The shape of things to come? Fixed costs, the new format bill and the Briggs reforms

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Topics

1. The change that’s already with us: Fixed Recoverable Costs

2. The change that’s probably on its way: the new format bill

3. The change that may be coming: the Briggs report
Fixed Recoverable Costs

1. Their present scope
2. Proposals for extension
3. Escape routes
Present scope of FRC

• RTA Protocol: claims for damages of £1,001-£25,000 arising out of accident on or after 31/7/13 (£10,000 if accident 30/4/10-30/7/13)

• Low Value PI (Employers’ Liability and Public Liability) Claims: claims for damages of £1,001-£25,000, arising out of injury or disease on or after 31/7/13
Present scope of FRC

- Part 45 contains a thicket of complex rules fixing the costs for RTA and low value PI claims in almost every circumstance.

- In broad terms Protocols apply where liability not is dispute, but Fixed Costs under Part IIIA apply where it is.
Present scope of FRC

- Fixed costs under part IIIA do not apply to disease claims which exit the Protocol.

- Clinical Negligence is presently outside the scope of the various fixed costs schemes.
Proposals for Extension

• Jackson LJ proposes fixed costs for all civil claims up to £250,000, and that scheme could be in place within a year

• One advantage, he says, is to avoid spending time and money on costs management (!)
Proposals for Extension

• Total costs would range from £18,750 for £50,000 claim to £70,250 for £250,000 claim

• Lots of criticism of figures; Jackson LJ now says that the grid is a “starting point for debate”

• One year timetable won’t happen!
Proposals for Extension

• Department of Health said in January 2016 that a fixed costs regime for clinical negligence claims would be introduced in October 2016

• But proposed consultation has not happened yet
Proposals for Extension

• Widespread criticism including from Master Cook, one of the QB clinical negligence Masters.

• Appears to have been subsumed into wider Jackson proposals
Escape from FRC

• The key weapon for a Claimant: an order for indemnity costs

• If a Claimant makes an effective Part 36 order, the court will usually make an indemnity costs order
The effect of an indemnity costs order

• Court of Appeal has decided in Broadhurst v Tan [2016] EWCA Civ 94 that fixed costs and assessed costs are different, and a Claimant with an effective Part 36 offer is entitled to assessed costs, not limited by reference to the FRC scale.

• Same rule under new schemes?
New Format Bill

1. What is it?

2. Why is it so unpopular?

3. Will it be strangled at birth?
So what is the New Format Bill?

The BoC is a self-calculating, self-summarising spreadsheet document based on the J-Codes, which is capable of being generated automatically by use of the J-Codes and adopting the same structure.
Benefits of New Format Bill

• Generated directly from contemporaneous time-recording, no need to reinvent wheel
• Self calculating
• Cheap and quick to produce
• No need to recast where rate reduced or different grade of fee earner allowed
• Useful in negotiation
Problems of New Format Bill

The challenge in developing a spreadsheet (as opposed to using the traditional blank piece of paper on which to write a bill of costs) is that one has to try to think of every eventuality and factor them all into the construction of the spreadsheet template.
Problems of New Format Bill

- Multiple parts
  (a) costs budgeting
  (b) solicitor client bills

- Complicated document with many active worksheets
Problems of New Format Bill

- Changes to formula boxes
- Need for expertise – do your local judges have a working knowledge of Excel Pivot Table functionality?
- Judicial resources and training
Why’s it so unpopular?

- Complexity of the spreadsheet and assumed time-recording software expense
- Fee earners struggle to record time under codes
- Does it threaten the future of costs lawyers?
- ACL proposes a simplified “new bill lite”
The SCCO Pilot

• SCCO 1/10/15-1/4/16

• Very limited take-up

• Problems with the few cases that have been seen
The SCCO Pilot

- If you have to J-code retrospectively, drawing the bill and responding to it expensive and prolonged

- The full version does not print, so you have hidden rows and columns in the printed version
The SCCO Pilot

- Still no assessments yet, although there was one new bill which the paying party applied to strike out but failed – the assessment then settled
- Some interlocutory/costs hearings: firms like Irwin Mitchell, Ince & Co and Weightmans are using J-Codes
Mandatory use of the New Bill?

- Unwillingness to invest in time-recording software until compulsory
- Original proposal for mandatory from October 2016, Jackson now says Oct 2017
- Rules Committee deferred decision, but has now formed a new bill sub-committee under Birss J
The Future

• Self-calculating spreadsheet on its way

• But transition difficult

• Transitional regime? Or 1 October 2017 cut-off – all work before then old bill, all work from then in new bill?
The Future

• Simplified ACL proposal? Traditional bill structure but using J codes and spreadsheet technology
• Or recent Jackson compromise proposal? New format bill but without J-codes
• Likely revised Practice Direction adopting the latter in July 2016
Briggs Reforms

1. The proposals
2. Timescale
3. Effects
The proposals

• Interim report published January 2016

• Contains proposals to reform the structure of civil courts to run in parallel to HMCTS plans for reform of courts (i.e. court closures)
The proposals

• Rather scary adoption of management speak:

A structure built on the strong, independent and trusted justice brand – but with different channels/experiences for different cases – all consistent with this brand.
The proposals

- Proposal for an online court, covering claims up to £25,000, with no provision for costs shifting

- IT at the centre of the proposal, with expert systems intended to allow litigants to set out their own cases.
The proposals

• A paperless court

*The central assumption … which underlies … this review is that it is now technically possible to free the courts from the constraints of storing, transmitting and communicating information on paper*
Timescale

- In a word, tight.
- Consultation completed at end of May; review to be completed by end of July 2016
Effects

- Based on investing proceeds of valuable sale of city centre court buildings in IT
- Very large scale IT project
- How good is government at these?
The reforms in general

- Reform will continue
- The focus will be on the interests of court users
- Current level of costs seen as barrier to justice