms

- More claims?
  - Flood prior to October 2012 abolition?
  - QOCS – pursue every case?
  - Rise in Third Party Funding
  - Use DBAs – although limited?
  - BTE:
    - “positive efforts” to encourage take up
    - product needs market development
  - If small claims track increases to £15,000 more litigants in person, no costs recoverability

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## Result of Reforms

- Fewer claims?
  - Fewer SMEs litigating unless small claims / fast track
  - CFAs less attractive but still available
  - Fewer defamation claims
  - Ban on PI referral fees
- Access to Justice denied?
- Insurers taking a firmer stance on claims under policy?
- Effect on businesses – brings back deep pocket defence?
- Continued lobbying – will it happen?

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## Cost to Insurers

- Dominic Clayden, Director of Technical Claims at Aviva, in February 2010 commented that
  - Aviva has computer modelled Jackson's Final Report and found that civil litigation costs under the proposed system would increase, rather than fall as intended.
- Costs would have to be passed on to insureds by way of higher premiums

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## Cost to Insurers

- Has anybody done any work on how much this will cost?

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