# Double entry

## Has Jackson really been too kind to insurers? **Simon Gibbs** does the sums

Lord Justice Jackson's proposals for civil costs reform, which have largely been accepted by the government, have generated much heated debate. The anti-Jackson claimant lobbying continues unabated. But what of the defendant's position?

Martyn McLeish, writing in the *Solicitors Journal* Bar Focus (April 2011), supported the continuation of the current system so far as it relates to cases subject to fixed success fees. McLeish writes: "The underlying philosophy behind the fixed success fee agreements was that they were costs neutral… in this context it is hard to understand the Lord Chancellor's argument that the current system causes injustice to insurers as they are compelled to settle weak cases that would otherwise fail."

The fixed success fee regime is indeed intended to be "costs neutral", but only from the perspective of the claimant lawyer. In theory, the success fee recovered on successful cases compensates the lawyer for the costs lost on unsuccessful cases. However, it is not costs neutral from the defendant insurers' perspective. The insurer is paying directly for the cost of cases successfully brought against them and indirectly for the cost of cases brought unsuccessfully against them. Costs neutral means that insurers ultimately pay for all claims brought against them, regardless of merit.

McLeish continues: "In road traffic accident and employers' liability cases, success fees on solicitors' costs are 12.5 per cent or 25 per cent at all stages of the proceedings until the advocate opens her mouth at trial… It is hard to see how the current regime could be described as forcing insurers' hands in weak cases. Even if settled late in the day success fees are still modest." This reveals a fundamental misunderstanding of the realities of the economics of personal injury claims from a defendant perspective.

Take a typical low-value RTA claim with damages worth £2,000. If the defendant insurer admits liability and settles the claim pre-proceedings, the matter would currently be dealt with under the new RTA claims process. Assuming the matter was privately funded, there would be fixed solicitors' profit costs of £1,200. In addition there would be VAT of £240 and perhaps a GP report fee of £220. The legal costs payable would therefore total £1,660. The total payable, damages plus costs, would be £3,660.

If liability is disputed and the matter proceeds to trial, and the case is lost, the costs will not be fixed. Base profit costs might be £10,000, plus £2,000 VAT, the GP report fee of £220, an issue fee of perhaps £120, a fee of £220 payable at the allocation questionnaire stage and further listing and hearing fees totalling £655. In addition there would be fixed trial costs for the advocate of £485 plus VAT of £97. Costs would therefore total £13,797. The defendant would therefore have a total to pay, damages plus costs, of £15,797. This ignores the insurer's own legal costs.

If an insurer had a batch of ten claims, where liability is 50-50 in each, they should be just as entitled to defend those claims as a claimant is entitled to bring a claim where liability is evenly balanced. If an insurer ran this batch of ten claims to trial, on liability, they would expect to win on five and lose on five. They would be liable to pay costs and damages on the five they fail on. This would total, based on the above figures, £78,985 (five multiplied by £15,797), ignoring own costs. On the other hand, if the insurer decided to concede liability without a fight, they would be liable to pay damages and costs on all cases, but with the costs significantly lower. The total payable would be £36,600 (ten multiplied by £3,660).

### Losing out

From the perspective of this hypothetical batch of ten cases, an insurer would be considerably better off conceding liability on all claims, regardless of having reasonable defences on all ten and being likely to successfully defend half. That is even where the claims are privately funded. Of course, insurers sometimes do defend such cases because failure to do so would leave them open to opportunistic, speculative or downright fraudulent claims.

Let's examine the impact of fixed success fees and ATE premiums. Taking the above examples, if the claim settles pre-proceedings, the solicitors will be entitled to a fixed success fee of 12.5 per cent on the profit costs of £1,200. This would total £150 plus VAT of £30. We will assume that a modest premium of £150 has been paid that will provide cover whether or not the claim exited the RTA claims process. The legal costs payable now will be £1,990 (the original £1,660 plus £330). The total payable, damages plus costs, is £3,990.

What happens if the matter proceeds to trial? If the case is lost, there will be a fixed 100 per cent success fee on the solicitors' profit costs of £10,000. This will add £10,000 plus VAT of £2,000. There will be a fixed success fee of 100 per cent on counsel's fees. This will add £485 plus VAT of £97. Again, we will assume the ATE premium remains at £150. In reality, the premium may be staged and a much higher figure might be sought. The legal costs payable if a claim is lost will now be £26,529 (the original £13,797 plus £12,732). The total payable, damages plus costs, is £28,529.

Assuming the same batch of ten cases is run to trial on liability with the same outcome of five successfully defended and five lost, the total payable by the insurer would now be £142,645 (five multiplied by £28,529), ignoring own costs. On the other hand, if the insurer decided to concede liability without a fight in all ten, the total payable would be £39,900. Even if the insurer successfully defended eight of these claims going to trial, they would still be paying out £57,058 (two multiplied by £28,529). This is £17,158 more than settling all ten cases in the claimants' favour at an early stage.

On this hypothetical example, the insurer needs to win 90 per cent of cases for it to be worth defending claims with 50-50 prospects. Once own costs are taken into account, probably none of these claims are worth defending. Even if one assumed a more modest figure for the claimant's solicitor's base profit costs of, say £5,000, these claims are still not worth defending. The pressure on insurers to settle low-value claims, regardless of the merits on liability, is enormous. When McLeish was writing: "The unnecessary settlement of unmeritorious claims within the present system is a bogus and unworthy argument," I wonder if he managed to keep a straight face.

Simon Gibbs is a partner with defendant costs specialists Gibbs Wyatt Stone and writes the Legal Costs Blog (www.gwslaw.co.uk/blog)