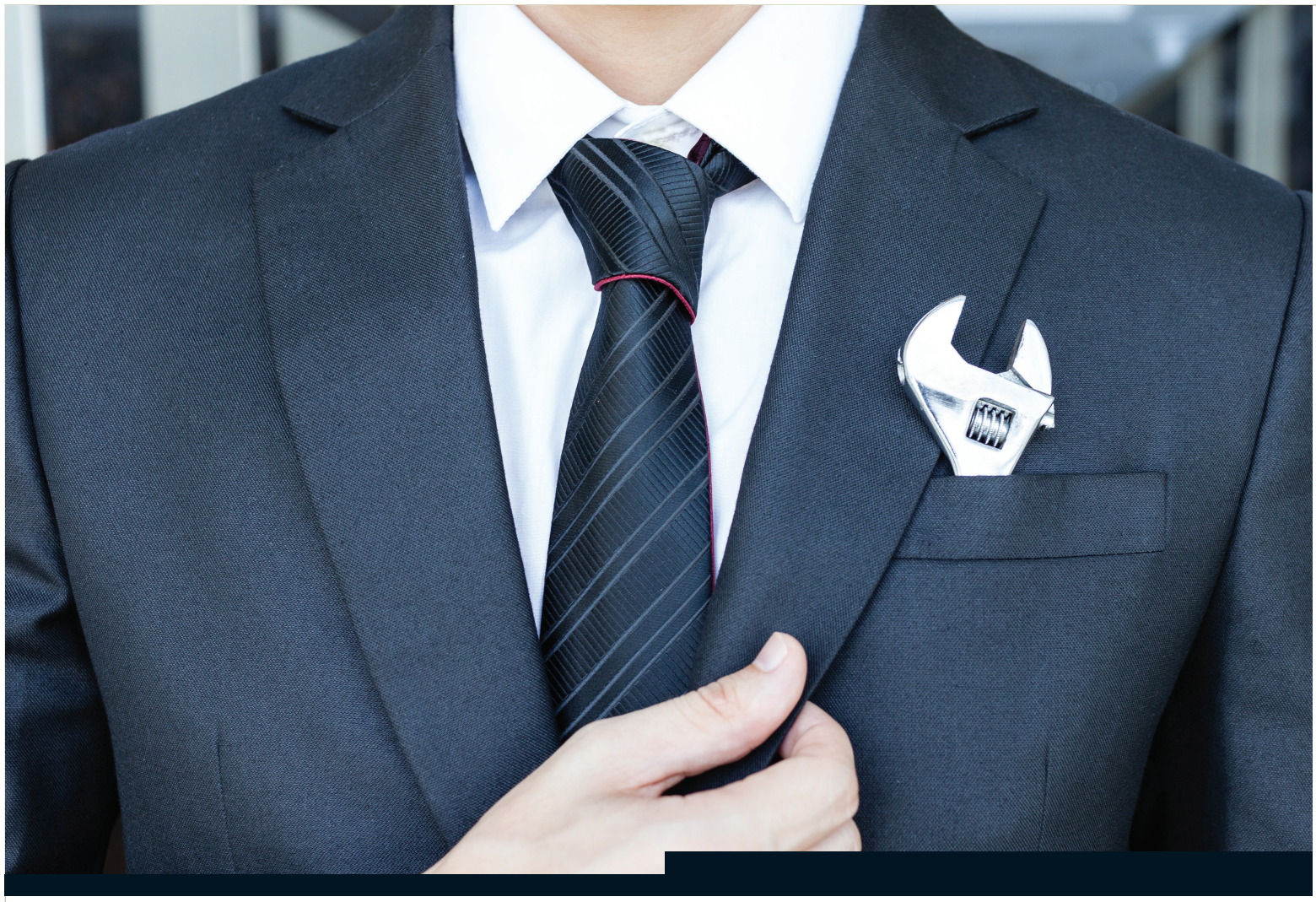
Fixing problems

Andrew Hogan on how lawyers should be preparing for fixed costs



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After the result of the Brexit referendum, seasoned observers noted that one of the consequences was that the Ministry of Justice would be tied up for 20 years, unpicking the country's legal relationship with the European Union, and so would have no time to pursue involved schemes for fixed costs. In fact the converse happened, and we find that we have not one, not two, but three reviews into costs under way at the current time (Jackson's fixed costs review, the Department of Health's costs consultation, and the Ministry of Justice's whiplash reforms).

In principle, there is nothing wrong with a concept of fixed costs. Fixed costs should, for the losing litigant, preserve both the 'polluter pays' principle and also ensure that the losing party can decide to settle or fight litigation on an informed basis, and not go bust if they wrongly decide to fight.

It is also hoped that a predictable scheme of fixed costs might kick start the before-the-event insurance market, which historically has functioned as a clearing house for the referral of claims, rather than a provider of useful insurance products. They could also encourage efficiency on the part of those bringing the claims and, more prosaically, they could be said to represent what is already happening in practice in lower-value claims.

Many case management systems in the personal injury context are set up to record standard units of time for routine or mundane activities: 1 unit for creating forms of authority, 6 units for reading a GP's medical report and so on; the sum of which is to all intents and purposes 'fixed'. The mischief is always the amount at which costs are fixed. The insurance industry would dearly love to see £65 per hour as one of the assumptions used in fixing costs, noting that if that rate is good enough for legally aided cases, then it is good enough for a wider application too.

Further, one notes from recent history that amounts that are prescribed by way of fixed costs tend to rust into position for years, irrespective of what is happening in the wider economy, such as inflation. A wider consideration will also indicate that there are other potential consequences whose importance should not be glossed over.

CONSEQUENCES

One consequence to note is that since the end of legal aid in personal injury and clinical negligence cases, the legal profession has been heavily dependent on the costs recovered from the insurance industry

FIXED COSTS

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and other compensating bodies. The independence and health of the legal profession is of constitutional importance. A short funded or failing legal profession is not in society's interests. Unless the law can be applied and accessed in the courts by the citizens who have rights under it, then parliament can make whatever laws it likes, but their implementation is likely to be disregarded or flouted.

It might be cynical to suggest that the introduction of wide-ranging provisions for fixed costs are a 'done deal' when consultations are still ongoing. But although the government must have an open mind, that is not the same thing as an empty mind - and all the pointers are that fixed costs will be introduced to a greater or lesser extent; and then in the years to come, their scope will be expanded to include more and more cases.

MITIGATION

So what can be done to mitigate the impact of fixed costs, or even to profit from their introduction? The following suggestions or ideas come readily to mind. There are others too, which may well come to pass further down the line. It is important to distinguish between steps that can be taken now or in the near future, and steps that may be taken in the far future.

The first improvement I would suggest is to claims handling triage. Claimants' solicitors (and barristers) make a living from the mistakes made by insurance companies and other compensators. These mistakes flow from the insurers having too much work and too few staff, taking bad points and ignoring good points and the consistent, persistent failure to make decent offers at an early stage of a claims notification.

As has been observed elsewhere, insurers like to pay 70 pence in the pound of a claim's true value, as would be assessed by the court. Under standard basis costs, the longer the claim runs, the more costs the claimants' lawyers recover. Under fixed costs, the longer the claim runs, the more overheads a claimant's solicitor will bleed.

It follows that ruthless early evaluation of a claim is necessary, and at the very earliest point a Part 36 offer should be made to make use of the principle in *Broadhurst v Tan* [2016] EWCA Civ 94 that an award of indemnity costs displaces fixed costs.

It would also be prudent for the likely recipients of fixed costs to lobby for a rule change. The insurers learnt long ago that test cases are usually (not always, but usually) an expensive waste of time, particularly in the field of costs. What works is to change the parameters within which costs are awarded.

Hence the drive for fixed costs is intended to drive down levels of recoverable costs. What claimants' solicitors should be doing is lobbying for a rule change that when a claimant's Part 36 offer is accepted out of time, the court has a discretion and / or there is a rebuttable presumption that the accepting party will pay indemnity costs.

It should also be emphasised that the introduction of fixed costs on a large scale will be a 'Black Swan' event. The characteristics of the part of the profession that undertakes personal injury work has changed dramatically in the last 20 years. Fixed costs could mean that there will be a drive to increase the size of firms in order to obtain economies of scale.

The problem with that is that lawyers – by and large – are terrible businessmen. Hubristic empire-building for the sake of it, or taking money out of the firm to buy a succession of expensive cars, always ends unhappily. More fruitful areas could be a move to smaller, more boutique practices, with a drive to reduce overheads, assuming that lines of credit for disbursement funding are available, or increasing automation.

Devotees of the recent book *The Rise of the Robots* (2015) will note that anything that is routine and predictable can be automated, as the bar has found to its cost, as routine pleading work has melted away. Such automation can already be observed, with websites such as www.donotpay.co.uk being the forerunners of the more intelligent and powerful systems that will be deployed in the future for document creation. The drive to reduce overheads could provoke a move to more enhanced and streamlined case management systems; getting rid of expensive premises, the end of the post, the end of paper itself, driven by a desire to save money and increase the profit element in fixed costs.

There will also be a need to diversify. Fixed costs and provisional assessments have knocked a hole in the work of costs lawyers and costs draftsmen, and it is doubtful that costs budgeting is going to make it up. They are going to have to diversify the work that they do, or integrate with other businesses.

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Equally, personal injury lawyers who have over-specialised in, for example, one particular type of injury or disease may need to raise their eyes to the horizon and look at other areas of work. There will always be injuries and claims in tort. The key is to spot new fashions or new waves of litigation and be ready to ride them in preference to well-known and comforting areas of work. These are not necessarily the areas that appear the easiest.

Holiday sickness, housing disrepair and cavity wall claims are being widely touted on LinkedIn. Those who take on holiday sickness claims will, I suspect, end up feeling rather ill themselves. But each year there are thousands of potential claims for disability discrimination under the Equality Act 2010, which are simply not being brought at the current time. Financial mis-selling (funded by contingency fee agreements) is another lucrative area.

In summary, although fixed costs on a wide scale will be a radical reform, I have no doubt that the practice of litigation will continue, albeit funded on a different basis, with different considerations and possibly different profitability.

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