Talkin' 'bout Jackson

HE HAD AGED since I last saw him, but that was a long time ago. The ink on my first practising certificate was scarcely dry, and he had hardly run in his first wig. I can remember nothing of the case that I briefed him on, except that I was late (the office bicycle had a puncture and I had to run to the county court – arriving out of breath and with a face as red as his hair). Rupert Jackson – as he then was without the trimmings – was clearly unimpressed with this shambolic solicitor.

Many decades later, in fact last Thursday evening, the Right Honourable Lord Justice Jackson – as he now is – was mingling among a small group of lawyers at a reception at the University of East Anglia before his delivery of the 25th Annual Norfolk Law Lecture.

He had about him the air of one who has been punched (metaphorically only) many times for his views on controlling costs. When he heard that I ply my trade in clinical negligence he braced himself for another onslaught. In reality he has covered such a huge canvas with his review of civil litigation costs (all 584 pages of it) that he was bound to find disagreement among most 'stakeholders'). Yet despite the brickbats he was genial, almost self-effacing and instantly likeable.

He has an academic appearance – more of a professor than an Appeal Court judge, with a vague resemblance to a younger version of the playwright Alan Bennett.

Stepping up

Then standing in shirt sleeves at the centre of the auditorium of the Thomas Paine Building at UEA (remember Thomas Paine was the author of *Rights of Man* – but not of the *Rights of Solicitors to a decent amount of costs* – that work has yet to be written – and native of Thetford in Norfolk) Lord Jackson began his talk. Like a protracted version of *Just a Minute* he spoke for almost exactly one hour without notes, and without hesitating or deviating.

He began by confessing that this was his first visit to Norwich in 40 years. On the previous occasion he sat next to the judge in a robbery trial as a pupil barrister and he remembers pouring out the judge's tea wrong (milk before tea or vice versa). He had hoped that after this visit he would pick up a few briefs but "such was the good sense of Norwich solicitors" that never once did any of them instruct him.

Over the next 59 minutes he raced through his proposals in a far more engaging way than in the report with a light touch here and an interesting statistic there.

One of the planks of his proposals is one-way costs shifting (the principle that if claimants lose they will not be at risk of costs orders against them, but defendants remain liable for costs if the case goes against them). Lord Jackson made the obvious point (which had certainly escaped me) that when legal aid was in its heyday and available in ordinary accident cases, that is exactly what we had because unsuccessful legally aided litigants seldom had to pay up.

Lord Jackson wanted to establish whether the replacement regime (with CFAs and after the event insurance) was all that it was cracked up to be. As part of his research he obtained from one insurer the details of the cases it had settled over a 12-month period – around 12,800 cases. The ATE premiums it paid out in respect of the cases it lost amounted to £3,000,000, but it recovered only about a quarter of a million pounds from ATE insurers where it had won. If there had been legal aid instead, no ATE premiums would have been paid, and, despite the fact that it would also not have been able to recover costs in the cases that it won, that insurer would have ended up saving about £2,275,000 – as compared to the present regime.

Home and away

He told us that he had investigated many jurisdictions "at your expense" and he has found that they all manage to provide access to justice, including to those with modest resources, without resort to recoverable success fees and ATE premiums.

He obviously particularly enjoyed his time in Australia, where he reported that personal injury lawyers consider that our system is "mad".

I don't know whether he actually shared a hot tub with Australian lawyers but he came back with a typically Australian concept: 'hot tubbing' of experts. It is the practice of putting all the experts in the witness box at the same time, with the judge chairing a discussion among the experts. It saves a lot of time, and gets to the nub of the issues much more quickly. Lord Jackson did not speculate on the effects of litigation if all protagonists (including the judge) were obliged to conduct their proceedings in a large courtroom hot tub.

He cantered through many of his other proposals: contingency fees, more active case management by the courts, budgeting, fixing costs in the fast track, among others. In the main body of his talk he did not mention referral fees, but in answer to a question from the floor he responded: "I think the wretched things should be abolished and banned."

Winners and losers

The problem is that with every proposal someone wins and someone loses. I think many would be happy to see an end to those costs that really do nothing to advance litigation but drag up the total burden, such as referral fees and insurance premiums. The ultimate goal must be access to justice. Lord Jackson in conversation readily conceded that he had no control over what the government will do with his findings – and there is always a risk that they could be implemented in a way that will make things worse.

Nonetheless, in his rounded presentation there was no denying he spoke a lot of sense and it was clear his views were well received by the lawyers of Norwich – who were perhaps now regretting that they had not made more use of his incisive mind when he was at the Bar.

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