



“What is the current judicial thinking on extending fixed recoverable costs to as many civil cases as possible? When will they apply and what will they be?”

Answered by:

**David Marshall, Managing Partner,
Anthony Gold**

Fixed Recoverable Costs: “current judicial thinking”

- **“When will they apply and what will they be?”**
- **Answered by: David Marshall**
 - Managing Partner, Anthony Gold Solicitors
 - Chair of the Law Society’s Civil Justice Committee
 - Vice-Chair of Civil Justice Council’s working group on noise-induced hearing loss
 - Jackson Fixed Costs Review Assessor
- **Speaking today in an entirely personal capacity!**

The ‘Transforming Justice’ Project (1)

- Joint statement from the Lord Chancellor, Lord Chief Justice, Senior President of Tribunals – 15 September 2016
- System must be:
 - Just
 - Proportionate
 - Accessible
- “The cost, speed and complexity should be proportionate to the scale and substance of the case”
- Embrace ‘innovation’ and ‘technology’; legal profession must be ‘ambitious’ to ‘meet needs’
- On-Line Court AND digitisation of existing process
- “Our times... provide the opportunity for radical change.”

The ‘Transforming Justice’ Project (2)

- “More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start.
- Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely so the costs of going to court will be clearer and more appropriate.
- Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to take more informed decisions on whether to take or defend legal actions.”

Is there a problem?

- “The lower reaches of the multi-track”
- £50,000... £75,000... £100,000... £200,000... £250,000... Higher?
- Tailored case management – how often used?
 - Not always order standard disclosure
 - Limited witnesses of fact
 - Statements limited to [x] pages
 - More single joint experts
 - Hot-tubbing
- Usual multi-track directions for a case up to say £75,000 damages in London will often mean costs budgets for each side to trial exceeding the damages.
- The ‘costs shifting externality’ problem
 - An ‘externality’ is the cost that affects a party who did not choose to incur

Is budgeting the answer?

- Some outstanding issues:
 - What about incurred costs?
 - What if you are part way through a phase?
 - Still waiting for a definition of proportionality?
 - What if case managing judge and costs judge differ on proportionality?
 - Are budgets disproportionate (or not bearing in mind the directions being made)?
- Progress
 - ‘Going amount’
 - Build on that for standardisation leading to ‘benchmark costs’?
- Time
 - Delays in listing may not go away – justice delayed

The Fast Track – unfinished business? (1)

- PI
 - RTA
 - EL Accident
 - PL accident
- Gaps?
 - E.g. Accidents abroad
- PI other
 - Clinical Negligence?
 - Noise?
 - Other EL disease?
 - Abuse?
 - Police?

The Fast Track – unfinished business? (2)

- Non – PI (above SCT £10,000)
 - Bent metal/credit hire only
 - Disputed debt
 - Contract
- Housing disrepair £1,000-£25,000
- Non-monetary claims
 - How to ‘value’?
 - ‘Works Order’/injunction – cost of work or value of a repaired property?
- Data?
- A cap?
- Align with PI cases based on complexity?

The multi-track – how high do you go?

- What are the ‘lower reaches of the multi-track’?
- Does it vary from case-type to case-type?
 - Contract dispute
 - IP
 - Clin Neg
 - Defamation
 - PI
- One size fits all v individualised, but overly complex
- Pilots?
- Incremental approach?

Fixed Costs in the 'Intermediate Track' (1)

- Process
 - IPEC?
 - Shorter Trials Scheme?
- One size fits all?
- How to align with the protocol driven cards on the table approach in PI/CN?
- Costs
 - How to fix?
 - Shortfalls – especially where the compensation principle is seriously threatened

Fixed Costs in the 'Intermediate Track' (2)

- Phase?
- Caps?
- Stage?
- Objectives
 - Avoid DA
 - Simplicity/certainty
 - Speed/cashflow

Fixed Costs in the 'Intermediate Track' (3)

- Escapes
- To the multi-track
 - Case type?
 - Value?
 - Issues?
 - Parties?
- Conduct
- Part 36

Clinical Negligence?

- Department of Health consultation – response May 2017
 - Claims up to £25,000 in value
 - 60% of all successful claims
 - But almost never allocated to Fast Track...
 - Amenable to cut down process of Intermediate Track, or not?
- National Audit Office investigation – report July 2017?
- Paul Fenn
 - Reported on NHSLA data for DoH and will work on DoH proposals
 - Jackson assessor
- Joined up government... or not (yet)?

Some concluding thoughts (1)

- Jackson is not on ‘a frolic of his own’
- Integral part of the Transforming Justice agenda
- The tribunal model is not the answer where law/procedure is complex and courts retain an adversarial approach
- Any further move towards inquisitorial process should be principle driven, not purely costs driven, openly debated, fully and properly costed and resourced

Some concluding thoughts (2)

- Strong arguments in favour of continuing lawyer involvement in civil justice with recoverable, proportionate costs
- How best to align proportionate process with proportionate cost?
- How to preserve access to justice and the compensation principle?
- Jackson reports by 31 July 2017. MoJ consultation. Implement 2018?