APIL London: Jackson Fixed Recoverable Costs Report

David Marshall

11 September 2017

AnthonyGold

About me

- Managing Partner, Anthony Gold Solicitors
- APIL President 2003-2004
- Chair of the Law Society's Civil Justice Committee 2013-2017
- Vice-Chair of Civil Justice Council's working group on noise-induced hearing loss 2015-2017
- Jackson Fixed Costs Review Assessor 2017

Speaking today in an entirely personal capacity!

The 'Transforming Justice' Project (1)

AnthonyGold

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)

AnthonyGold

- "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."

Terms of reference for Jackson

AnthonyGold

- "On 11th November 2016, the Lord Chief Justice and the Master of the Rolls commissioned [Jackson] to carry out a review with the following terms of reference:

- "(i) To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.

- (ii) To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

- (iii) To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017."

Jackson's introductory remarks

AnthonyGold

- "In England and Wales, the winning party in litigation is entitled to recover costs from the losing party. The traditional approach has been that the winner adds up its costs at the end and then claims back as much as it can from the loser. That is a recipe for runaway costs.
- The only way to control costs effectively is to do so in advance: that is before the parties have run up excessive bills. There are two ways of doing that:
  - a general scheme of fixed recoverable costs ("FRC");
  - imposing a budget for each individual case ("costs budgeting")."
- "My Final Report also proposed that after those reforms had bedded in work should be done on extending FRC to the lower regions of the multi-track."
- "it was inevitable that in due course another judge-led review would be set up to develop proposals for fixing the recoverable costs of lower value cases. This is that review. The terms of reference for the present project flow inexorably from the terms of reference set by Sir Anthony Clarke MR in 2008 and from the unfinished business of the previous review."

REVIEW OF CIVIL LITIGATION COSTS: SUPPLEMENTAL REPORT FIXED RECOVERABLE COSTS

AnthonyGold

Evidence collection

AnthonyGold

- 14 Assessors
- 5 public meetings
- 12 other meetings/seminars listed in the Report
- Submissions from 141 respondents
- Budgets from “CCMCs” between 5/12/16 and 20/1/17 - 223 cases and 535 budgets (232 PI)
- Budgets and costs data contained in submissions
- Taylor Rose data (Fast Track and Multi-track post LASPO settled/assessed costs
- “The costs grids in chapters 5 and 7 are based upon (a) evidence and submissions received during the review, (b) a detailed analysis of recent approved or agreed budgets, (c) a robust analysis of recent costs data by Professor Fenn, one of the assessors and (d) the experience and expertise of all the assessors”.

Evidence base for the fixed costs figures

AnthonyGold

"Readers may wish to compare the figures set out in sections 2 and 4 of this chapter with Table 7.1 in chapter 7. In undertaking any such exercise, they should bear in mind that:

(i) There will be 'process' savings if recoverable costs are fixed.

(ii) There will be 'efficiency' savings consequent upon the streamlined procedure proposed in chapter 7.

(iii) Approved budgets include incurred costs which are likely to be reduced following agreement or assessment at the conclusion of the case.

(iv) Approved budgets and many of the costs figures quoted in this chapter include disbursements which are additional to the sums shown in table 7.1.

(v) Not all of the cases up to £100,000 in value will go into the new intermediate track – only those which meet the criteria set out in chapter 7. Many of the multi-track cases reviewed in this chapter self-evidently do not meet those criteria."

CHAPTER 5. THE FAST TRACK

AnthonyGold

- "CPR Part 45 sets out the current FRC regime, which is based on the recommendations made in chapter 15 and appendix 5 of my Final Report. It provides a matrix of FRC for the main categories of personal injury claims. These are: road traffic accident ("RTA"), employers' liability accident ("ELA") and public liability ("PL") cases."
- "I have come to the conclusion that it is not appropriate for me in this review to start 'tinkering' with the existing fast track FRC regime, which overall works well."
- "The time has surely come to complete the introduction of FRC across the fast track, not to keep kicking the issue into the long grass."
- "I agree with that view and recommend that all recoverable costs in the fast track should be fixed."

PI Fast Track costs not currently fixed

AnthonyGold

- Also, there are categories of personal injury claims for which FRC are not yet in place. In particular:
  - **Holiday sickness claims**. These are growing in frequency and are the subject of much discussion in the media… On the basis of the evidence received during this review, I would suggest that the FRC for such claims (when pursued individually) should be the same as for RTA personal injury cases. Multi-party actions in holiday sickness cases should proceed in the multi-track, as now.
  - **Employers' liability disease ("ELD")**. In recent years, most ELD cases in the fast track have been claims for noise induced hearing loss ("NIHL"). A working party set up by the Civil Justice Council ("CJC"), whose members include claimant and defendant representatives, has put forward proposals for FRC in respect of NIHL claims which remain in the fast track. This agreement was reached following a mediation.
  - Other fast track personal injury claims which are **excluded from the Protocols** for Low Value RTA, ELA and PL Claims."

The bands

AnthonyGold

- Current EL and PL grid to be combined into one
- Two new bands for Fast Track costs to be added.
- Band 1: RTA non-personal injury, defended debt cases.
- Band 2: RTA personal injury (within Protocol), holiday sickness claims.
- Band 3: RTA personal injury (outside Protocol), ELA, PL, tracked possession claims, housing disrepair, other money claims.
- Band 4: ELD claims (other than NIHL), any particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other claims at the top end of the fast track.

Band 4 & NIHL

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4
£2,250 + 15% of damages + £440 per extra defendant
£2,575 + 40% of damages + £660 per extra defendant
£5,525 + 40% of damages + £660 per extra defendant
£6,800 + 40% of damages + £660 per extra defendant
a. £1,380 b. £1,380 c. £1,800 d. £2,500

Stage:	NIHL claims with value less than £25,000
Pre-issue	£4,000 + £500 per extra defendant (reduced by £1,000 if there is an early admission of liability or by £500 if settled before proceedings drafted)
Post-issue, pre-allocation	£5,650 + £830 uplift per extra defendant
Post-allocation, pre-listing	£7,306 + £1,161 uplift per extra defendant
Post-listing, pre-trial	£9,187 + £1,537 uplift per extra defendant
Trial advocacy fee	£1,380.

Uprating for inflation

AnthonyGold

- "Many submissions make the point that FRC must be uprated for inflation.
- I agree and recommend that FRC in the fast track be adjusted periodically by reference to the **Services Producer Price Index**. This index is a measure of inflation for the UK services sector. It is constructed from quarterly surveys measuring the price received for selected services.
- Annual increases will generate too much complexity and confusion in ongoing cases. I therefore recommend reviews **every three years**. To the extent that technological advances reduce legal costs at a faster rate than those of other services, the triennial review may wish to adjust the uprating accordingly. This uprating will only apply to the 'lump sum' elements of fixed costs, not to any percentages of damages which may be added. The level of damages rises over time to take account of inflation, so the 'percentage' elements will not need uprating."
- https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/servicesproducerpriceindices/jantomar2017.

CHAPTER 7. A NEW INTERMEDIATE TRACK FOR FIXED COSTS CASES

AnthonyGold

(i) The case is not suitable for the small claims track or the fast track.

(ii) The claim is for debt, damages or other monetary relief, no higher than **£100,000**.

(iii) If the case is managed proportionately, the **trial** will not last longer than **three days**.

(iv) There will be **no more than two expert** witnesses giving oral evidence for each party.

(v) The case can be justly and proportionately managed under the **expedited procedure** described in section 4 below.

(vi) There are **no wider factors**, such as **reputation or public importance**, which make the case inappropriate for the intermediate track.

(vii) The claim is **not** for **mesothelioma** or other **asbestos** related lung diseases.

(viii) Alternatively, even if none of criteria (i)-(vii) are met, there are particular reasons to assign the case to the intermediate track, [e.g. neighbour/family disputes or 'to promote access to justice"].

Suitability for PI?

AnthonyGold

"The **APIL conference** provided an opportunity for me to talk informally to many highly experienced personal injury and clinical negligence lawyers. This informal feedback revealed:

(i) The proposed intermediate track will catch very few cases if it is limited to cases where each party only has one oral expert. Furthermore, 'one oral expert cases' will not need three days. **It would be more realistic to limit the intermediate track to cases where there are not more than two oral experts on each side and the trial will take not more than three days**.

(ii) **Multiple defendant cases would be unsuitable** for the intermediate track, unless liability is admitted and the only issue is quantum.

(iii) Quite a few solicitors would be **content to have FRC** in personal injury cases (but not clinical negligence cases) where the claim is up to £75,000 or £100,000, provided that (a) there is a **streamlined procedure** and (b) **the figures are right**…"

Cases unlikely to be suitable, even below £100,000

AnthonyGold

- "Complex personal injury and professional negligence cases"

- "Clinical negligence claims above £25,000 will seldom be suitable for the intermediate track, unless both breach of duty and causation have been admitted at an early stage. The multi-track will be the normal track for clinical negligence claims above £25,000."

- "The intermediate track will seldom be suitable for
  - (a) some **multi-party** cases;
  - (b) **actions against the police** (as demonstrated by the submissions of the Police Action Lawyers Group);
  - (c) **child sexual abuse claims** (as demonstrated by the submissions of the Association of Child Abuse Lawyers);"

Clinical Negligence budget data

AnthonyGold

Clinical Negligence – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	**Total (£)**
0-25k	6	35,988	59,568	**95,555**
25-50k	12	47,965	107,665	**155,630**
50-100k	15	59,987	137,214	**197,200**
100-250k	13	74,920	152,695	**227,615**
250k+	2	64,062	85,526	**149,588**
Value unknown	**3**	**93,640**	**227,221**	**320,861**

Streamlined process in the intermediate track

AnthonyGold

- Statements of Case: 10 pages plus core documents
- CMC
- Disclosure (standard for PI)
- All witness statements: 30 pages
- Experts: 1 or 2 (20 pages)
- Trial not more than 3 days – preferably less

Intermediate Track: fixed costs matrix (1)

AnthonyGold

Stage (S)	**Band 1**	**Band 2**	**Band 3**	**Band 4**
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,750	£1,750	£2,000	£2,000
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950 + 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages

Intermediate Track: fixed costs matrix (2)

AnthonyGold

S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
s11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750
Total: (a) £30,000 (b) £50,000, (c) £100,000 damages	(a) £19,150 (b) £22,150 (c) £29,650	(a) £33,250 (b) £37,250 (c) £47,250	(a) £39,450 (b) £43,450 (c) £53,450	(a) £53,050 (b) £57,450 (c) £68,450

Fixed recoverable costs as a working model of "proportionality"

AnthonyGold

"The recoverable costs set out in Table 7.1 represent my best effort at converting the proportionality rules into hard figures. This must be the correct approach. The grid cannot be an exact pre-estimate of the costs which every party will incur in every intermediate track case."

"Comparability of personal injury and non-personal injury cases. There is, I suggest, sufficient flexibility in the grid to accommodate the general run of personal injury and non-personal injury cases which fall within the intermediate track. Also, as one of my assessors has pointed out, within the intermediate track we should not be putting a higher price on property and financial claims than on claims about human health."

Intermediate Track: Disbursements, London weighting and inflation

AnthonyGold

- "The above table does **not include disbursements**.
- The principal disbursements will be court fees, expert fees and (where ADR takes the form of mediation) the mediator's fee. In some cases, translators and/or interpreters are needed.
- I recommend that once the new fixed costs regime is in place, work should commence on developing fixed costs for experts. This is essentially what happened in the fast track. Once the fast track fixed costs for personal injury cases had been in place for a year, a scheme of fixed costs for medical reports was introduced: see chapter 15, paragraph 5.22 of my previous report and CPR rule 45.19. It would also be sensible to develop fixed costs for mediators, translators and interpreters."
- 12.5% uplift on fixed costs **London weighting as per Fast Track**.
- Uprating for **inflation every three years** as per Fast Track."

Broadhurst v Tan [2016] EWCA Civ 94

AnthonyGold

- This decision, unless its effect is modified by rule change, will impact upon fixed costs generally.
- 9 assessors believe:
  - "in the context of a fixed costs regime it would be better for there to be **a percentage uplift** on the fixed costs rather than an order for indemnity costs. This will avoid the need for a detailed assessment of costs. Also, it will provide certainty for litigants."
- 5 assessors believe:
  - do not agree with the proposal that we do away with the **Broadhurst indemnity costs order**… A 30% enhancement is not sufficient to redress the failure to accept an offer. It ignores the fact that as between solicitor and client more than the fixed costs will have been incurred by the client.
- "On balance, for the reasons set out … above, I favour **replacing indemnity costs with a percentage uplift of 30% or perhaps 40%**. BUT this is a clear issue of policy, which will need to be addressed in the consultation exercise following this report."

CHAPTER 6. COSTS MANAGEMENT

AnthonyGold

- "The costs management regime was, initially, greeted with horror in many quarters. However, opposition to this new discipline has slowly been diminishing."
- "That does not, however, dispense with the need for extending FRC."
- The principal problem is **incurred costs** which on average represent 32% of the claimant's budget and 15% of the defendant's budget. That is not an argument against having costs management. The lion's share of the costs still lie in the future and it is well worth controlling those future costs. Nevertheless, we do need to take steps to control incurred costs. PIBA have made some proposals which merit consideration. So has Master Cook, supported by the Senior Master.
- "Recommendation. When the reforms recommended elsewhere in this report have been implemented and have bedded in, consideration should be given to developing (a) a grid of FRC for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in that grid."

Some concluding thoughts

AnthonyGold

- Jackson is not on 'a frolic of his own'
- Integral part of the Transforming Justice agenda
- "The terms of reference require me to put forward substantive proposals, not a detailed set of rules. The task of rule drafting cannot begin until after (a) the Ministry of Justice ("MoJ") has carried out its planned consultation and (b) policy decisions have been taken."
- Consultation 2018?
- Impementation (not retrospective) 2019?
- Cash challenges for PI Practices - delay
- Profitability challenges for PI Practices
- The wider picture
- Planning and business mix