JUDICIARY OF
ENGLAND AND WALES

MR JUSTICE FOSKETT

KEYNOTE ADDRESS

THE MOTOR ACCIDENTS SOLICITORS SOCIETY

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Can I begin by thanking the Motor Accidents Solicitors Society and my colleague on the Civil Justice Council, Craig Budsworth, in particular, for inviting me to give this address?

Being invited to give the Keynote address to an organisation such as MASS because I happen to be Chair of the Costs Committee of the Civil Justice Council is a rather novel experience. I am more accustomed to being asked to give a lecture or perhaps make an after-dinner speech simply because I am me, rather than because I am Chair of something. When I perform that more accustomed role, the usual tactic is to start with a joke or some other light-hearted comment to establish some immediate rapport with the audience and engage their attention. It has been suggested to me that it would be hard to manufacture a laugh out of the work of the Costs Committee, so I think I will abandon any such endeavour. Perhaps it would have been inappropriate anyway because the work the Committee is engaged in at present is pretty important and rather serious.

It is the work of the Committee that I would like to speak about briefly this morning and I hope that what I will say will be of interest to the Society and to its many members.

I am conscious, however, that I am speaking today to solicitors engaged in the work of representing victims of road traffic accidents. If, as I hope may be the case, what I say this morning gains some wider dissemination, I should like to make it plain that I would be saying precisely the same things if I were addressing any other litigation practitioners' society or organisation, whether it represented the victims of accidents or those on the receiving end of claims. Indeed I would be saying the same to any group of civil litigation practitioners even if not involved in accident-related litigation. My reason for saying that will, I think, become apparent shortly.

Anything to do with costs seems to generate controversy within - and indeed outside - the legal profession. The cost of going to court is a major factor in determining whether there is true access to justice for everyone. The report into the costs of litigation by Lord Justice Jackson provoked considerable discussion, comment and, in some quarters, dissension. However, what has been decided has been decided and it is now necessary to focus on the new costs landscape that is beginning to unfold.

One of Lord Justice Jackson's recommendations was the formation of a Costs Council. In the relevant part of his final report, he said that if the recommendations set out later in the report were accepted, some "independent and authoritative body" will need to undertake the following tasks every year: (i) set Guideline Hourly Rates (GHRs) for summary assessments and detailed assessments; (ii) review the matrices of fixed costs for the fast track; and (iii) review the overall upper limit for fast track costs.

That particular recommendation was not accepted. However, on 30 October last year (almost exactly a year ago) the then Justice Minister announced that the Advisory Committee on Civil

Costs, the committee that had previously been responsible for recommending GHRs, was to be disbanded and that particular function was to transferred to the Civil Justice Council with effect from January 2013. Perhaps it is an example of being in the wrong place at the wrong time, but it was in that period that I was asked to chair this new Committee: I had for a number of months been the High Court Judge member of the Civil Justice Council.

As you will all know, GHRs influence, but do not necessarily govern, what solicitors and other legal fee earners are paid by the losing side in civil litigation for the work they have done in the case. Because that is so GHRs can have an impact on what lawyers can charge their clients.

The Costs Committee has been given the responsibility of conducting a comprehensive, evidence-based review of the GHRs and to make recommendations accordingly to the Master of the Rolls by April 2014 and thereafter on an annual basis to review the GHRs and make recommendations to the Master of the Rolls about how they need to be updated. Our final term of reference is "to monitor the operation of the costs rules, in consultation with the Ministry of Justice, and where appropriate, to make recommendations."

As yet that final area of responsibility has not kicked in because it remains early days in the operation of the new rules. It will, of course, be a responsibility that becomes active in due course and how it is to be exercised has yet to be determined. I should say that, as things stand, the Committee is busy enough in seeking to address the question of the GHRs without having to focus on that particular sphere of responsibility.

The GHRs were last updated in 2010, but the evidence upon which those rates were based was outdated as was the process by which they were originally derived. It involved the gathering of

information by district judges and solicitors in the context of the practice in their local County Court and its later communication to the Supreme Court Costs Office for publication.

I do not need to remind an audience such as this that the legal services market has become increasingly complex in recent years and it is obvious that the rather informal process to which I have referred could no longer be regarded as 'fit for purpose'. So far as clients are concerned, they need reassurance that there is a proper contemporary basis for any standard rates awarded by the court.

We are attempting something on a much wider, national scale than previously undertaken although it is likely that, as with the existing GHRs, there will be regional variations in those we recommend and variations between, for example, various parts of London. We will be considering whether to recommend different rates for different types of work, but whether, and if so, how we do so will depend on the evidence we obtain. The GHRs are, in any event, often used as a yardstick by which rates for specialist and complex work are assessed.

Getting to the right contemporary figures, in so far as any such figure can be described as "right", is and will not be an easy task. I will say a little more about it in a moment.

Although the Costs Committee is not the Costs Council that Lord Justice Jackson recommended, its membership is very much along the lines he had in mind for the Costs Council. What he said was this:

"It is appropriate for the Costs Council to include representatives of stakeholder groups. However, its membership should not be dominated by vested interests."

That, it seems to me, has been achieved. Of the solicitor members, all of whom have very considerable experience of costs issues, one is from what might be termed broadly the claimant community in general civil litigation, another is from broadly the compensating community in that area and another has particular experience of commercial litigation. In addition there are members who have been nominated by the TUC, the CBI, Which? (the consumer association), the Association of British Insurers, the Association of Costs Lawyers, the Chartered Institute of Legal Executives, the Bar Council and the Ministry of Justice. There is an experienced specialist Circuit Judge from Manchester and an experienced District Judge from Wales. My Vice-Chairman is the Senior Costs Judge, Peter Hurst, who has unrivalled experience of the kind of issues that arise in any costs context.

Although a number of the representatives come from what might be described as different "constituencies" in the context of costs, I think that all recognise that their task, as members of a Committee that must make evidence-based recommendations, is to contribute to the evaluation of the evidence at its disposal and then reach conclusions based upon that evidence in an open-minded way. Whilst differences of approach to some of the issues we face have been evident in the discussions so far, as Chairman I have been impressed and heartened by the fact that even those who start from differing viewpoints have been able to recognise and respect, even if not to agree with, the position taken by others. All that makes for a healthy decision-making atmosphere. We have said repeatedly in the material describing our task that the Committee has no agenda or pre-determined mindset. I would like to emphasise that as strongly as I can today.

These are days when resources for many tasks are limited. That applies to our work. We are very fortunate to have access to the expertise of Professors Paul Fenn and Neil Rickman, of Nottingham and Surrey Universities respectively. They are not members of the Committee as

such, but attend our meetings as advisers. It is they who already have examined and advised us about the available evidence and who will assist us in evaluating the further evidence we collect.

At an early stage of our deliberations we decided to see what contemporary evidence existed that might inform our work because it would obviously not be sensible or cost effective in human terms simply to replicate research already carried out. With the assistance of the Law Society and others we identified a number of recent surveys of the financing of solicitors' practices that certainly afforded us a starting-point. We have then set about formulating our own survey that is designed to supplement the material from those other surveys and to cross-check that what we can learn from those other surveys is valid.

Since our survey is to be launched a week today, namely, on 1 November, it makes today an extremely opportune moment for me to highlight its importance and, through you if I may, to encourage as strongly as I can as many firms of solicitors as possible to respond to it.

We need to look, amongst other things, at what is happening in the litigation market-place. What happens out there will help to shape the GHRs. Our survey is an extremely important part in the process we are pursuing. As I have said, it is designed to supplement existing data from other recent surveys by asking a range of questions including questions on numbers and average earnings of fee earners at all levels, the costs of overheads, types of work undertaken, hours billed and sums recovered. The objective is to obtain as clear a picture as possible of the salaries paid and hours charged (and amounts recovered) for trainees up to senior partners engaged in litigation across the country and to obtain an appreciation of the costs of running a modern litigation practice.

I will be the first to admit that, doubtless like many others, filling in a questionnaire is something for which I will find almost any excuse to avoid. Life always seems too short. However, there are times when I have said to myself that if I do not do so, I can hardly complain if the outcome of whatever process the questionnaire is designed to assist then reaches a conclusion with which I disagree. I have in those circumstances set aside my natural inclination and got on with the task. I hope I might persuade others of a similar disposition to do the same. This survey is important for any firm seeking to make at least some of its annual income from litigation.

We have worked very hard, with the particular input of the solicitors on the Committee, to keep the survey as short and as clear as possible, with questions that should be easy to answer by reference to a firm's most recent annual report and accounts and its costs management systems. We believe that it can be answered within a reasonable timescale.

We are also conscious that we are asking for sensitive information. There is, however, no other way of performing the task we have been set than asking the kind of questions we have. We do want everyone to understand that the responses to the survey will be treated in the strictest confidence, held securely and used only for the purposes of the survey. Nothing will be published that discloses the identities of the respondents and indeed their identities will not be revealed to the Committee members, its economic advisers or anyone else without the express consent of the particular respondent. A handful of members of the CJC secretariat will be able to access each full survey just for the purpose of checking its authenticity and of ensuring that all the data is properly transferred to the experts and then to the Committee. Only I or the Vice-Chairman will know the identity of a respondent if there is some query that needs following up - otherwise we will not know it either. I do trust that that will give the reassurance that I quite understand people will want.

I have already alluded to the Jackson reforms. You may wonder whether we propose to try to factor into our analysis any effect that those reforms may have. The answer is that the evidence available to the Committee, which members of this Society may also be able to confirm, suggests that their impact is yet to be felt in the legal market-place and the overwhelming majority of the Committee took the view that there will not be a sufficiently reliable evidence-base about the effect of the reforms for the present exercise. That may change when we review things next year given our remit to keep GHRs under review.

I am accustomed to directing a jury in a criminal case that they most focus on the evidence and not engage in speculation. A rather similar principle applies to the Committee's work given the evidence-based nature of the exercise. Some of the survey questions (for example, on referral fees) may give us an early indication of what is happening out there in the context of Jackson, but we will be dependent upon people telling us, even if only in broad terms at this stage, of the influence the reforms are having or are likely to have in the fullness of time. We have deliberately included a general question towards the end of the survey inviting respondents to make additional comments which they feel are relevant and will assist us. I am happy to encourage liberal use of the answer to that question in this context or any other context that seems appropriate to the person completing the answers.

The time for completing the survey runs from 1 November for 4 weeks until 29 November. When the evidence has been collected and collated it will be reviewed by our expert advisers and then by the Committee. We will then be deciding on what, if any, further written submissions would be useful and whether we should invite some oral evidence sessions in the New Year. Hopefully, we will then be on course for making our recommendations to the Master of the Rolls at the end of March.

So there it is. I happen to have you, members of MASS, as my captive audience this morning. As I said a little earlier, I would be saying the same today to any group of practitioners. If you want to ensure that the Committee has a full and, therefore, balanced picture of the current market-place, please ensure that your firm completes the survey and please encourage others to do so too.

Just as I was hesitant about how I should start this address, I was also not quite sure how I should finish it. I remembered the other day the words of a well-known politician who ended his speech to the Annual Party Conference with the stirring words "Go back to your constituencies and prepare for government." History shows that his Party had to wait another 30 years before sharing power. The Costs Committee has a deadline to meet and it is rather shorter than that. So can I please ask you to go back to your offices and complete the survey when it goes live next week?

May I thank MASS once again for the invitation to speak, to you for listening and may I wish you a very successful Annual Conference?
