The future is fixed

Dominic Regan predicts a bold extension of fixed costs

Sir Rupert Jackson is back on the reform trail. On 28 January next year, he is going to deliver a talk about fixed costs. I have never read a Jackson speech which dwelled on the past. When he speaks, it is with the primary purpose of setting out another vision of radical reform. Anticipate profound proposals rather than tinkering at the margins.

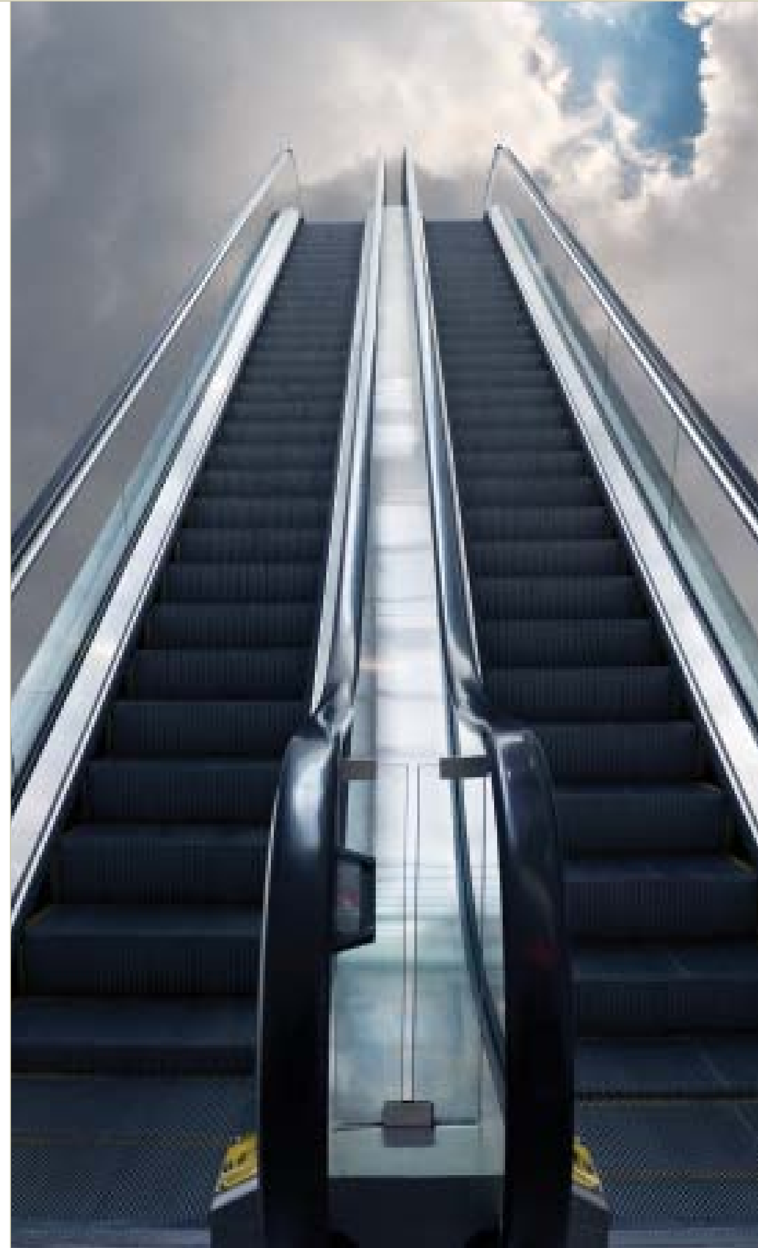
Jackson's reports, which led to the 2013 reform package, lavished praise on the German fixed-costs model. The perceived virtues are utter certainty, the absence of the need to budget, and no pesky arguments about the continuing uncertainty of the proportionality test.

Inevitably, there has been intense speculation about what will be pulled out of the hat. More than a few have said that the proposals will be modest; perhaps an increase in fast-track to £50,000 with a corresponding extension of fixed costs confined to those matters where they are already in place, mainly personal injury claims.

Nonsense. If one looks back to the breathtaking scope of the April 2013 changes, which did not deliver all that he sought, it strikes me that modest meddling is not what Sir Rupert had in mind. Speculating as I do, my intuition is that a bold extension of fixed fees is on the horizon. I believe that change with be both horizontal and vertical. There is no justification for singling out one litigation sector – injury – and leaving costs at large everywhere else. Why should one category of litigant be treated differently from another? A universal application of fixed costs would make sense, subject to crucial qualifications I express below.

A vertical extension is certain. Fast-track matters have been ticking along nicely at £25,000 for a long time. Optimists fondly suggest that they could cope with an increase to £50,000. This figure has been mentioned in dispatches emanating from the Rule Committee. But something far more audacious is possible. An overwhelming volume of mainstream disputes would be captured if the ceiling were to be set at a far higher level, maybe £175,000 or even £250,000. At that level, the bulk of conventional multi-track activity would be captured.

I had an illuminating general discussion in October with Mark Field PC MP, deputy chairman of the Tory party. He utterly appreciates how important our litigation process is for the economic health of the UK, and is MP for Westminster and the City of London. What intrigued me was his general statement that the new government was looking to pursue a radical agenda for change. He was not talking about litigation, but rather looking across the entire social landscape, of which law is an integral component. I detect a will to push seismic changes through in all directions.



CLINICAL NEGLIGENCE

Jackson has unfinished business. Despite his insistence that the reform package be implemented in one single sweep, he was advocating that fixed costs be accelerated to the front of the queue. He ruefully reflected, in a fine essay to be found in the autumn 2013 *White Book* supplement, that his wishes remained unsatisfied.

Injury practitioners have piled into clinical negligence work, perceived as a safe and lucrative haven. It is a discipline that is often complex, and as far removed from the mainstream of conventional lower-value injury work as one could imagine. But how much longer until fixed costs will be introduced into this arena? At the unveiling of the Jackson report, the very first matter the judge alluded to was the disproportionately high level of costs in this field; though it is worth acknowledging that experts can have an immense impact on the bill. The government has a vested interest in slashing bills here, for it stands behind the NHS Litigation Authority. Any saving will translate into a benefit for the state; and so there is overwhelming pressure to slot clinical negligence into a fixed costs matrix too.

AN ESTABLISHED TEMPLATE

How in practice might all of this work? The template in current fixed costs work will be attractive to the reformers. It is now established and simplistic. Costs would be determined by reference to the subject matter of the dispute, stage of settlement and quantum. Low costs at the outset give defendants a fervent incentive to settle in a hurry. It can then be claimed that accelerated dispute resolution represents a virtuous outcome.

The contrary argument is that a typical clinical negligence action is horrifically complicated, with much evidence and documentation to master. An injury claim is generally far simpler. Putting aside the remote prospect that clinical negligence will be left untouched, I suppose that one could either apply a discrete and more generous scale of costs, or attach a significant uplift to clinical claims.

Fixed costs are not necessarily a bad thing. Having an independent and transparent mechanism for determining what is due could be good. As ever, caveats must be entered. First, the level of costs must be realistic and not set at a random, arbitrary level by an ignorant civil servant. Second, it is imperative that unreasonable conduct is penalised so that, for example, a defendant who makes a meal of a matter should pay handsomely for their untoward behaviour. These two considerations are non-negotiable.

THE HOBBS CASE

The recent decision of Master O' Hare in *Hobbs v Guy's And St Thomas' NHS Foundation Trust* (2015) EWHC B20 (costs) illustrates the current dilemma in this field, and shows the downward pressure that now exists, with costs at large having to be proportionate. The claim settled for just £3,500. A bill for £32,329.12 was presented. Any objective viewer, lawyer or not, would be bemused. Master O'Hare undertook a provisional assessment, slashing the bill to £9879.34 plus the costs of the assessment, before making a further deduction for proportionality.

Some of those who are complaining about the prospect of fixed costs have also whinged about budgeting. If budgeting were universally embraced, then the case for an alternative device to regulate costs would be diminished. Even now, it strikes me that a wholesale effort to embrace costs management and particularly J-codes might just persuade Sir Rupert to take a more benevolent approach to higher-value claims.

> Having a transparent mechanism for determining what is due could be good

It is one thing to make proposals, and quite another to deliver them. Jackson has a strong following within the insurance world, which has immense lobbying clout. Portals and fixed costs were fanciful just a few short years ago; yet his 2013 changes were embraced by both politicians and the senior judiciary. Whatever Sir Rupert proposes on 28 January will shake the profession. Mark my words.

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