MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

COSTS, MANAGEMENT, PROPORTIONALITY AND INSURANCE

PERSONAL INJURIES BAR ASSOCIATION CONFERENCE, OXFORD

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(1) Introduction

1. This evening I would like to discuss some issues which arise out of the Jackson costs review, and one issue which doesn't[1]. The first of the issues which arises out of the Jackson review – or rather was the impetus behind it is, unsurprisingly, the issue of costs. The second is case and costs management. I will then turn to proportionality, and end with insurance schemes.

2. Concern about litigation cost is as old as litigation itself. Case management too has been with us from the mid-nineteen nineties; and in other countries for much longer. And we have been slowly introducing a rudimentary form of costs management through costs estimates and cost capping orders. Proportionality too is no longer novel: it is an idea common to both the European Convention on Human Rights and with the overriding objective (or, as it was printed in a transcript of an *ex tempore* judgment I gave at first instance, the overriding objection). So far as procedure is concerned it is an idea which the Woolf reforms not only embedded here, but which they also caused to be adopted in civil justice reforms across the world. As to talking about insurance, I don't mean after-the-event or before-the-event insurance, but no-fault insurance – that is to say no fault compensation – schemes, such as is embodied in a scheme which has been adopted and has for some time been in place in New Zealand.

3. I should say at the outset that I am aware that you are as concerned about the cost of litigation as I, and Sir Rupert Jackson are. I doubt that there are many of you who would say that the present state of affairs is satisfactory, but I too realise that you, like others, have concerns about some – I hope not all – of the Jackson review's recommendations. Those recommendations have my enthusiastic support, as they do that of the other members of the senior judiciary, including the Lord Chief Justice. We will implement as many of them as we properly can through rules of court. But some of the Jackson recommendations in respect of, for instance, conditional fee agreements, contingency fees, require Parliamentary consideration. They will no doubt be debated in Parliament. There will, I imagine, be some,

[1] I would like to acknowledge the great assistance I have received from John Sorabji in preparing this lecture.

albeit I hope limited, further Ministry of Justice consultations as part of that process. I am sure that your concerns will be put properly and forcefully to the Ministry. No doubt, when you make those submissions they will be informed by your experience of operating personal injury claims in a partially reformed landscape – a landscape with, for instance, greater and more effective costs and case management, with fixed costs in the fast track. I can imagine that debate in light of such experience will be an enlightened one.

4. With that introduction, I propose now to turn to the first of my themes tonight: costs.

(2) Costs

5. No one can doubt that litigation is costly. That is a truth here as it is a truth throughout civil justice systems the world over. The cost of personal injury litigation has been the source of concern here for some time. The Winn Committee examined personal injury costs in 1968. The Cantley working party had another go in 1979. Both the Civil Justice Review and Woolf Reports looked at them again, although in a wider context, in the 1990s. And now they have formed one of the foci for Sir Rupert Jackson's cost review. Unlike previous reviews, Jackson has concentrated on producing an evidence-based analysis, a feature which was, as Hazel Genn pointed out in her admirable Hamlyn lectures last year, rather lacking in the Woolf proposals. In defence of Woolf, I should say that it covered such a broad canvas that focussed evidence-gathering would have been a Herculean task. However, that does not diminish Jackson's astonishing achievement in gathering so much factual and statistical material in such a short time, especially bearing in mind the overall fullness and thoroughness of the report.

6. Costs issues are not of course confined to personal injury claims. Anyone who thought that was the case would be naive at best. They are however perhaps particularly acute in respect of some personal injury litigation and most acute where claims are allocated to the fast track. They are therefore particularly acute in respect of litigation which in the overall picture is, or ought to be, simpler and more straightforward than claims which require allocation to the multi-track. As Sir Rupert Jackson put it in his preliminary report:

   "*A major part of civil litigation costs is attributable to personal injury litigation. Many personal injury claims (particularly at the lower end) are relatively straightforward matters, which ought to be capable of fair resolution without the defendant's insurers paying out sums to lawyers and experts in costs comparable to what they pay out in damages to claimants.*"[2]

7. So much for the problem. But what is the solution? How are we to ensure that the cost of personal injury litigation is no more than proportionate? Jackson points the way and does so: first, through proposals aimed at reducing the incidence of the basic costs of litigation; and second, through his proposals relating to conditional fee agreements, success fees and contingency fees. The latter, as I have said, are now a matter for Parliament. I intend therefore to focus on the former: on the issues that judges and practitioners can implement. As such, with the reality of the political process in mind, it is those recommendations which will be put into effect first; the consequences of which will no doubt inform Parliament's consideration of the proposed legislative reforms and the debate surrounding them. With that in mind I turn to case and costs management.

[2] Jackson, *Review of Civil Litigation Costs: Preliminary Report (Vol 1)* (May 2009) at 231.

(3) Case and Costs Management

8. The introduction of active judicial case management was a true revolution in English civil justice. It was a revolution, which Woolf understood would need to be kept under review. While it was clear to him that experience in other jurisdictions demonstrated that it was effective in reducing delay, it was equally clear that, at least in other jurisdictions, the jury was still out on whether it was an effective mechanism to reduce litigation cost. For him the introduction of case management was something which required careful monitoring.[3] The same is equally true of costs management.

9. One thing which I think we all have to acknowledge is that case management is still in its infancy here. Ten to fifteen years is a short time to change a culture. Judges and lawyers brought up under a more laissez-faire regime, where the conduct of litigation was in the hands of the parties and their lawyers take time to change. We have though taken great strides since 1995. But more needs to be done if effective case management is to play its proper role in bringing base costs down to proportionate levels.

10. In the first instance, there must be greater consistency in the approach of the judiciary. Clear guidance needs to be given, and stuck to, by the senior judiciary so that a consistent approach to case management can develop across the entire judicial piece – I can't believe I said that. One way in which this could be done, as the Jackson Report recommends rightly, is that an experienced District Judge could sit as an assessor with the Court of Appeal on case management appeals[4]. In that way the Court of Appeal would be able to draw on, and in due course to acquire, the relevant experience, just as it does in costs appeals where Chief Master Hurst, the Senior Costs judge sits as an assessor with the Court, of a judge well-versed in the day-to-day mechanics of case management. Case management guidance could then reflect, perhaps more so than it has done in the past, the realities of life in the County Court and High Court, while properly shaping its future development.

11. It seems to me that in this we have a clear example of how a consistent approach by the Court of Appeal can shape case management to enhance both the efficiency and economy of litigation. A line of authorities in point are those on service: *Godwin v Swindon*[5] through to *Collier v Williams*[6]. In those cases the Court of Appeal gave consistent guidance on what is a much stricter post-Woolf approach to service and compliance with the service time limits. That approach had a properly beneficial effect; something which was noted by Dyson LJ in *Hoddinott & Others v Persimmon Homes (Wessex) Ltd*[7]. He remarked how the District Judge dealing with the matter had commented that practice had changed in light of the service authorities and that few extensions of time applications were being made. In other words a consistent approach to case management in that area had changed litigation practice; had made it more efficient and, consequently it can fairly be concluded, more economical.

12. That benefit took a while to achieve. It took, as I'm sure you're all aware, probably more appeals to the Court of Appeal than was ideal – an issue which both I and Dyson LJ – now the 12th Supreme Court Justice – had separately criticised. But it illustrates an important point. A consistent approach by the Court of Appeal to an aspect of case management is an effective means to bring about a change in litigation culture. To that extent the court should

[3] Woolf (1995) at 33.
[4] Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO) (December 2009), recommendation 88, at 470.
[5] [2002] 1 WLR 997.
[6] [2006] 1 WLR 1945.
[7] [2007] EWCA Civ 1203.

concentrate on the myriad of future cases just as much as, if not more than, the actual facts of the case it is deciding. A similarly consistent approach to such issues as compliance with pre-action protocols, disclosure, expert evidence, the brevity of skeleton arguments, of witness handling will have an equally beneficial effect. It too will, as it no doubt has with service, ensure the growth of a properly efficient and cost-effective approach to these aspects of litigation, and thereby reduce base costs. In other words, what worked in service can work elsewhere to bring about a change in culture so as to reduce base costs.

13. Such an approach by the Courts will also no doubt further embed a more and properly disciplined, almost managerial, approach to the conduct of litigation by lawyers. It will no doubt foster a culture where lawyers can rest assured that they ought only to expend proportionate base costs on the conduct of litigation. Training and education will also play a key role here, both for judges and lawyers. It strikes me as odd that after ten years of case management, young lawyers – solicitors and barristers – are not given detailed training in case management as part of their vocational courses, pupillage and training contracts. The same point could, I am sure be said, of the judiciary. One way in which we can remedy this is for greater judicial training via the Judicial Studies Board. Consistency from the Court of Appeal or through the development of a menu of standard directions to be used as a starting point for case management directions by all procedural judges[8] is one thing, but prevention is better than cure. We should not just be developing a culture committed to no more than proportionate costs in the judiciary and lawyers of today, but we should be doing so in respect of the lawyers and judiciary of tomorrow.

14. Training and education is one way to tackle the problem. Another is of course docketing, or as the Jackson report puts it '*the assignment of cases to designated judges with relevant experience.*'[9] Docketing is an excellent idea; where it operates already it operates well: a point well made about the approach taken in, for instance, Liverpool County Court. Assigning responsibility for the proper management of a case to a single judge, with experience of the subject matter of the proceedings gained through their own time in practice, will help to build consistency and knowledge of the case and its issues. It will focus the minds of both judge and practitioners. It will provide the judge with, for instance, sufficient knowledge of the case to ensure that it is conducted at proportionate expense; something which may well not arise where, as now, different judges deal routinely with the same set of proceedings throughout its pre-trial case management stage.

15. General case management is one important area where, if properly applied, it will bring base costs down. Specific costs management will also prove essential here. The initial problem here is again one of education. As noted in the Jackson final report, there is no great '*groundswell of enthusiasm amongst either judges or practitioners for learning all about costs.*'[10] Unfortunately for the groundswell such apathy can no longer continue. Perhaps lawyers and judges, like mankind as Rousseau saw it, have to be '*forced to be free*' or in our case forced to love costs management. Training is again the key here. Even the most sceptical now admit that judges can be trained. The JSB is again ideally placed to train them in costs management. Lawyers can clearly be trained. CPD courses abound. In-house training is commonplace. Bar and solicitor's vocational training can be adapted to include proper costs management training. Practice will, as costs budgeting takes its proper place in proceedings, make perfect. Again, as with case management, perfection will not come

[8] Jackson (December 2009) at 393.
[9] Jackson (December 2009), recommendation 81 at 469.
[10] Jackson (December 2009) at 416.

overnight. Improvement will come over time as skills a learned and practice adapts to the new culture. And again clear and straightforward general rules covering costs management applied consistently by the judiciary will enable a readily understood process to take hold. What is true of general case management is as true of specific costs management.

16. These are all changes which the judiciary and the profession can bring about as means to reduce base costs. Simpler, more straight forward and consistently applied procedure carried out by a judiciary, properly equipped to take a more interventionist case management role and a legal profession also committed to such a culture, will, I am sure, have a positive effect. Costs will however come under pressure from an external source: the Legal Services Act 2007. Up until now the legal profession has operated as it always has: in the main split between branches. We are on the verge of that changing and changing radically. I have no doubt that the new legal landscape with ABSs, MDPs, LDPs, BoPs and other acronymic entities, and also procurecos – including possible barrister-led business entities competing with solicitors – as well as so-called Tesco-law will render the legal market place ever more competitive. Ever increasing competition will lead to novel business practices. It may result in an end to hourly billing; or if not its end then its marked decline. The end of the billable hour would be likely to have a salutary effect, it seems to me, on the base costs of litigation. Greater competition between firms will no doubt lead to fixed price deals: deals which will be for proportionate amounts. They will have to be or the work will go to competitors. In thinking about how we will transform civil procedure to render costs proportionate, we should bear in mind the possible effect of external factors. Such factors working in tandem with the internal reforms recommended by Jackson will have a profound effect on costs and, necessarily, in the conduct of litigation.

17. Having made that point, I should perhaps turn to proportionality as it provides the underpinning for both the Woolf reforms and Jackson recommendations.

(4) Proportionality

18. More case and costs management is, as I have said, central to Jackson's remedy to the illness affecting our justice system. But as with all cures we must take care with it. Interventionist case and costs management must not become excessive. A balance will of course need to be struck. It must not become a cause of the problem it seeks to help resolve i.e., a new cause of excessive cost and delay. Proportionality is the key here.

19. Proportionality underpins the entire Woolf reforms, the CPR and the Jackson recommendations. We can all see that in the very existence of the three procedural case tracks, where procedure is matched to the nature of the claim. We have perhaps not taken a sufficiently rigorous approach to proportionality. That is not surprising. It is a concept which, in the field of civil procedure, is still relatively new, and it is much easier to talk about in theory than it is to apply in practice. For me, one fundamental point made in the Jackson report is in his discussion of proportionate costs, where he said this (which has received surprisingly little coverage in the commentaries following the publication of his report):

"*Disproportionate costs do not become proportionate because they were necessary. If the level of costs incurred is out of proportion to the circumstances of the case, they cannot become proportionate simply because they were 'necessary' in order to bring or defend the claim.*"[11]

[11] Jackson (December 2009) at 37.

20. This truth is the very essence of the Woolf reforms, which the Jackson report now seeks to build upon. Very many different types of cost can be said to be necessary to bring or defend a claim. They are costs which are incurred, as Woolf would have put it, to ensure the achievement of substantive justice. They are necessary to enable the court to decide cases on their merits. But such necessary costs are, as we all should well know by now, balanced now by an equal commitment to what Woolf described as procedural justice; that is to a fair, just and properly accessible justice system for all litigants. Procedural justice thus goes beyond the immediate concerns of individual litigants: it goes beyond what is necessary to achieve a decision on the merits in any individual case. In this way it is outward looking while necessity is inward looking.

21. The CPR are intended to strike the balance between substantive justice in the individual case and procedural justice for all. In doing so they move our justice system in a new and radical direction, away from the familiar old world of full-costs recovery to the brave new world of proportionate cost recovery. We have not opted for the abolition of costs recovery; we have opted for a balance. It is a balance which Woolf struck between (a) the need to ensure that those who are effectively forced to come to court, whether as claimant or defendant, to vindicate their substantive rights, are indemnified for having had to do so, and (b) the need to manage litigation cost in order to ensure that each claim does not consume more resources than ought properly be made available to it - by reference not just to the nature and value of the claim itself but also the need to ensure that other claims are able to obtain a fair amount of the court's limited resources.

22. The CPR aim to achieve this through, as I have mentioned, procedural case tracks. Equally, they do so through standard disclosure in some cases, with more detailed, tailored disclosure in others. Examples can be multiplied. One way in which the CPR has fallen short is in not carrying through this policy consistently. One place where it might be said that this has happened is pre-action protocols. They were intended to give concrete form to the spirit of the Woolf reforms: to engender a less adversarial approach and foster early, informed settlement through a full and early cards on the table approach to litigation. But it seems to me that they may well have become too detailed, prescriptive, and inflexible. Is it really the case that a fast track personal injury claim, for instance, needs the same level and degree of pre-action conduct as a high-value multi-track case? Maybe some practitioners do take an appropriately nuanced approach, but I strongly suspect that many do not. And where they do not an unnecessary source of additional base costs are frontloaded into the claim.

23. The pre-action protocols are currently being reviewed, as many of you will know. One thing which I think needs real consideration during that review is whether and to what extend they need amending to render the pre-action procedures they set out more proportionate both for individual cases and globally. This may require specific changes which go beyond the proportionality provision, which is currently found in paragraph 1.5 of the Pre-Action Protocol for Construction and Engineering Disputes. And now it is being suggested that we should be extending judicial case, and costs, management to the pre-action stage. But would that represent more sensible judicial costs control, or would it result in yet more front-loading of costs?

24. More generally, a clearer and more consistent approach to proportionately must take hold throughout the civil justice system, whether it is case management, disclosure or pre-action conduct. When litigation is conducted proportionately, proportionate cost should follow. Where it does not those costs will be unnecessary and ought to be disallowed on assessment. Equally, where the pursuit of litigation to trial is itself understood to be disproportionate

because, as Lord Hoffmann stated in *Sutradhar v Natural Environment Research Council* [2006] 4 ALL ER 490 at [42], the costs incurred are too great – too great because they impose too great a burden on the parties and on other litigants through their use of court resources – then measures have to be taken to properly balance substantive and procedural justice.

25. Such measures might include, in an extreme case, stopping the claim from proceeding to judgment – to the extent that that would be consistent with article 6. More usually, it will require both the court and the parties to conduct litigation consistently with the obligation to ensure that justice is pursued at no more than proportionate cost. In some cases this will mean that steps which would have been assumed to be necessary in the past will now have to be viewed as unnecessary. As ever, a balance will need to be struck. Innovation will need to be the order of the day. If it is, base costs will no doubt come down in personal injury claims just as they will no doubt come down in other proceedings. But what if they don't? What if personal injury costs remain disproportionate notwithstanding the implementation of all the Jackson recommendations? What then for personal injury claims?

(5) Insurance – No Fault Systems

26. That question leads me neatly to my final topic tonight: insurance or no fault compensation for personal injury. Sir Rupert Jackson noted that in Ireland and New Zealand tribunals had been established to '*deal with personal injury claims, or certain categories of personal injury claims.*' He did not however put forward any such proposal for debate.[12] That may have been because such a proposal would have been outside his terms of reference – which were to '*consider whether changes in process and/or procedure could bring about more proportionate costs*'[13]. Or it may have been because, unsurprisingly, he did not have the time to look into the question. Whatever the reason, the Jackson costs review did not consider whether improvements in compensating individuals for personal injuries would be better achieved by the removal of personal injury claims from the civil justice system, either partially or entirely. I am not advocating such an idea, but I am suggesting that it is something which might be considered by policy-makers if we fail to achieve proportionate costs in personal injury litigation. Let me look briefly at the New Zealand scheme, as it is probably the most well-developed and established of its type.

27. The New Zealand scheme, now administered by the Accident Compensation Corporation, arose out of the 1966 Royal Commission into compensation for personal injury in New Zealand, chaired by Justice Owen Woodhouse, the now former President of the New Zealand Court of Appeal. The Woodhouse Commission concluded that the common law negligence action as '*a form of lottery*'[14] '*due to its inconsistency of solution*'[15]: a point reiterated some thirty years later by Atiyah in his well known book *The Damages Lottery*, which also argued for comprehensive Woodhouse-consistent reform in this area[16]. Woodhouse and Atiyah were not the first to reach the conclusion that the common law was a lottery. As the Woodhouse report noted the lottery point was one made by William Beveridge in his famous report of 1942, when he said this:

[12] Jackson, *Preliminary Report (Vol 1)* at 231.
[13] Jackson, *Preliminary Report (Vol 1)* at 3.
[14] Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry (Wellington) (1967) at (19) (http://www.library.auckland.ac.nz/data/woodhouse/woodhouse1c.pdf).
[15] Drabasch, *No Fault Compensation* (NSW Parliamentary Library Research Service, Briefing Paper No 6/05) at 36.
[16] (1997) (Hart Publishing) at 1 – 2.

"*With the inevitable uncertainties of legal proceedings, suits for heavy damages on the ground of negligence cannot escape having something of the character of a lottery.*"[17]

28. Woodhouse went on to draw five conclusions about the common law. Those were that:
"*(1) The adversary system hinders the rehabilitation of injured persons after accidents and can play no effective part beforehand in preventing them.*

(2) The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation.

(3) The remedy itself produces a complete indemnity for a relatively tiny group of injured persons; something less (often greatly less) for a small group of injured persons; for all the rest it can do nothing.

(4) As a system it is cumbersome and inefficient; and it is extravagant in operation to the point of absorbing for administration and other charges as much as $40 for every $60 paid over to successful claimants.

(5) The common law remedy has performed a useful function in the past, but it has been increasingly unable to grapple with the present needs of society and something better should now be found."[18]

29. In light of this, and its other conclusions the Woodhouse Report recommended that, rather than relying on the common law tort action, New Zealand should abolish the common law action for damages for personal injury and introduce a no fault personal injury compensation scheme.[19] The scheme was to be based on five principles: community responsibility; comprehensive entitlement; complete rehabilitation; real compensation – in other words to ensure as Lord Blackburn put it famously in *Livingstone v Rawyards Coal Company* in 1879, that the general rule '*where . . . any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation*'[20]; and finally administrative efficiency[21]. Of course, the fundamental difference between the Woodhouse proposal and Lord Blackburn's statement of principle is the absence of fault in the former and its presence in the latter.

30. The rationale behind the scheme's proposal was manifold. As summarised by Drabasch the Woodhouse Commission concluded that:

"*the remedies provided by the common law were inadequate in a number of ways, including: the failure to compensate numerous people; its expense and delay; and its failure to sufficiently encourage rehabilitation.*"[22]

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[17] Beveridge, *Social Insurance and Allied Services* (1942) (Cmd 6404) para 262, cited in Woodhouse (1967) at 63.
[18] Woodhouse (1967) at 178.
[19] Woodhouse (1967) at 179ff.
[20] (1879 – 80) LR 5 App. Cas. 25 at 39.
[21] Woodhouse (1967) at 177 – 178.
[22] Drabasch (2005) at 36.

31. Its purpose is to provide 24 hour no fault cover for personal injury. In the ringing terms of the Commission, its purpose was to provide '*24-hour insurance for every member of the workforce, and (I should note, in the terms of the day) for the housewives who sustain them.*'[23] The majority of the Commission's recommendations were enacted through the Accident Compensation Act 1972, passed unanimously by the New Zealand Parliament.[24] It abolished the right to bring proceedings for personal injury arising from accidents. The 1972 Act has since then been replaced on a number of occasions. The current statutory regime is set out in the Accident Compensation Act 2001. Section 317 sets out the abolition of the common law cause of action, as it provides that:

"*No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—*
(a) personal injury covered by this Act; or
(b) personal injury covered by the former Acts."

32. The scheme Woodhouse proposed and which was introduced in New Zealand in 1974 has since that time been administered by a Crown agency - the Accident Compensation Commission, which is funded from a number of sources, for instance: general taxation, a levy on earned income, a percentage of car tax. The scheme has not gone unchanged since its introduction. Nor has it been without its critics; some of whom have no doubt dwelt on the reduction of damages awarded to individuals since its inception in comparison those awarded by courts. Equally, and as you might expect, it has been subject to criticism for its cost. It has been said to have had an adverse impact on the deterrence effect, which legal proceedings produce. In other words the removal of the common law right of action has been said to have reduced the incentive on potential tortfeasors to establish and maintain safe systems. As such it has produced an unnecessary obligation on the state to provide greater health and safety monitoring across wider areas than would otherwise have been the case.

33. Equally, the right to seek exemplary damages was retained – only personal injury claims seeking compensatory damages were subject to the scheme. As might be expected New Zealand has seen an increase in claims for exemplary damages.[25] The suggestion being that individuals who would be entitled to low levels of compensation under the Woodhouse scheme, have an incentive to bring actions for exemplary damages, which would not otherwise be brought if there was only a common law cause of action for compensatory damages. In other words the scheme has produced a perverse incentive to litigate claims for exemplary damages, which would not have been pursued by way of a claim for compensatory damages.

34. The merits or otherwise of the New Zealand scheme can be, and have been, debated. It may not be an ideal system, but, of course, no such system exists. It may not be a system which detailed review would see policy-makers here endorse. Indeed as Howell and others concluded in a review of the scheme in 2002,

"*The New Zealand experience with no-fault accident compensation, in the absence of tort action to modify moral hazard behaviour, is almost unique. While ensuring certainty of*

[23] Woodhouse (1967) at 26.
[24] http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/ABA00004
[25] Drabasch (2005) at 40.

payment, it is far from clear that the scheme has succeeded in balancing the transaction costs and benefits of overt monitoring and enforcement against the costs and benefits of incentive management available from tort action."[26]

35. In other words the transfer of accident compensation from the civil justice system has, at least arguably, not produced the intended cost saving to society as a whole. That may well be the case. But that is simply a criticism of the New Zealand scheme. It is not necessarily a criticism of such schemes in general. As Sir Rupert Jackson said, and I noted earlier, he did not carry out an examination of the New Zealand, or similar, schemes. It seems to me though that unless the cost of litigation to individual claimants and defendants, to the state, is brought under a greater degree of control, attention will turn to such schemes. Such schemes need not be general. They could be focused on discrete types of personal injury claim. But if it is concluded that they are more cost-effective, provide greater certainty for those injured as a consequence of accidents, are capable of providing compensation earlier and more efficiently, and are able to reduce moral hazard then it is easy to see how policy makers could conclude that we ought at least consider taking the road to Wellington. Whether that conclusion is capable of being drawn is the sum of many factors. One of those factors is litigation cost and delay. And it is on that point which I wish to make some final remarks.

(6) Conclusion and postscript

36. Woolf's aim – which now underpins all of Jackson's recommendations – was to introduce proportionality into our civil justice system, for proportionality to guide and shape procedure, case and cost management, track allocation, the use of expert evidence and disclosure, and this aim, and its achievement, will play a significant part in any future debate. The achievement of justice, of compensation for those who suffer personal injury, at proportionate cost will be a key factor in that debate. That debate is one in which I am sure you will take an active and informed part. And conferences like this will provide ideal places for the examination and discussion of the issues, just as they are currently providing the ideal forum for you to debate the Jackson recommendations, their merits and their challenges and the effect they will and ought properly to have on personal injury litigation and the pursuit of justice at proportionate cost.

37. I can well imagine that one of the issues that you will be discussing here, and elsewhere, is the Jackson recommendation in chapter 15 of the Final review that at least some of counsel's fees in fast track PI cases should not be ring-fenced as disbursements, but should rather be added to a global figure. I can well see the argument PIBA put forward in its submissions to Jackson that if counsel's fees were no longer all to be treated as a disbursement they would no longer be instructed. I am not entirely convinced that this conclusion is one that follows inevitably from the recommendation, but the force of the point, and the possibility of its realisation, at least to some extent, cannot be denied.

38. It seems that counsel are still instructed to carry out trial advocacy, notwithstanding the provisions of CPR 46, which implemented Woolf's recommendation that there be a single recoverable fee for trial advocacy. Not in every case, but in very many cases. The same, it may fairly be said, is likely to be the case for pre-trial work. Where the expert, independent and cost-effective input of counsel is required, the junior PI bar may well, therefore, still be expected to be instructed. Where such an instruction is unnecessary because it is

[26] Howell et al, *No-fault public liability insurance: evidence from New Zealand*, Agenda, 9(2) 2002 at 147, cited in Drabasch (2005) at 42.

disproportionate for the solicitor to do so, they will not be instructed and, one would have thought, rightly so. But, as I said, where it is proportionate to do so – and in many cases it will be cost-effective for solicitors to outsource such work to an independent expert – they would, I believe, continue to do so. The aim is to ensure that only proportionate costs are recoverable.

39. You may well take a different view. Would such views also ensure that total costs are not increased above that which are proportionate? How would they ensure that the total fixed costs, as the Jackson report puts it, '*reflect the complexity of the case as a whole, not the decisions made as to what type of lawyer should do the work*'?[27] Like Sir Rupert, I have yet to see a compelling counter-argument or, crucially, a proposal which both encompasses a clear and workable fixed costs recovery scheme for the fast track, while nonetheless providing for all counsel's fees to be treated as disbursements. Can PIBA come up with such a scheme, one which also takes proper account of the changes to come to the bar and the solicitors' professions as a consequence of the advent of ABSs, LDPs and procurecos – an alternative scheme to the one set out in the Jackson final report? Jackson reform is not being introduced in a vacuum, but in a much wider context.

40. With that in mind I wish you an enjoyable, interesting and thought-provoking two days. Thank you.

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[27] Jackson (December 2009) at 160.