

Institution: University of Nottingham
Unit of Assessment: 19 Business and Management Studies
Title of case study: Determining the Costs of Civil Litigation
<p>1. Summary of the impact</p> <p>Research at the University of Nottingham on the costs of civil litigation has informed policy-makers and influenced the development of policy measures to control costs. As an advisor in the Jackson Review of Civil Litigation, Professor Paul Fenn assisted the development of the far-reaching reforms in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and informed changes to the Civil Procedure Rules which were introduced in April 2013. Based on the formulae calculated by Fenn, changes to the fixed recoverable costs in personal injury claims now benefit many clients and policy holders as recipients of lower fees and/or premiums.</p>
<p>2. Underpinning research</p> <p>This research programme has its origins in research into the costs and delay of litigation. Lord Woolf's inquiry into civil justice reform was established in 1994 to recommend ways of simplifying and speeding up litigation and his interim report in 1995 described delay as 'one of the key problems facing civil justice today'. In a response to this problem research was undertaken drawing initially on data uniquely obtained from NHS hospitals in respect of their handling and disposition of clinical negligence claims. It was conducted by Professor Paul Fenn (Nottingham) with Professor Neil Rickman (Surrey) and Professor Alastair Gray (Oxford).</p> <p>Fenn and Rickman [1] presented a version of Spier's (1992) bargaining model of litigation and derived a functional form for the conditional probability of case settlement. This was estimated and predictions were tested about the effects of legal costs and uncertainty on the conditional probability of settlement, using data from negligence claims against several NHS Trusts. The results provided a direct test of the model and shed light on the causes of settlement delay in England. In particular, our results suggested that speedier transfer of information between the parties should aid settlement and reduce delays, and that the lack of cost pressure on legally aided claimants was a significant factor behind settlement delay. Fenn and Rickman then drew on this approach to help understand the underlying case for a change to the negligence system for medical injuries, and in Fenn, Rickman and Gray [3] they assessed the current negligence approach in England and provided costings for some key alternatives to have featured in the policy debate, including a no-fault compensation scheme for medical injuries. This work linked closely to their involvement in the provision of advice to the Chief Medical Officer in his report of the reform options, Making Amends [B].</p> <p>Further research on clinical negligence claim data in Fenn and Rickman [5] explored empirically, using a competing risk model, the relationship between information about case strength and the speed with which medical malpractice disputes are resolved. They found that litigation encourages the dropping and settling of cases over time in a systematic way relating to the assessed case strength, and that cases that involve relatively little uncertainty are resolved faster than those where liability appears to be more unclear. Fenn and Rickman suggest that this evidence is consistent with the litigation process using time to help sort, and deal with, cases according to their strength.</p> <p>This research was subsequently widened to incorporate work on all forms of personal injury claims, not just those involving clinical negligence. The core methodology underpinning the research has been the statistical and econometric analysis of large claims datasets, obtained from liability insurers and claimant representative organisations. Fenn and Rickman [2] derived predictions about the duration of legal claims against motor insurers. Those predictions were tested against a unique set of case data collected from an English motor insurer. They found that different forms of</p>

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plaintiff finance (including legal expenses insurance, legal aid and private funding) can affect case duration. Subsequent research in support of the use of fixed costs for motor insurance claims is documented in Fenn and Rickman [4]. Overall, they found that the rules succeeded in reducing the variability of costs (by fixing the degree to which they were proportional to damages). They also reduced the amount of costs litigation, without significantly altering the way cases were handled. This research was instrumental in Paul Fenn's appointment as one of the Assessors working with Lord Justice Jackson on his review of the costs of civil claims.

The key researchers were:

Professor Paul Fenn (Aviva Chair of Insurance Studies, UoN since 1993)

Professor Neil Rickman (Department of Economics, University of Surrey since 1991)

Professor Alastair Gray (Department of Public Health, University of Oxford since 1990)

3. References to the research

1. Fenn, P.; Rickman, N. (1999)., "Delay and Settlement in Litigation", *Economic Journal*, Vol.109, 457, pp.476-492 [ABS 4* rated journal]. <http://jstor.org/stable/2565715>
2. Fenn, P.; Rickman, N. (2001)., "Asymmetric Information and Insurance Claims", *Journal of Risk and Insurance*, Vol.68 (4), pp.615-630 [ABS 2* rated journal]. <http://www.jstor.org/stable/2691541> (also available on request)
3. Fenn, P.; Rickman, N.; Gray, A. (2004)., "The Economics of Clinical Negligence Reform in England", *Economic Journal*, Vol.114 (496), pp.272-292 [ABS 4* rated journal]. <http://dx.doi.org/10.1111/j.1468-0297.2004.00222.x>
4. Fenn, P.; Rickman, N. (2011)., "Fixed recoverable costs: A case study in policy and empirical legal studies", *Journal of Empirical Legal Studies*, Vol.8 (3). <http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2011.01219.x/pdf>
5. Fenn, P.; Rickman, N. (2013)., "Information and the Disposition of Medical Malpractice Claims: A Competing Risks Analysis", *Journal of Law Economics and Organization*, May 2013 [ABS 3* rated journal] <http://jleo.oxfordjournals.org/content/early/2013/05/16/jleo.ewt002.full.pdf+html>

4. Details of the impact

The research established Fenn, Rickman and Gray as being best placed to advise various government departments on policy issues arising from the costs of civil litigation, the need to control these, and the implications for behaviour. Their early work on clinical negligence claims data directly led to a request from the Chief Medical Officer for a project which attempted to assess the costs of various policy reform options which ultimately appeared in his 2003 report, *Making Amends* [B]. Research presented in the report, and subsequently in [3] provided evidence that the option to pursue a Swedish-style no-fault scheme for medical injuries would be extremely costly for the UK (£2.1bn), and this option was not pursued further. Although the ongoing financial consequences of this option, if it had been pursued, are difficult to determine, the equivalent cost of the current fault system to the NHS at the time of the estimate was £327m [3], suggesting a significant cost saving to the current day.

Moving to the broader personal injury litigation context, in the aftermath of the Access to Justice Act 1999 there was a standoff in the civil courts between liability insurers and claimant solicitors over the level of legal costs incurred in no-win no-fee arrangements (the "cost wars" [see C]). Fenn and Rickman's research [2] on the cost and duration of motor insurance claims led to an approach in 2001 by the then Chief Executive of the Civil Justice Council to assist with their attempt to mediate between the two sides of the industry. This ultimately led to the implementation of the Fixed Recoverable Costs Scheme (FRCS) in 2003 that utilised a formula devised by Fenn and Rickman to control the legal costs of low value motor claims. Fenn and Rickman were

subsequently asked to formally evaluate the scheme (see [4]). The FRCS formula continued to be used to determine recoverable costs for some 500,000 motor claims involving personal injury each year up to April 2010 [F], affecting in excess of £0.5bn worth of costs per annum (assuming a conservative figure of £1,000 average legal costs per claim) . From April 2010, a significant proportion of low value motor claims (those where liability was admitted by the defendant) were taken out of the FRCS and dealt with through a new process. In 2011 Paul Fenn was asked by the then Parliamentary Under-Secretary of State at the Ministry of Justice (Jonathan Djanogly) to conduct a review of the Low Value RTA Claims Process, published by the Ministry in 2012 [D] which was part of the process leading up to the extension of the RTA Portal to other types of claim by the MoJ in April 2013.

The key role played by Fenn in the resolution of the “cost wars” was instrumental in him being invited by Lord Justice Jackson to join his 2009 review of Civil Litigation Costs as the sole economist on a team of seven advisors [C]. The main recommendations of the Jackson Report have been implemented from April 2013 as part of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 [E]. Part 2 of the LASPO Act is the most far-reaching reform of the civil justice system in decades, and explicitly implements the recommendations of the Jackson Report. Inter alia, it changes the way that no-win, no-fee arrangements work, and the costs recoverable in such cases; it amends the level of damages payable, the way in which offers to settle are made, and introduces for the first time US-style “contingency fees”, to be known here as Damages-Based Agreements (DBAs).

The Jackson Report also led to very significant changes to the Civil Procedure Rules which were introduced from April 2013 [G]. In particular, these changes altered the fixed costs recoverable in most personal injury claims, and many of these costs will be based on formulae calculated by Paul Fenn as part of his role in the Jackson Review [C: Ch 15 and Appendix 5]. In effect, this means that from April 2013 almost 1m claims for compensation annually [F] will have their legal costs determined directly or indirectly by research undertaken by Paul Fenn, with clear consequences for law firms conducting personal injury business and liability insurance companies, as well as their clients and policyholders (who will benefit from lower fees and/or premiums).

5. Sources to corroborate the impact

- A. Head of the Master of the Rolls' Policy Team and Private Office, Judicial Office for England and Wales. This contact will corroborate the input made by Paul Fenn to the Jackson Review calculations of fixed costs which were subsequently incorporated into the Civil Procedure Rules.
- B. Making Amends (DoH, 2003) available from: http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4060945.pdf (accessed 26th September 2013) and available on file.
- See Chapter 7 for explicit use of research by Fenn, Gray and Rickman.
- C. Jackson Report [Review of Civil Litigation Costs: Final Report], TSO, December 2009 available from <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf> (accessed 26th September 2013) and available on file.
- Corroborates Fenn's role as one of seven Assessors on this Review (p2) and his specific involvement with the recommendations relating to fixed recoverable costs (in particular see pp154-163, and Appendix 5).
- D. Fenn, P. 'Evaluating the low value Road Traffic Accident process' Ministry of Justice Research Series 13/12, July 2012 available from <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-traffic-accident-process.pdf> (accessed 26th September 2013) and

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available on file.

- E. <http://www.legislation.gov.uk/ukpga/2012/10/contents>]
- F. <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/>
- G. <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#IIIA> [Source corroborates changes in Civil Procedure Rules that draws upon Jackson Report: Tables 6b-d are based on Appendix 5, Table B of the Jackson Report, which presented Paul Fenn's fixed cost calculations for the Jackson Review]