Middle Temple and SA Conference, September 2010

The rule of law under a written and unwritten constitution

Costs

In this issue we publish two papers delivered at the Middle Temple and SA Conference dealing with costs.

- Reform of the cost regime – a South African perspective by Justice Malcom Wallis, Judge of the Supreme Court of Appeal
- The reform of the costs regime by Lord Justice Jackson

Reform of the costs regime – a South African perspective

BY **JUSTICE MALCOLM WALLIS**, JUDGE OF THE SUPREME COURT OF APPEAL

It would make a refreshing change if we could discuss questions of costs without saying that, unless they are very rich or can obtain some form of legal aid, people are denied access to justice. It would also be refreshing if the words 'disproportionate', 'billable hours' or 'over servicing' did not enter the conversation, but that never seems to be the case. The theme of access to justice and the perception that legal costs are too high are always central to any discussion on costs. This is so even though the number of lawyers is growing exponentially and our law faculties are flooded with students, many of whom cannot find a place within the profession. But that is never raised in these discussions. Yet the most basic of all economic laws – that of supply and demand – would suggest that introducing more and more lawyers in the legal system should drive the price of legal services down to more affordable levels and make significant inroads into the problem of access to justice. It may be helpful to explore why this is not the case.

The two problems of costs and entry to the profession are usually dealt with entirely separately. When I was chairman of the Bar and serving on international legal bodies both were ongoing subjects of discussion. On the costs side an enormous amount of time is spent trying to simplify legal processes on the basis that if lawyers are expensive we will give them less work to get rich on.[1] At the same time a good deal of energy and imagination is devoted to devising ways in which people can gain access to legal services that they cannot afford or, even if they can, not at a cost they are willing to incur. Legal aid, judicare, pro bono services, and ingeniously structured fee agreements seem to be the grist to this particular mill. On the side of entry to the profession in the last twenty years or so universities have enrolled a lot of law students as a cheap way of increasing government funding, which is then used to cross-subsidise more expensive faculties, and students see law as a way to acquire both a degree and (they believe) well-paid employment in a difficult environment for finding jobs.

The profession insists that practical experience and training are essential to the practice of law, but is increasingly unable to find the capacity to provide that training by way of what we call articles for candidate attorneys and pupillage for barristers. Whilst our situation at the Bar is not I suspect quite as dire as that in England, where apparently only one in six of those who pass the Bar vocational course find a place in chambers and places in solicitors' firms are extremely hard to come by, we are already limiting the numbers who can undertake pupillage and it is notorious that many graduates are unable to obtain articles.[2] The end result is that we spend very large sums of public money training young lawyers at university and they are then unable to find a place in practice.[3]

Despite this the profession has expanded markedly.[4] However this has not, as one might have expected, resulted in increased competition and (making allowance for inflation) lower fees. The explanation seems to lie largely in two areas. First, there is the impact of technology that has increased the burdens and demands of practice with the result that more work has to be done to handle the same number of cases. Instant communication demands instant responses and it is not uncommon for a busy attorney to receive 50 or 100 e-mails a day with an expectation on the part of clients that there will be an immediate response. Also clients make more frequent demands for reports on their cases. Firing off an e-mail is quicker and simpler than writing a letter or even making a phone call, so many more are sent. Phone calls and sms messages are incessant in the era of the mobile phone and the ubiquitous Blackberry. Electronic production and copying of documents ironically increases the burden of paperwork in the era of the paperless office and we see this daily in lengthy papers and enormous discovery affidavits and trial bundles that clog our courts. This requires more administrative staff and more professional staff in order to service the same case and the same client, inevitably at much greater cost.

Second, the sheer volume of the law and

its complexity has increased substantially in most countries in the past half century.[5] This may be less perceptible in the United Kingdom where the process has probably been more gradual, but in South Africa our transition from apartheid to democracy has been accompanied by sweeping changes that have created whole new areas of law and made other areas far more complex than before. Some of these, such as the development of labour law as a discipline, preceded the advent of democracy as the former government sought to adapt to and regulate the activities of the emergent trade unions. Others such as pensions law and competition law have followed on behind and received new impetus since 1994. Constitutional law has been constructed upon the Constitution and the human rights lawyers from the old dispensation are vigorous in promoting the new. In many areas there has been a complete overhaul of legislation[6] and consumer protection legislation is now in place that generates huge amounts of legal work.[7] The end result is that there are vast new areas of law in which lawyers can litigate and in old-established areas litigation is more complex and time consuming and consequently requires more lawyers and more expense.

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Let me give two simple examples of this complexity. In the case of a defaulting tenant, where formerly default alone would result in an order, there is a preliminary application to court for an order that notice of the proceedings be given to the local authority and the defaulting tenant. Once such an order has been obtained and served through the sheriff the application for eviction can proceed. The court must consider whether it is just and equitable to grant an order for eviction – default alone does not suffice. This imposes additional requirements upon the landlord to show that eviction is appropriate. In addition the court must consider the constitutional guarantee of the right of access to adequate housing. In the case of a defaulting debtor under a credit agreement default notices must be served on the debtor, time periods must be observed and the whole process may be rendered subject to debt review and attempts to have the consumer's debt obligations restructured."

My object is not to criticise this type of social legislation but to make the point that undertaking relatively routine legal work in courts today involves greater procedural complexity, more work and more cost than it did in the past. In addition the legislation provides far more opportunities for the defendants to delay proceedings by raising technical defences. Claimant attorneys and their clients seek to limit costs by using standardised notice letters and forms, but these provide scope for the pedant to find fault and raise that most valuable thing for a recalcitrant debtor – an arguable point. The result is that, however well meaning and socially desirable the legislation, one of its inevitable, and I would suggest unintended, by-products is greater legal complexity, longer time periods and more work for lawyers.[8] When one adds to that the new law and areas of development, such as the field of judicial review, it is little surprise that the legal profession has grown and the work has expanded beyond the power of lawyers to do all of it. Basic economic theory tells us that this will result in high prices as it indeed does.

Taking matters a little further, having made the activities of lawyers a more central part of society and more relevant to the man or woman in the street, higher standards are demanded of lawyers. The courts have made them legally liable for negligence in the conduct of litigation.[9] This increases insurance premiums and results in lawyers, who are in any event cautious and don't like being sued, becoming ever more cautious. I suggest that over-servicing is the result just as over-treating has become the medical response to avoiding being sued. There is adherence to litigation protocols within a firm, excessive discovery, overly lengthy witness statements, too many hours spent in consultation exploring every possible nuance of a case, lengthy skeleton arguments and too many authorities being cited by counsel from all conceivable (and some inconceivable) jurisdictions aided by the giant search engines available on the internet.[10] The inevitable by-product of legal liability is greater care to avoid being charged with, much less being found guilty of, negligence. That in turn involves more work for the lawyers, longer hours and greater costs. The attitude is that reflected in one judge's description of counsel's argument as 'leaving no stone or any part thereof unturned.'

Time and space preclude a more complete analysis but I suggest that a significant reason for the continued problem of the cost of access to justice being too high for the majority of people flows from a relatively simple economic analysis. On the one hand one has an extensive demand for legal services (some obligatory but most not, especially in the case of litigation), but most of those seeking it are only able or willing to pay a very low price. If it were free or cost only a nominal amount they would be happy to proceed. This is perhaps evidenced by the real life economic experiment in the United Kingdom for the past few years with the advent of conditional fee agreements[11] and after the event insurance, which have the result that plaintiffs can litigate at no cost and little risk to themselves beyond the ATE premium, which is likely to be small where the merits of the case have already been evaluated as favourable.[12] There is a proliferation of claims management companies that advertise for claimants and refer the resulting claims to solicitors on payment of referral fees. This is likely to have resulted in many more claims being made than previously.[13] In other words the demand curve for legal services is very steep at high prices but very long and flat at low prices. On the supply side however the sheer complexity of legal work and the copious quantities available – unintentionally assisted by governments passing new legislation and courts imposing new obligations – in conjunction with the relatively few lawyers available to undertake that work, means that the supply curve starts at a relatively high price[14] and slopes upward in a way that leaves a substantial unsatisfied demand. Of course this is a very considerable simplification of the position but it is an endeavour in economic terms to reflect the practical situation where there is a significant potential demand for legal services that is not being met at price levels that consumers are willing and able to pay.

The solution of universal legal aid to which many countries once aspired is receding into the distance because it is simply unaffordable. It is too far down any government's list of priorities to have any hope of being realised especially as governments are cutting expenditure. The solution of fixing litigation fees for lawyers will make the profession less attractive or force it to shift to other work where the price is not controlled, thereby exacerbating the problem. Forcing lawyers to do more pro bono work may satisfy those who envy the high levels of earnings that they believe all lawyers enjoy, but it will be a mere drop in the

ocean in addressing the demand for legal services at the lowest end of the financial spectrum, because this is a classic instance of cross-subsidisation. The high value work must continue in order to meet the costs of the free work and with many small firms of lawyers and those at the Bar who are already struggling to make ends meet, pro bono work is a luxury they can ill afford.

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Ultimately I believe that there will always be an unsatisfied demand for legal services and there will always be good cases that are not brought to court and good defences that are not advanced because of the inability of people to fund or obtain funding for the proceedings. We can facilitate access to justice by way of endeavours to reduce levels of costs by simplifying procedures, better case management and contingency fee agreements. It would be a work of supererogation for me to try in a short paper to reprise what Lord Justice Jackson has already done. I make only a few comments from our domestic experience. Contingency fee agreements have been relatively successful in South Africa in making personal injury litigation available to even the very poor in our community. Whilst we have a statute that regulates this topic[15] it is badly drafted and generally ignored by the attorneys who act on a contingency. In practical terms these attorneys conduct litigation on a 'no win, no fee' basis where, at the successful conclusion of a case, they will tax a conventional bill of costs (which covers a fair proportion, but not all, of their disbursements) and charge over and above that a proportion, usually 25% though sometimes less with small claims, of the damages recovered. The latter fee is not recoverable from the other side. Whilst there are occasional complaints of over-reaching in these arrangements by and large they appear to work well and people are willing to sacrifice part of their damages in return for making some recovery.

In regard to court procedures I have little doubt that measures to speed up cases by simplifying procedures can reduce costs simply because they involve less work and therefore fewer billable hours. However I am sceptical of achieving this through the front-loading of costs by way of detailed pre-action procedures and by shifting the taking of evidence towards written witness statements. Not only does this make proceedings more costly as noted by Lord Justice Jackson but in a country such as ours where there are wide differences between the quality of legal practitioner available to the well-resourced and those available to ordinary people it has the potential to work injustice, because the one side's lawyers are better resourced and more adept at giving evidence than those of their opponents. And we need to acknowledge that when evidence is reduced to writing it is the lawyer's voice that we are hearing not that of the witness.[16]

Lastly if something can be done to break the near universal reliance on charging by time, particularly by attorneys, but increasingly by counsel, that would be a good thing. Our courts have bemoaned it as a basis for charging fees, describing it as putting a premium on slowness and inefficiency.[17] It started as a way in which clients could monitor the costs charged to them. It has become routine because it is easy to calculate (especially if the hour is 6, 10 or 20 minutes, which is how most law firms calculate them) and I would suggest profitable when law firms demand anywhere from 1500 to 2200 billable hours annually from professional staff at the junior and middle levels.[18] Clearly it provides a perverse incentive to the lawyer to manipulate the time spent on a case and I was always amazed in practice by the number of hours my juniors would claim to have spent on a draft prepared for my consideration. The problem is that the practice is well nigh universal, although my information from speaking to the managing partners of leading firms is that it is highly unpopular with clients and a constant source of disputes over fees especially in litigation. Even experienced costs judges admit to difficulty in keeping the number of hours claimed in check when looking back over a case. How much less qualified is the litigant who is facing a bill calculated on an hourly basis irrespective of how much can be recovered from the other side? There can be little doubt that it increases costs and inhibits access to justice.

In this country hourly rates are used only to a limited extent in the taxation of bills of costs,[19] and a menu of tariff items is specified in the rules of court. However that creates the problem of keeping the tariff up to date with the result that recovery is usually limited to 50 or 60% of the actual cost to the client. There is the further problem of the artificiality of determining the value of work on a basis wholly different from that actually used as between the attorney and its client. However if hourly rates are introduced into the taxation process, as I understand happens elsewhere, the rates used are likely to be based on those charged in practice, which effectively endorses the current level of attorneys' charges. The one glimmer of light on this particular horizon is that it appears that the customers are beginning to revolt. Articles in journals and professional magazines note that corporate counsel are increasingly demanding that work be charged on a fixed rate fee basis agreed at the outset of the instruction.[20] I suspect that the problem of hourly rates is more likely to be resolved in the marketplace than by intervention from the side of the courts

Reverting to my basic theme, however, it seems to me that all these reforms and adjustments address the problems only at the margins rather than bringing about a sea change in the level of costs and the ability of ordinary people to obtain access to justice at affordable prices. It is undoubtedly helpful to allow some form of regulated contingency fee arrangement and experience suggests that clients are prepared to accept some diminution in the award rather than forego their claim entirely, although one suspects that at the lowest level some people will regard their claims as no longer worth pursuing. To permit some funding of litigation by outside funders is also a good idea although it is likely to be restricted to a limited range of cases from which a profit can be expected and the ethical implications are potentially troublesome. As Baroness Deech points out in her paper 'we have yet to work out the reconciliation of consumerism and ethics' in this and many other spheres.

It is also helpful to look at the impact of issues of cost shifting in areas such as judicial review. Our own experience in labour cases, where adverse costs orders are rare

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and generally parties bear their own costs (or very often in the case of workers are represented on a contingency basis), is that this is regarded as acceptable. This is especially so because such litigation is usually preceded by a mediation and conciliation process so that litigation becomes a last resort. In constitutional litigation the Constitutional Court has to a great extent set its face against making unsuccessful parties who are seeking to enforce constitutional rights pay the costs of the organs of state that defend such proceedings.[21] In competition cases the power of the Competition Tribunal to make adverse orders of costs is limited. This has not spread generally to cases of judicial review but the courts are clearly willing to be flexible in appropriate cases so that genuine litigants are not burdened with adverse costs orders.

Notwithstanding these improvements I am sceptical that at the end of the day they will provide a solution to the basic problem as opposed to ameliorating its impact in certain instances. So, if the problem cannot be solved on the side of forcing down the level of fees charged by practising lawyers, the solution must be sought elsewhere. There are some ideas suggested by economic analysis that I believe are worth exploring. The first is to provide an incentive for completing cases quickly and efficiently. That could possibly be achieved in assessing costs at the end of litigation by allowing an uplift if the case is completed within a court managed timetable and a penalty if it is not. If the penalty component applies not only to the recovery of costs from the losing party, but also to the attorney's bill to its own client the two should be mutually reinforcing. That is a possible way of overcoming the present perverse incentive whereby the lawyer's fees are maximised if they prolong the proceedings.

The second idea arises from the focus on proportionate costs in the Jackson report. Whilst I accept that a baseline percentage of the claim is not always appropriate as a guide the reality is that a potential litigant engages in a cost-benefit analysis where the issue is whether it is worth spending Rx in order to try and recover Ry. They are not concerned with the legal complexity of the case but with its value in Rand and cents. This could be reflected in a rule that in cases up to a specified value (Rx) the costs claimable from the loser may not exceed 50% of the claim, with that percentage declining to 40% if the claim is R2x and so on to a level where the amount of the claim is such that the litigant can look after itself. In addition it would be necessary to fix the costs that the attorney could recover from its client on the same basis so that one did not simply increase the attorney and client component of the bill. Such a rule would have to be subject to a judicial override on good cause shown and would at first provoke some litigation over the taxation of costs until the principles governing the override had been established. Thus delaying tactics by the defendant in order to try and force a settlement could warrant an override. However the potential value of this approach is to benchmark the issue of costs and give the plaintiff an incentive not to exaggerate the claim (which facilitates settlement) and the legal practitioners the incentive not to waste time and indulge in tactics that run up unnecessary costs. The more skilled and efficient the practitioner the easier it will be to make a profit from such cases.

My third idea may seem counter-intuitive but it is based on the idea that the problem is not too many, but too few lawyers. I return to the point that we are training in law schools and elsewhere, such as Bar vocational courses or the courses being run in this country by the Law Society of South Africa, more students than we can hope to train and absorb within the profession following current methods, with the result that many with law degrees are effectively barred from entering the profession. That seems to be wasteful when the taxpayer has contributed so much to their education and there is a crying need for legal services. Substantial progress in addressing this issue and allowing these people to enter practice in large numbers could create greater competition. As they seek to make a living they will necessarily be forced to look for ways in which to operate a practice profitably at a lower level of remuneration than is at present the norm. In effect I am suggesting that we should try to shift the supply curve of legal services by enabling many more people to enter the profession than do so at present. There is a possible variation on this. In various tribunals we find that non-practising lawyers or even non-lawyers can be effective in representing clients on a limited basis. Perhaps we could look at licensing people initially as law agents (to use an ancient South African designation[22]) with rights of representation in the lower civil courts in respect of claims of a limited value and the possibility of advancing to the status of fully qualified attorney after a period in practice and some kind of competency assessment. One could achieve the same result by way of a limited certificate to practice granted to attorneys who have completed vocational courses but not managed to find articles or pupillage. At first they should not be permitted to hold client funds as that increases costs and risks significantly. The idea is that if we are to address and resolve the problems of the costs regime in civil courts we will need to look at how to provide lawyers who are less expensive rather than hoping to make the current crop cheaper.

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I appreciate that these may seem radical proposals. They are advanced because the legal system is constantly revised in ways that have unforeseen consequences for legal practice without any attempt to audit the effect of the changes on legal costs and access to justice. The costs regime we have in place is riddled with perverse incentives that reward delay and over-servicing of clients. The system is universally criticised and regarded as unsatisfactory. We are dealing with an economic phenomenon. To invoke the discipline of economics to guide us in addressing the problems we face seems sensible even if the solutions it proffers run counter to traditional approaches.

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Endnotes

[1] As far back as 1996 I participated in a session entitled 'Civil Justice: who can afford it?' at a Commonwealth Law Conference where Lord Woolf presented his reforms and Eleanor Gonk presented similar recommendations arising from a review by the Canadian Bar Association. The problems foreshadowed on that occasion, such as a massive upsurge in costs in consequence of 'front end loading' of costs and a shift to more written presentations are now reflected in Lord Justice Jackson's report.

[2] There is anecdotal evidence of desperate parents paying attorneys to conclude formal training agreements, where there is no intention that the trainee will in fact receive any training beyond sitting at a desk and making the occasional cup of tea or running a message.

[3] The problem is not limited to our two jurisdictions. The Bar Issues Commission of the IBA has held sessions on the problems of providing professional training in East European countries that have seen an explosion in legal graduates. I was informed by the chair of the Hungarian Bar Association that in one year they had as many graduates looking for training as they had practising lawyers in Budapest.

[4] When I started practice at the Bar in 1973 there were some 400 practising advocates in South Africa.

There are now over 2300. The attorneys' profession has undergone similar expansion.

[5] The position is aptly summarised by WH McConnell in *William R McIntyre: Paladin of Common Law* 217 where he writes: 'The totality of law, moreover, is becoming so massive that no individual can hope to know more than a small part of it.' In practice this is reflected in the increased level of specialisation of attorneys' firms and the consequent need to involve more lawyers in order to address a single problem.

[6] All labour legislation has been revised starting with the Labour Relations Act 66 of 1995. Protection against unfair eviction is provided by the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (commonly known as PIE) and the Extension of Security of Tenure Act 62 of 1997 (commonly known as ESTA). The Competition Act 89 of 1998 has created an entirely new field of law with its own tribunals.

[7] This arises from consumers invoking the protection of the procedures of the National Credit Act 34 of 2005.

[8] This usually translates into an order for costs against the tenant or debtor, which merely increases their financial burden.

[9] *Saif Ali v Sydney Mitchell & Co* 1980 AC 198; [1978] 3 All ER 1033; *Arthur J.S Hall and Co. v Simons and Barratt v Ansell and Others v Scholfield Roberts and Hill* [2000] UKHL 38; [2000] 3 All ER 673. Our own courts have not yet dealt with this.

[10] Once again technology intrudes to make life more complicated rather than simpler.

[11] The Leigh Day website describes CFA's as follows: 'This method is the most modern way of funding your case. They are complicated agreements and your solicitor must explain the terms carefully to you. They are often called "No Win, No Fee" agreements. This means that if you do not win your case you are not liable for your own legal costs. If you win you are liable for your costs but the costs should almost all be paid by your opponent. It is crucial to realise that if you lose your case it is highly likely that you will be made liable for your opponent's legal costs. If you win your case the law allows us to charge a "success fee" calculated as a percentage of the basic costs. Your opponent is liable to pay at least the majority of the success fee, in addition to paying your damages. We will only enter into a conditional fee agreement with you after we have evaluated the merits of your case. If you enter into a conditional fee agreement you will need to buy an accompanying policy of insurance to protect you from an adverse costs order in the event that your case was lost.'

[12] Attorneys in South Africa who practise on a contingency basis become highly skilled at 'picking winners'. I spoke to two firms in this field. The one said that they had lost only 1 case in the past two years and the other said that they had incurred costs running into several million Rand in their ongoing cases and they regarded the entire amount as recoverable. I have little doubt that English solicitors are equally adept and Lord Justice Richards' report refers to evidence from the USA to similar effect. Chapter 12, para 2.4.

[13] It is unsurprising that the Jackson report notes a complaint that many of these are manufactured. Chapter 20, para 2.2.

[14] On the assumption that the lawyer is seeking to break even, the floor price below which services will not be provided will be determined by the cost of being in practice ie rental, telephone, professional dues and insurance etc.

15 The Contingency Fees Act 66 of 1997.

16 The problem is apparently an ancient one. Genesis 27 vs 22.

[17] *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 601-2. Endorsed by the Constitutional Court in *President of the Republic of South Africa and others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC)

[18] According to a document put out by the Yale Law School Career Development Office entitled *'The Truth about the Billable Hour'* a target of 1800 to 2200 billable hours annually translates into 2400 to 3000 working hours a year.

[19] In England this is called assessment.

[20] For recent articles see *The Economist* (July 24) 53; an article by the presiding partner of Cravath Swaine & Moore LLP entitled 'Kill the Billable Hour' in *Forbes magazine* of 12 January 2009 and the article in *The Australian* on 20 August 2010 entitled 'Business demands fixed fees as revolt builds against billable hours'. All are available on the internet.

[21] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

[22] This is something more than the McKenzie friend allowed in England and a numberof other jurisdictions.

Reform of the costs regime

PAPER BY LORD JUSTICE JACKSON DELIVERED AT THE MIDDLE TEMPLE AND SA CONFERENCE, SEPTEMBER 2010*

1. NERO'S PRINCIPLE

(i) Costs in the Roman Republic and under the Julio-Claudian emperors

1.1 No costs. Under Roman republic advocates were not allowed to charge fees for their services.[1] Augustus renewed this law in 17 BC and that remained the position under the next three emperors. This was justified on grounds of public policy. The senator Silius pointed out, with relentless logic, that if advocates were not paid, there would be fewer lawsuits. He added for good measure that, as illness brings revenue to doctors, so a diseased legal system enriches advocates.[2]

1.2 Capped costs. The emperor Claudius,[3] however, succumbed to pressure from the Bar. The Bar argued that if there were no incentives, their profession would perish.[4] Claudius allowed advocates to charge fees, subject to a cap of 10,000 sesterces per case.

1.3 Nero's principle – *certam iustamque mercedem*. Claudius' successor, Nero, continued the dispensation. Nero stipulated that litigants should pay *certam iustamque mercedem* (a fixed, fair and reasonable fee) for the services of their advocates.[5] Although not all of Nero's actions advanced respect for the rule of law (e.g. murdering his mother, plundering the Roman treasury and killing Christians as a form of public entertainment), this particular provision was wise and sensible. I refer to it as "Nero's principle".

1.4 Nero's principle is a statement of the ideal. Fees charged (and – in a costs shifting regime fees – fees recovered from the loser) should be known in advance and they should be fair and reasonable.

(ii) The pursuit of Nero's principle in modern times

1.5 Formulating specific rules for litigation costs has presented a formidable challenge for legislators and rule makers around the world. There is a tension inherent in Nero's principle, because one size does not fit all. If fees are fixed in advance they will be certain, but they will not always – or possibly ever – be fair and reasonable. They will sometimes be too high and sometimes too low. If fees are left open to be fixed retrospectively, they can be tailored to the work done in the particular case and thus be fair and reasonable. However, this means that they cannot be certain – the litigants do not know what they are letting themselves in for until too late. Different jurisdictions have attempted to meet this challenge in different ways.

1.6 Germany. Germany has opted for a fixed costs regime. Court fees are fixed by the Court Fees Act.[6] Lawyers' fees are fixed by the Lawyers' Fees Act.[7] The costs paid by the losing party to the winning party are calculated by precise formulae, according to the value of the case, the final outcome and the stage at which it was resolved. For example, if the claimant obtains judgment for 30 mil-

*Editorial note: The paper is reproduced unedited and largely in the style in which it was delivered.