Law Society Litigation Conferences: Leeds University: Lord Phillips, Master of the Rolls: Keynote speech

It is now nearly three years since I took up my duties as Master of the Rolls. When I did so I was not quite sure what the Rolls were of which I was Master. I had, as have many people, a vague idea that they were or included the roll of solicitors.

That is not the case. The office of Master of the Rolls originates in the 13th century long before solicitors existed. He was assistant to the Chancellor, who was then the King's Chaplain and secretary. The Master of the Rolls was also a cleric. His task was to look after the King's official correspondence which was recorded on parchment rolls and as a legacy of that task I still chair the committee which advises the Lord Chancellor on Public Records.

I have nonetheless many duties in relation to your profession and I see my role as essentially avuncular. I have to sign my approval to the names of all who are about to be admitted to the profession. As you may imagine, in this day and age this is a somewhat formal approval. Indeed I regret to say that on occasions the list does not reach me until the candidates in question have already been admitted.

There are statutory rights of appeal to me under the Solicitors Act and other legislation which makes me the last port of call for solicitors or would be solicitors in a wide variety of situations. In this role I see the less attractive side of the profession, for many of the appeals are by solicitors whose conduct has been such that the Office for the Supervision of Solicitors (OSS) has directed that they practice only in approved partnership or employment. This role has led me to take a keen interest in the regulation of solicitors, which is of course self-regulation. I spent a day with the OSS at Leamington last year and I am going there again next month.

This is an area where all has not been well. The task of dealing with complaints and queries from members of the public is gargantuan. I say complaints or queries because members of the public who come in contact with the law are frequently bewildered by the whole process. When it seems to be taking a long time to deal with their affairs they do not know whether this is normal and inevitable or whether it is something about which they have just cause to complain.

When you put yourself into the hands of the medical profession it used to be the case that little explanation would be given as to what was wrong with you or as to the nature of your treatment. The doctors and surgeons used, and indeed they still use, a language which is unintelligible to the layman. So it used to be with solicitors.

All that has changed. Solicitors are required to keep their clients informed, in Plain English, as to what their needs are, what services are to be provided for them to meet those needs and how much those services are likely to cost. They are also being urged to deal properly and expeditiously with queries and complaints in-house. Personal dealings that I have had with solicitors in recent years - not I hasten to say involving complaints - demonstrate what an impressive and transparent service most of you now give.

It is a relatively small minority of the profession that is responsible for what is nonetheless a flood of correspondence and telephone enquires with Leamington. This has not been dealt with in the past as well as it should have been. The Law Society, under the admirable direction of Janet Paraskeva, has been striving to put this part of its house in order. I particularly welcomed the appointment of Sir Stephen Lander as independent commissioner and I look forward to receiving his first annual report. As you know the Lord Chancellor has announced a detailed review of regulation in the profession. I believe that self regulation, if done efficiently, is the best form of regulation but there must be a question mark over whether it is going to survive.

Another of my roles - different spelling - is to approve all regulations passed by the Law Society. This task has become extremely exacting, as you who will have received the regulations that have been pouring forth

will appreciate. Professional life and conduct is changing fast, driven by European Regulation and Directive and the great God of competition. When I started at the Bar any form of advertising then referred to as touting for was forbidden. To attend at a solicitors office rather than to have the solicitor attend on you was a gross breach of professional etiquette. To invite solicitors to a party at Chambers would have been unthinkable. Similar rules affected, or constricted, your branch of the profession. You were expected to attract your clients by word of mouth and reputation for providing a good service. All of this could cause problems. I started out at the Bar in Chambers which did no work but admiralty. To my surprise I started receiving instructions from a solicitors in Morton in the Marsh in a wide variety of common law matters. Whilst surprising, these instructions were most welcome to a young man starting at the Bar. In the end I plucked up the courage to ask him why he instructed me. He told me that he had taken the law list and with a pin picked out my name from those juniors who were members of the Oxford circuit. I hope he had a good indemnity policy.

Times have certainly changed. Any rule of professional etiquette that can be seen as a restriction on free and uninhibited competition is under attack. The new methods of funding litigation have brought into the picture un-regulated businesses, competing with the independent solicitor or the litigation business. Cogent arguments are advanced that in this new world solicitors must be permitted cold calling and payment of referral fees in order to compete on a level playing field. It seems to me that what has happened is that the goal posts have been moved, and there are aspects of the new game that I do not find attractive.

I want to turn to a topic which I believe will be of interest to all of your - costs. The abolition of legal aid for personal injury claims and its replacement by conditional fee agreements incorporating uplift for success and after the event insurance, both chargeable to the unsuccessful defendant, has had unforeseen and very unfortunate consequences. Put bluntly, defence interests felt that they were being ripped off by being called upon to pay uplift and substantial insurance premiums in relation to the vast proportion of claims which were almost bound to be settled before they ever got to court. The result was warfare between claimant and defence interests - warfare which was assisted by the introduction into the rules of court of costs only proceedings so that defendants could settle liability but take the costs to litigation. And take the costs to litigation they certainly did. Many of you will have followed that litigation through the courts - in the case of Callery & Gray right up to the House of Lords. In the meantime, large numbers of solicitors doing small claims work were not being paid and the courts were log-jammed with costs-only proceedings, many on hold awaiting the result of test cases. I consider that this was the greatest problem facing the civil justice system when I took over as Master of the Rolls. Not only were the courts being clogged with this completely unproductive and very expensive satellite litigation, but the conciliatory approach to dispute resolution that the Woolf reforms had sought to engender was being poisoned. As a judge there was little that I was in a position to do about this. The existence of the Civil Justice Council which, as Head of Civil Justice I chair, opened a possibility. That was not a very lively body when I took over. Its role was largely reactive - responding to consultation papers about civil justice. It had, however, a secretariat and more importantly, a budget. Over the last three years it has become a proactive body. We set up, in November 2001, a two day costs forum chaired by Professor Martin Partington, who is a Law Commissioner. Representatives of all interests were invited - barristers, solicitors, insurance industry, claims managers, the Lord Chancellor's Department and the Judiciary. It was conducted under Chatham House rules and those who attended dropped their guard and took part with refreshing objectivity. Two agreements in principle were reached. One was that the indemnity principle should go - I shall say something about that in a moment. The other was that there was a need for predictable, which is euphemism for fixed, costs in relation to at least some categories of fast track work. This agreement was symptomatic of a more important development. What had taken place was, in effect, group mediation. The two opposing interests re-established amicable relations. The poison was dissipated. Over the next year a lot of hard work was done by way of informal negotiation and preparation of data. There was then a second residential costs forum in December last year. The data, which showed the effect on costs of the new funding methods in relation to road traffic accident claims settling for under £10,000 provided a catalyst for agreement. After two days feverish discussion and negotiation a formula at the eleventh hour was arrived at which had general agreement. This formula produces a scale of costs to be recovered where RTA claims settle before issue of proceedings for damages which do not exceed £10,000. If the damages are £1,000 costs will be £1,000. The scale then rises steadily until for damages of £10,000, £2,550 costs will be recoverable.

With the approval of the Ministers, the Rules Committee is about to implement this agreement by making

rules laying down this scale of costs and we will be discussing this tomorrow. The scale will determine costs in a very large number of cases, for the vast majority of RTA claims are small and the vast majority settle before issue.

It will be open to a claimant to seek to recover more than the fixed costs on the ground of special circumstances, but such a claim will not succeed unless the court considers that the scale costs should be increased by a substantial merger. There is also a suggestion that up to 50% should be required to upset the scales.

Negotiations are continuing, conducted by the Civil Justice Council, into seeing how far one can build on this agreement by way of extending fixed costs and also agreeing the appropriate percentage uplift for a success fee. I believe that some form of fixed costs of wide application may be the answer to the problem of proportionality which continues to bedevil both the incurring and the recovery of costs.

Finally I turn to the Indemnity Principle. That principle is not widely understood. Let me try to explain it.

It is not obvious that the successful party should recover the costs incurred in the litigation from the unsuccessful party. The right to recover costs is statutory and dates back to the Statute of Westminster in 1275. In 1842 Pollock's Act provided that parties should be entitled to recover "such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit or other legal proceedings as shall be taxed by the proper officer on that behalf". Thus the right to recover costs is by way of right to an indemnity for a liability incurred. If you have not incurred the liability you have no claim to an indemnity. That is what I understand to be the Indemnity Principle of the right to recover indemnity is the right of litigants, not solicitors.

There is another rule which is relevant in this context. That is the rule of law which prohibits champerty and maintenance. Under that rule a solicitor cannot contract on terms that give him a financial interest in the result of the litigation.

The Access to Justice Act 1999 made a dramatic inroad into the law against champerty and maintenance in that it made lawful:

"an agreement with a person providing advocacy or litigation services which provides for his fees or expenses or any part of them, to be payable only in specified circumstances."

The Act was, as you see, enigmatic in that it did not specify what the specified circumstances were. It was generally accepted, however, that the circumstances envisaged by the legislation were success. Thus a no win no fee agreement was made legal, provided that it satisfied the rather complex regulations governing conditional fee agreements.

A no win no fee agreement does not impinge on the Indemnity Principle. Once the client has won he becomes liable to the solicitor to pay the solicitors costs and thus he can properly claim an indemnity in respect of that liability from the unsuccessful party. But Section 31 of the Access to Justice Act contained a provision which did violate the Indemnity Principle. The section provided that the Rules Committee could introduce a rule:

"for securing that the amount awarded to a party in respect of the costs to be paid by him to [his legal] representatives is not limited to what would have been payable by him to them if he had not been awarded costs."

This slightly cryptic provision envisaged an agreement between solicitor and client along the lines - you will not have to pay me any more than the costs that are awarded against the other side. Thus Section 31 envisaged that the court would award costs to a litigant although the litigant was not under any pre-existing liability to his solicitor to pay those costs. Once the award was made, however, the litigant would be liable to pay to his solicitor the costs awarded.

Such an agreement does not go far enough to meet the reasonable needs of a solicitor. Costs awarded are

not necessarily costs recovered. What the solicitor wants to be able to agree with his client is that the client can enter into the litigation without financial risk at all - that is he will not have to pay his solicitor anything that he does not recover from the other side. It was and is my view that there was no difference in principle between an agreement - I will not have to pay you any more costs than I am awarded by the judge then an agreement which provides I will not have to pay you any more costs than I recover from the other side.

After some rather lengthy discussions I persuaded both the Lord Chancellor's Department and the Rules Committee that Section 31 opened the door for the award of costs that will be payable by the litigant only if those costs are recovered from the other side. Rules are being introduced to make it plain that this is legitimate. Such an agreement will, by definition, be a conditional fee agreement (CFA). Simplified regulations are being introduced in relation to this type of CFA, which some describe as "CFA lite". I hope and believe that this change will allow solicitors to agree legitimately with their clients what I suspect many have been agreeing surreptitiously, namely that if the client doesn't recover the client will not have to pay.

There is still a lot more work to be done in relation to costs, including a root and branch simplification of the CFA regulations. I am happy to say that the Lord Chancellor's Department has embarked on this task.