

Institution: University of Lincoln
Unit of Assessment: 20 – Law
Title of case study: Efficient and Effective Access to Justice
<p>1. Summary of the impact</p> <p>The impact relates to research carried out by Professor John Peysner, and subsequently with Dr Angus Nurse, into three linked areas of access to justice: (a) the cost of litigation, in particular fixed fees, budgeting and contingency fees; (b) the financing of claims, in particular Contingency Legal Aid Funds and Third Party Financing; and (c) forms of dispute resolution and redress. Litigation is of major importance in underpinning civil society, and as a global business, and changes in the costs and financing of it will potentially impact on all practising lawyers. The research has had impact on practice developments, government policy, and statutory and procedural rules of court, particularly in connection with the influential Lord Justice Jackson's Review of Litigation Costs (2009). The impact has been at a national and international level.</p>
<p>2. Underpinning research</p> <p>The underpinning research has been ongoing since 1996, with the elements that are most relevant to this case study having taken place from 2006, following Peysner's appointment at the University of Lincoln. The policy objective of achieving predictable costs allied to access to justice has been the central and consistent theme of Professor Peysner's research, leading to outputs in the form of journal articles, contributions to books, and advice to Government and other reviews (e.g. the Jackson Review; Member of the Technical Board to the Law Society Clinical Negligence Specialist Panel, 2011), policy makers and practitioners.</p> <p>The research addresses the issue of access to justice through the suppression of excessive litigation costs. This has several strands:</p> <ul style="list-style-type: none"> • predictable cost systems (fixed recoverable costs and budgeting); • innovative financing systems; and • appropriate/efficient dispute resolution. <p>(a) Predictable Cost Systems. This aspect of the research emerged as a critical response to those elements of Lord Woolf's <i>Access to Justice</i> proposals (1996) which were not immediately implemented. Although the government gave effect to most of his findings by radically altering civil procedure, it failed to implement his proposals in relation to costs, in particular, fixing costs for low value cases and budgeting for higher value cases. Peysner's research has continued to suggest that these cost reforms need to be implemented, and also that conditional fees should be replaced by contingency fees. For example, research into the effect of delay in increasing costs (Peysner and Nurse's data analysis for National Accident Helpline (2011)), and into court fees (through a literature review for the Civil Justice Council (unpublished internal document, 2011)), culminated in Peysner's interventions in the Jackson Review (2009), following which all of these proposals were implemented in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and court rules.</p> <p>(b) Innovative Financing Systems</p> <p>(i) Peysner was commissioned to undertake desk research and empirical research (interviews) for the Northern Ireland Legal Services Commission (2005-8) into the proposal for a Contingency Legal Aid Fund to largely replace civil legal aid. This included research into the operation of the Personal Injury Assessment Board in the Republic of Ireland, and also involved advising officials and the committee, including writing internal papers. The model proposed was accepted by the Commission, but did not proceed owing to technical issues with the role of the Accounting Officer and boundary issues between Westminster and the Assembly government.</p> <p>(ii) Peysner and Nurse, with Professor Hodges of the Centre for Socio-Legal Centre, University of Oxford, carried out research into the development and regulation of Third Party Funding for</p>

commercial litigation funded by the global re-insurance company Swiss Re. This involved semi-structured interviews with legal practitioners and funders and desk research into bars to Third Party Funding including the comparative context. The research established: that this model was more widespread than had been believed; and that it was growing in scope and could safely be self-regulated, unless and until it moved into the consumer area.

(c) Appropriate and Efficient Dispute Resolution

(i) Research was commissioned in 2008 by the Department for Business, Enterprise and Regulatory Reform (BERR) into the need for, and mechanisms to achieve, satisfactory compensation for groups of consumers, where they have suffered detriment. The research used qualitative and quantitative methods. Structured questionnaires to trading standards/enforcement officers were used to obtain quantitative data relating to the number of consumer protection cases each year. Qualitative questions were also designed to obtain views on restorative justice and representative actions from enforcers, regulators and consumer groups. Interviews were carried out with trading standards officers, other enforcers and regulators, consumer groups and representatives, and some business representatives. A BERR workshop on Restorative Justice was held at the Trading Standards Institute Conference.

(ii) European consumers have been subject to particular detriment by cartel and other anti-competitive activity without effective remedy. Peysner's work has contributed to developing new initiatives of access to justice in this area. Research was carried out with Professors Rodgers (Strathclyde) and Riley (City University) into the impact of European Commission proposals on the regulation of actions for breach of European antitrust rules (i.e. *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, Experts' Report for Centre for European Policy Studies, Brussels, and the European Commission (DG Comp)). This report was published alongside a Commission White Paper on the issue: Brussels, 2.4.2008, COM (2008) 165 final ({SEC(2008) 404}{SEC(2008) 405} {SEC(2008) 406}). Peysner is also the co-author of a forthcoming Arts and Humanities Research Council report on these developments.

3. References to the research

1. Peysner, J. (2010) 'National Report' and 'Woolf for Slow Learners', in Hodges, C., Vogenauer, S. and Tulibacka, M. (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective*, Hart, pp 289-302 and 313-326.
2. Peysner, J. (2009) 'Blot on the Landscape', in Dwyer, D. *Civil Procedural Rules Ten Years On*, Oxford University Press, pp 157-170.
3. Peysner, J. (2008) 'Access to Justice in Multi-Party Actions', in O'Dell, P. and Willett, C. (eds), *Global Governance and the Quest for Justice Volume III*, Hart, pp 103-115.
4. Hodges, C., Peysner, J. and Nurse, A. (2012) *Litigation Funding: Status and Issues*, Joint Report, University of Oxford (Centre for Socio-Legal Studies) and University of Lincoln, available at www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf.
5. Peysner, J. and Nurse, A. (2008) *Representative Actions and Restorative Justice*, BERR ITT, No.101/08.
6. Peysner, J. (2008) 'Referring to Justice', *European Business Law Review*, Volume 19, pp 1105-1127.
7. Peysner, J. (2007) 'Follow the money: Money damage claims in Northern Ireland', in Pleasence, P., Buck, A. and Balmer, N. J. (eds) *Transforming Lives: Law and Social Process*, The Stationery Office, pp 161-185.
8. Peysner, J. and Riley, A. (2006) 'Damages in EC Antitrust Actions: Who Pays the Piper?',

European Law Review, Volume 31, pp 748-76.

4. Details of the impact

In terms of the range of the impact, as has been noted above, dispute resolution is of major importance in underpinning civil society and as a business. The rules relating to funding and costs of litigation are important for access to justice, reduction in insurance premiums (particularly in personal injury cases), and for the health of a very large service industry. Over 1.5 million civil (non-family) cases were started in 2011 (Ministry of Justice, *Judicial and Court statistics 2011* (published 2012)), and in 2012 the Law Society reported that there were 128,778 practising solicitors in 10,102 firms. All of these firms, and their clients, both UK based and international, will be affected by changes in the ways in which cases are financed and costs regulated. Five specific examples of the impact of the research listed in 3 above are set out below.

i. 2009: Advice was given to Jackson LJ in a confidential meeting in relation to his Review of Civil Litigation Costs, and Peysner also spoke at meetings he attended. As indicated above, the Review proposed that fixed fees, cost budgeting and a form of contingency fees should be introduced (damage based agreements); the latter to replace recoverable conditional fees which defendant insurers had to pay with the objective of reducing motor and house insurance premiums. These are all policy objectives that arise from Professor Peysner's research and his conclusions on policy reforms required. These proposals have been implemented in 2013 through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (sections 44 to 47) and changes in rules of court.

ii. 2010/2013: Involvement in Jackson 'Review of Civil Litigation Costs' (above) led to an invitation to speak at the Holyrood Policy Conference, Edinburgh, offering an English perspective on the *Report of the Scottish Civil Courts Review* ('The Gill Review'). Peysner debated the issues with another speaker, Sheriff Taylor, a member of the Gill Review. This led to Peysner's approach on referral fees being taken up by the following government review: 'Review of Expenses and Funding of Civil Litigation in Scotland' (Taylor Review) (11/9/2013) – eg Ch 10, para 48:

In 2008, John Peysner, Professor of Law at the University of Lincoln, predicted the impact of a prohibition of referral fees once alternative business structures had been permitted in England and Wales... 'Referral fees between lawyers and brokers or insurers will be replaced by transfer pricing within vertically integrated organisations. If these arrangements are outside regulation but the remaining firms surviving outside the corporate umbrella remain subject to the full rigor of discipline, it is difficult to see how this can be sustained'. In June 2012, the SRA [Solicitors Regulation Authority] addressed the concern that businesses may become alternative business structures in order to circumvent the ban. So long as the formal requirements for authorisation are met, the SRA could see no grounds on which to prevent such arrangements, even where they are made explicitly to circumvent the ban. It could be said that Peysner's comment was prescient.

iii. 2008: *Representative Actions and Restorative Justice* (2008) – this report was commissioned by the Department of Business Enterprise and Regulatory Reform (BERR) and its successor department, the Department for Business, Innovation and Skills, adopted the proposal put forward by Peysner and Nurse in the BERR report for pilot enforcement trials, which were then carried out. It also adopted and announced the Consumer Advocate (the Consumer Ombudsman proposal), and advertised the post as Chair of Consumer Focus with the education role first and the Ombudsman powers to follow. The Law Commission's Consultation Paper on Consumer Redress for Misrepresentation and Aggressive Practices (LCCP 199/SLCDP 149) makes reference (page 47) to the BERR report in relation to compensation orders, and (at page 51) in relation to the civil sanctions pilot.

iv. A report for the European Commission to which Peysner contributed, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, (2007, available at ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf) was drawn on by the 2008 European Commission White Paper on Damages Actions for Breach of the

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EC antitrust rule – see the impact statement attached to the White Paper: Impact Assessment Report SEC(2008) 405, 2.4.2008.

v. In 2012 Peysner was invited to speak on developments in Third Party Funding to The Geneva Association (the leading organisation of global insurers/re-insurers) International Liability Regimes Conference in Paris. This led to an interview with *The Economist (On-Line)* (www.economist.com/news/finance-and-economics/21575805-fat-returns-those-who-help-companies-take-legal-action-second-hand-suits) in which Peysner's opinion that the research does not support fears that such funding would encourage 'junk lawsuits' was quoted.

5. Sources to corroborate the impact

1. Jackson LJ's report: there are a number of separate references in the report including: '...a very instructive article entitled "Predictability and Budgeting" by Professor John Peysner...', 'Distinguished academic lawyers. From time to time I have sought the views of distinguished academic lawyers on specific issues. They include Professor Dame Hazel Genn, Professor Michael Zander, Professor Adrian Zuckerman and Professor John Peysner'. I am most grateful for their advice.' (pp 11, 217, 233 and 413 in Final Report, and others in Preliminary Reports)

2. *Law Society Gazette*, 11 March 2011 – 'National Accident Helpline commissioned Professor Peysner, widely considered to be the leading legal costs academic, to undertake the first study of its kind into the link between defendant behaviour and civil litigation costs. His conclusion is that defendant delay is too important to be ignored and must become part of the debate for regulators and policy makers'.

3. Lord Justice Jackson speech: Third party funding – '2.4 Developments between 2005 and 2009. The Court of Appeal's decision in *Arkin* brought litigation funding into the main stream in England. The High Court's majority decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 had a similar effect in Australia. The Civil Justice Council ("CJC") took up the baton. In 2005 the CJC published its report '*Improved Access to Justice – Funding Options and Proportionate Costs*' (authors M Napier, Judge P Hurst, R Musgrove, Prof Peysner). This proposed that 'building on the judgment of the Court of Appeal in *Arkin* further consideration should be given to the use of third party funding as a last resort means of providing access to justice"', www.judiciary.gov.uk/media/speeches/2011/lj-jackson-speech-third-party-funding-or-litigation-funding-23112011.

4. *Mail on Sunday*, 10 June 2012 – 'One of the few impartial observers is Prof John Peysner, of the Lincoln Law School, who has studied the insurance industry for years. He said: "Insurance companies have driven referral fees, not greedy lawyers and fraudulent claims. The only way to bring the system under control is to bring costs under control so it is not possible to generate huge referral fees"'.

5. *Guardian Unlimited*, 28 May 2010, 'Legal insurance: will Britain buy it?' – 'Professor John Peysner, head of law at Lincoln Law School, points out there is a radically different litigation landscape in Germany, not least because transactional legal costs are fixed. "The basic problem is you can't inject BTE insurance into an environment where costs are so uncertain", he says'.