LITIGATION COSTS, PAST, PRESENT AND FUTURE

By John O'Hare

1. The Past

1.1 Suppliers of Litigation Services

All of the work requiring professional expertise was done by barristers: advising, settling important documents and appearing in court. Their instructions came from firms of solicitors but, in those firms, all the work was done by clerks. In the first half of the 20th century the vast bulk of the solicitors' work concerned conveyancing, wills and family trusts.

1.2 Entitlement to Costs

In most cases "costs followed the event" ie, the losing litigant was ordered to pay the winning litigant's reasonable costs. The "follow the event principle" was regarded as of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they were likely to lose.

In the past the costs which were said to follow the event were all of the costs, including the costs of issues which the successful litigant had lost on.

> "It is not the usual course in exercising discretion as to costs to approach the matter as if one were scoring points in a boxing match as to how many issues there were and precisely who has won on each issue."
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> (*per* Ferris J in *Colchester Borough Council v Smith* [1991] Ch 448.

Until recently English law condemned all forms of contingency fee agreements because of the abuses to which such agreements may give rise.

> "To put it in a nutshell, once a lawyer has a personal interest in litigation, his or her objectivity may be affected."
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> (*per* McCowan LJ in *British Waterways Board v Norman* (1993) 26 HLR 232).

In 1990 a new type of fee agreement was created. A *conditional fee agreement* (CFA) did enable the lawyer to charge fees according to results: base fees plus a success fee (up to 100% of base fees) if the case was won and no fees or reduced base fees if the case was lost. Like the American system of contingency fees, the success fee was payable out of the winnings and was not payable by the opposing party. Unlike the

American system, the success fee was expressed as a percentage of base costs, not a percentage of the winnings.

1.3 Method of Assessment

In most cases costs ordered by a court had to be "taxed" according to the relevant scale. Into the early 1980's there were various scales for each court. The High Court scale included upwards of 100 items. For most items the scale stated the minimum and the maximum sums which could be awarded.

In order to get the costs taxed the receiving party had to draw a complex bill, the costs of which were not themselves recoverable.

The process of taxation was of ancient origin. The earliest records of taxations date back to 1163. The jurisdiction was not always monetary. An Act of Parliament of 1531 stated that litigants who successfully pleaded poverty "shall not be compelled to pay any costs ... but shall suffer other punishment as by the discretion of the Justices or Judge ... shall be thought reasonable." In 1647 it was ordered that "any vexatious pauper plaintiff shall pay unto the defendant good costs or receive corporal punishment by whipping according to the statute".

1.4 Basis of Assessment

In most cases the costs were said to be assessed on the "party and party" basis. This meant that only those costs which were regarded as "necessary and proper" were recoverable.

Under the "indemnity principle" the losing party's liability for costs could not exceed the winning party's liability to his solicitor.

Because of the scales of costs in use, the definition of party and party basis and the effect of the indemnity principle receiving parties never received more than they had to pay and often received a great deal less than they had to pay.

2. The Present

2.1 Suppliers of Litigation Services

The role of barristers in litigation has diminished whilst the role of solicitors has increased. Solicitors have a full right of audience in all County Court cases and an increasing number also have full rights of audience in High Court cases. Although the

majority of the routine work continues to be done by solicitors clerks (now called para-legals) solicitors rather than barristers now run civil cases.

The abolition of legal aid for most non-matrimonial civil claims has led to the growth of claims farmers. In return for the purchase of AEI these organisations refer potential claimants to solicitors (from whom they also receive payments) and provide loans to cover the costs of disbursements, including the costs of the AEI premium. The most successful claims farmers rely upon saturation advertising on TV, radio and in the press and are referring thousands of cases per week. Some solicitors fear that, if they are to retain direct access to individual clients, they must organise advertising campaigns which rival those of the claims farmers.

2.2 **Entitlement to Costs**

As between litigants there are three developments from the past:

2.2.1 The fee shifting principle has been abolished in "small claims" save for the costs of commencing such proceedings.

2.2.2 In other cases the "follow the event" principle remains significant but has become a starting point from which the court may readily depart.

> "The most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues ... it is now clear that a too robust application of the "follow the event principle" encourages litigants to increase the cost of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."
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> (*per* Lord Woolf MR in AEI *Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507).

2.2.3 The losing litigant may now be ordered to pay, not only the base costs of the winner but also costs in respect of a reasonable success fee (up to 100% of base costs) and a reasonable premium for AEI. Note that, at present:

> The costs of BEI are not recoverable.
>
> There is a doubt as to whether the costs of AEI are recoverable in cases which settle before commencement of proceedings.

There is a doubt about the recoverability of any "own costs" insurance.

2.3 Method of Assessment

Taxation has become detailed assessment. The receiving parties still have to draw complex bills of costs but can now recover the reasonable costs of doing so from the paying party. The old scales of costs have gone. In its place enormous emphasis is placed upon the time spent by solicitors and other fee earners.

In all cases lasting less than one day (including cases in the Court of Appeal) the rules of court encourage the summary assessment of costs. To facilitate this each party seeking costs must prepare and serve a statement of those costs at least 24 hours before the hearing. (Such statements need never disclose the amount or method of calculation of any success fee or insurance premium claimed.)

In cases on the fast track the trial costs are fixed: the maximum fee for the advocate is £750 plus any reasonable success fee payable.

If a court orders detailed assessment rather than summary assessment it should consider whether to order a payment on account (Costs Practice Direction, para 12.3).

2.4 Basis of Assessment

Most costs are assessed on the standard basis, a basis more generous than "party and party". On the standard basis the costs must be both reasonable and proportionate. There is little guidance yet as to when costs become disproportionate.

The indemnity principle is now applied upon an item by item basis (*General of Berne Insurance Co Ltd v Jardine Reinsurance Management Ltd* [1998] 1 WLR 1231). Thus, a receiving party who has negotiated a discount rate with his solicitor cannot use that discount to off-set the burden of any irrecoverable costs he must pay.

3. THE FUTURE

3.1 Suppliers of Litigation Services

Will BEI grow at the expense of AEI? If so the number or referrals to solicitors by claims farmers will diminish and the number of referrals to solicitors by BEI insurers will increase.

Will the solicitors fight back against panels succeed? One route to success might be offering legal services in which the solicitor shoulders all of the risk of loss. Such solicitors would no doubt seek a new form of professional indemnity insurance.

Can the Bar survive? In at least four respects the problems caused by the new success fee law are worse for counsel than they are for firms of solicitors.

- As sole practitioners, barristers have a smaller case load against which to spread the risk of non payment.
- In most cases, barristers have no direct access to clients. They fear that solicitors will adversely select the cases to pass to counsel.
- In routine cases, counsel will not be instructed until a late stage. By then there is no prospect of early settlement. However they fear that solicitors will pressurise them into accepting the same success fee percentage as the solicitors agreed at the outset.
- If the success fee percentage allowed between the parties is less than the agreed percentage, it may be more difficult for counsel to recover the shortfall than it is for the solicitor.

3.2 **Entitlement to Costs**

In the short term the irrevocability of the reasonable costs of BEI should be reconsidered.

In the longer term the fee shifting principle should be reconsidered. Are there some cases in which it should be abandoned together with the rule against contingency fees (eg in class actions). In other cases should successful parties always expect to have to pay a percentage of their reasonable costs personally and, if so, what percentage?

3.3 **Method of Assessment**

There are plans to standardise costs in short and routine court hearings by publishing benchmark figures. In cases covered by such a scheme the court will award the benchmark sum unless persuaded to award a larger or smaller sum or unless persuaded to order a detailed assessment.

Is there any scope for implementing the recommendations of Lord Woolf that there should be a fixed or capped costs regime for cases on the fast track? If so,

on what basis should the fixed costs be assessed? A lump sum with additions for court fees and court hearings?

Should the basis of the regime vary according to the type of case? For example, different figures for personal injury cases, contractual disputes, possession of land and neighbour disputes.

Should the fixed costs vary according to the locality in which the work is done?

3.4 **Basis of Assessment**

It seems that the Lord Chancellor has been persuaded to move away from the old costs questions (what costs has the winning party incurred and to what extent are those costs reasonable?) in favour of a more pragmatic approach (are the costs claimed reasonable and proportionate?) He has decided to implement Section 31 of the Access to Justice Act 1999 thereby enabling the rules of court to provide that the indemnity principle will not apply when assessing costs. At present there is no indication as to when the Rule Committee will be able to address this question.

Will a relaxation of the indemnity principle enable some litigants to obtain orders for costs which exceed the costs they are obliged to pay? For example, many multi national companies and insurance companies are able to negotiate discounted rates with their solicitors. At present that discount is passed to the opponents where the opponents are paying costs. In the future the value of that discount may go neither to the opponent nor to the lawyer but to the litigant who negotiated the discount. The current guideline rate for grade 1 fee earners in the City of London is £265 per hour. In bills assessed in the Costs Office it is common to see claims not exceeding £200 per hour where the receiving party is a multi national company or an insurance company.

One possible way forward would be for the Rule Committee to relax the indemnity principle only in claims and counterclaims in respect of personal injuries and death, housing law and similar topics. In other cases (eg commercial cases and defences to personal injury cases) the indemnity principle might continue to apply.

A further relaxation of the indemnity principle which might be considered is the negativing of the Court of Appeal decision in *General of Berne* (see above). This change would move the benefit of the discounted rates which some receiving parties can achieve from the paying party to the receiving party but only to the extent that the receiving party had incurred other costs in the matter which would otherwise be irrecoverable.