EXTENDING THE SMALL CLAIMS COURT LIMIT FOR PI CLAIMS

A Workshop

7 JULY 2016

NOTES

Key
CCSR Civil Court Structure Review
CFA Conditional Fee Agreement
CJC Civil Justice Council
CMC Claims management companies
CPR Civil Procedure Rules
DBA Damages based agreement
FCA Financial Conduct Authority
FRC Fixed recoverable costs
FT Fast track
ICO Information Commissioner's office
IFT Insurance Fraud taskforce
MF McKenzie Friend
MT Multi-track
PSU personal Support unit
PTSD Post traumatic stress disorder
QOCS Qualified one way costs shifting
RTA Road traffic accident
SCT – small claims track

Context

The CJC had convened a workshop to discuss the Government's proposal to raise the small claims limit for personal injury cases from £1,000. The other element in that Autumn Statement was the proposed withdrawal of general damages from claims for soft tissue injury.

Introduction

The chairman welcomed delegates, noted the considerable expertise in the room and his intention to derive the greatest benefit from that expertise during the discussion. Both policies outlined in the Chancellor's Autumn Statement in 2015

were controversial, but the purpose of this workshop was not to evaluate the principles (points better addressed by responses to consultation), nor about where the level for each of the changes was best set. The key fact for the purposes of this discussion was that there was likely to be a group of PI claims that, with a rise in the small claims limit, would come out of the Portal and into the SCT and there were questions of practical implementation that might alleviate problems resulting from this. Today's aim was to look at solutions to those. Discussion was under the Chatham House Rule. The CJC would record the sentiments, but without attributing names.

MoJ update

The importance and value of meetings of expert stakeholders of this kind was reiterated, in particular in helping consider the implications of the policy and considerations in making it effective – including what changes needed to be made by whom and at what stage. There would be a full consultation. He recommended that today's discussion worked on the basis that the extension for PI claims would be from £1k to £5k.

As well as the two key announcements in the Autumn Statement 2015, the report of the Insurance Fraud Taskforce (IFT) had been published and welcomed by Ministers in May 2016. Other context included:

- The importance of keeping costs of appropriate access to justice more proportionate.
    - Controlling the costs of low value RTA and whiplash claims in particular, by among other things FRC and MedCo.
    - The increase in the SCT limit to £10k for most other areas in 2013, but with the limit for PI claims retained at £1k, creating a greater discrepancy.
    - The recommendations in the interim CCSR report for greater digitisation and the online resolution of civil claims.
    - Continuing concern about fraudulent claims, though he did not wish to over-stress fraud as a motivating factor for the policies.

The Autumn statement was about proportionality. There would be a Government consultation but there were approval processes to be gone through before that could be commenced. The timetable had been affected by recent political events. Implementation was at least 12 months away. Changes would need primary legislation. These timing were a guide to assist debate rather than a commitment.

The position of CMCs had been the subject of Carol Brady's recent report (www.gov.uk/government/publications/claims-management-regulation-review-final-report). Their regulation was to move to the FCA by 2018, though again primary legislation was needed. The new powers of the ICO in relation to nuisance calls

would also be set out in due course. Penalties were already being enforced against CMCs for offences of non-compliant marketing. There was also evidence of increased fines for CMCs/ICO.
On FRC for NIHL claims, the CJC would produce its report in the Summer 2016.
On the IFT, the MoJ was particularly grateful to the PI WG, some of the members of which were present, for their advice on (among other things) the abdication of QOCS when a claim was withdrawn at a late stage. The Government was keen that the IFT's recommendations were pursued and there would be a meeting of stakeholders in the Autumn to 'shine a spotlight' on progress. The dialogue should continue, and the PI WG was an example of that.
All these initiatives sat within the broader context of HMCTS reform and Briggs proposals.
There were clearly a lot going on and while there was uncertainty about the timings, the direction of travel was clear. The Government would look to expertise of groups such as this to help make implementation successful. It was important to have as much foresight as possible to mitigate unintended consequences. He confirmed that the extension of the limit would apply to *all* PI cases, including NIHL, clinical negligence and disease.

Current method of resolving claims

At the moment, claims worth between £1k and £5k went into the **Portal**. The users of the Portal were mostly lawyers. Its blueprint were the Protocols for PI claims (www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic and www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims).
It was hard to measure the overall success of the Portal – its data was limited to cases that remained within it and it was not able to measure cases that fell out for different reasons or that went onto Stage 3. At present,86% of the cases remaining in the Portal were resolved by it at Stage 2, without the involvement of the Court system. An early admission of liability was central to the resolution of these cases. Of those that went onto a hearing in Stage 3, one judge noted that fewer than 1 in 20 settled. That court saw 800-1,000 such cases a month. There was no mechanism for negotiation once the case progressed to Stage 3. Within Stage 3 at this court, cases were listed for 15 minutes each with counsel on both sides present. This meant one judge could deal with 20 cases per day.

If these cases became small claims in the present system, the claimant would have to appear in person and give evidence, which would elongate the process and meant each case could take up to a day. Of Stage 3 claims, 80-85% were valued at under £5k.

There had only been one personal injury case in the SCT (so under £1k) in their experience. That judge saw other RTA SC cases as well – but they related to vehicular damage, credit hire, and others where the insurers funded lawyers on both sides. The small number of claims under £1k might be as a result of inflation and of claims inflation. The level had not been index-linked.

Though the Portal had initially been criticised by lawyers as clunky and not intuitive, it had been the best possible in the time available. Its advantage was that it created a **pyramid** structure, with the question of liability sorted out in the first month (15 or 30 working days). In contrast, in the SCT, liability is not dealt with until the final hearing. This meant that a DJ could hear 20 cases from the Portal in a day, but only two or so in SCT from the start. This meant that an LIP would find out at the end of a case that an earlier offer had been a good one. The LIP risked charges of unreasonable conduct if the court's decision on quantum ended up being the same as the original offer. The pyramid was replaced by an oblong, which was considerably less efficient.

One conclusion might be that the SCT was good for **issues of liability**, but not of quantum. In disputes relating to liability, claimants were generally represented – though it was suggested this was not a major issue in such disputes, as DJs were practised in getting the claimants to tell the story of their accident. There would be an enormous surge of damages-only claims under these proposals – and a mechanism was needed for those. Would claimants feel deterred in pursuing their claim after these policy changes?

It was noted that the vast majority of soft tissue injury claims were for less than £4k. They comprised 80% of 1 million claims a year. But this policy related to **all PI claims** – including EL/PL – where liability was admitted less frequently. An LIP would find it even harder to establish the liability of an employer for a workplace accident. They often didn't even know who to sue. Clinical negligence was another complicated world, where liability was not straightforward.

One problem with the **flexibility and ad hoc processes** in the SCT was that it was hard to give firm advice to LIPs on how the hearing was to be conducted and the way in which evidence was gathered, among other things – and the steps they had to go through as a result.

Online access

Might the Portal be made accessible for those acting without lawyers? In principle, yes, though time and money would be needed. Portal was business-to-business orientated and in effect an electronic postbox. It wouldn't be difficult to build

something for consumer-to-business, but would need to think afresh about the business requirements. It wasn't just a matter of assembling a new front end on the existing Portal. What was needed was a **web platform** that allowed people to conduct an online search and to have their hand held on occasion through the process, with others linking in, providing an end-to-end service. That was not what the Portal did at the moment. There would also need to be rule changes and a separate Portal Protocol written for LIPs as the present Portal rules were complex, and designed for lawyers on both sides. This would have to be written before the online system was designed, as that system would then be built on the basis of the Protocol's requirements.

LIPs see the justice system as one big body. They did not recognise differentiation between sectors. **Online access** for different claims should work in same way and ideally from same place. 'CourtNav' had had a 100% success rate in the submission of forms for divorce. There, users were asked questions in a clear, user-friendly way, the answers to which populated a back court form, which was then checked by a lawyer. There was no clear picture of what online access looked like. There were differences of view on internet access – range between 50 and 90%.

Importance of building in security checks (e.g. identity checks) into new system to stop **fraud** was noted.

Predictive damages

No defendant or insurer wanted these cases in the SCT either – it cost them more money. After an admission of liability, the Portal could guide people through the process – e.g. on obtaining medical evidence. SCT was only suitable for exceptions or liability disputes. A **predictive damages tariff** was suggested, a medical decision based on a points system and giving people a clear idea of how damages were calculated. There was a suggestion that instead of 'precipitative reforms', the Government might introduce a system that included a mechanism for the accurate assessment of damages. Otherwise, without paying for legal advice, a claimant wouldn't know the likely level of damages. Lawyers enabled settlement, because they recognised a reasonable offer. It was even harder with a claim for a mixture of injuries – whiplash, shoulder and an element of PTSD. How could a claimant know whether an offer was reasonable? To force them to make a decision on whether to accept an offer based on no expertise was in essence dispensing with the principle of fair compensation. That was the nature of the adversarial system. Or they had to wait for judicial determination, increasing the number of hearings, the opposite of what the Government wanted. Some sort of adjudication was needed for the lay person on quantum, however, or a system of fixed tariffs. DJs often had a good idea of likely figures for different categories of claim, or for its constituent parts. Might a

new system of fixed tariffs concentrate on claims where liability had been admitted? Though a degree of handholding would still be required. And who would set the tariff? It had to be the judiciary – not Colossus ('the insurance industry's leading expert system for assisting adjusters in the evaluation of bodily injury claims'). There was no such IT already in existence, and the number of PI cases made this a large project.

There were so many factors in assessing quantum element, and a risk of **losing individuality** if fixed sums were introduced. Of pain, suffering and loss of amenity, loss of amenity was particularly difficult and individual, e.g. pregnancy anxiety after an accident. There was some resistance to a 'one size fits all' mentality.

For those on **low pay**, any margin of error or under-compensation of a couple £100 would be of greater significance. This was coupled with problems of internet access and illiteracy, with accompanying difficulties in downloading and accessing information. This would affect a significant number of claimants.

Medical evidence

How would the unrepresented claimant obtain medical evidence? It was suggested that the responsibility should be on the insurer to find objective medical evidence. It was also suggested that **MedCo** might be changed so that a claimant put in their postcode and got the name of an expert to approach for a medical report. That medical report might then use a system of tariffs or fixed boxes to come up with a sum of damages. Was there a risk of lawyers being precious about PI claims for minor injuries? Why couldn't it be a fixed amount with a medical assessment by a GP? It was different with catastrophic injury, of course. MedCo was very simple, three screens in effect. You chose the type of expert you wanted, their specialism, and then how far you were prepared to travel. It was already business-to-cosumer. The problem was registration - it would need about 1 million additional user codes to cope with the increase in demand. Also, it cost £180 + VAT to conduct the search. Who was to pay for that? The solicitor was usually making the assessment of risk in that outlay – how could the LIP? Even if their claim was successful, they wouldn't be able to reclaim this sum in the SCT. And the GP would want that sum up front. Medical records were sensitive personal information and the security also needed to be right if claimants were going to be asked to email them.

Sources of legal advice

The PSU saw few PI cases, though many others in the SCT. They helped LIPs interpret and navigate a system designed for lawyers. Any increase in the small claims limit was bound to increase the demand for their services. The **demands on the not-for-**

profit sector were already huge. The proposals risked replacing a cost-effective means of providing lawyers for these cases with a need for further funding for the advice sector, in order to cope with the increase in demand. There had been an 80% increase in the sector's work in the two years after LASPO partly due to a need for advice in far more family cases. None of this was mapped out in advance – and planning was hampered by a lack of data on numbers of LIPs. There was a problem predicting any impact because there was no comprehensive measure of the number of people who represent themselves. It was guesswork.

The group considered **alternative sources of legal advice**. MFs often had an axe to grind. While CMCs offered a level of consumer protection in PII claims, No doubt that speculative CMC calls would multiple with extension of small claims limit. If DBAs were revised, they could work, though they simply transferred the cost of pursuing a claim from the insurer to the party. Damages were low in many of these cases. There were also instances where the claim got bigger the more it was investigated – i.e. with the addition of heads of damage for temple/mandible joint (TMJ) claims, thumb injury, psycho trauma. They impacted on how a litigator pursued a claim and might get lost without legal advice. There was some way to go, though room for manoeuvre in the way in which CFAs were structured.

The only way of dealing with **CMCs** was to ban any compensation up to the SCT limit. CMCs sometimes added an administrative charge to the DBA. Though CMC regulation was moving to the FCA, the resource was still likely to be insufficient for the numbers and number of areas in which they dealt. The change would not affect the amount of cold calling. The only way to do that was to require notification of a claim within 6 months or a year of the event, as recommended by the IFT. It should be acknowledged that the SRA and professional indemnity for solicitors meant that CMCs were likely to be the dominant player in this field. The unregistered acted as MFs often with claimants paying a premium for shoddy representation and with no comeback if things went wrong. Why not introduce controls on how much a CMC could charge? In financial mis-selling cases, they could not get more than 15% of the amount recovered – however cleverly the payment package was put together. Was it possible to extend that to other areas? In any event, any suggestion of a vacuum in the availability of legal advice was disturbing and begged questions about how it would be filled. This wasn't unique to PI, however. Again, join up between the various initiatives (JEB consultation, CCSR, etc.) was needed.

The system had initially wanted **MFs** to regulate themselves, but that hadn't worked in any formal or comprehensive sense. This wasn't about cheap lawyers. Litigation should always be regulated and people accredited – how do you arrange that provision for those who can't afford lawyers? Consumers were not a homogenous

group – there was also a need for consumer segmentation in suggesting solutions, with the system tailored to where the need existed.

Unbundling legal services would allow claimant to understand their claim properly. Even an hour of advice would allow claimants to understand whether there was merit in their case, have the steps described, and then be referred to mediation. It should be recognised that there had been a reduction in take-up for mediation in family cases when legal advice had been removed from scope. Solicitors were cautious about unbundling – the risks were still large and they should only be held liable for the parts of the case on which they advised, not the whole action.

Risk of undersettlement

Direction of travel seemed clear – and it was suggested that that was the de-skilling of one side of these claims. **Undersettlement** in PII claims, which involved precise figures, was different from undersettlement in PI cases where the impact was ongoing. Large proportion of claimants were from socio economic groups C, D and E. Not unique issues however, and overlapped with areas such as divorce. Need to accept change, without getting rid of stuff that is core to system. Part 36 settlements depended on the involvement of lawyers. Not sure how to replicate that if there are no lawyers involved.

ADR

Mediators in the SCT were described as an 'endangered species', though they had a good success rate. But 85% of those claimants who ticked box for mediation didn't get to meet with one before the hearing. This was one cornerstone of the CCSR interim report – the ability to mediate. But PI is not a good area for mediation because of the inequality of arms. An ACAS model might work, but who would fund it? Claimants would welcome it. Why couldn't the Portal be used as a settlement system? Any changes designed to reduce cost would need to be reflected in the CPR. It was possible to select the best bits of different elements of the existing system for a new model. There could still be questions of inequality of arms in mediation – and it was one of the skills required by a mediator to work with that.

Overlapping initiatives

The CCSR and HMCTS reform programme were already doing some of those things. CCSR was aiming at implementation in 2020. These proposals had a tighter deadline. Problem of overlapping reforms – how to pull them together and not duplicate work. **Monitoring** and the gathering of data to allow that should also be central to any new system. It was noted that the consultation paper would be accompanied by an **impact assessment**.

Summary and final points

The group's conclusion seemed broadly that these cases should not be moved to the County Court. That would be the worst answer to the questions and concerns raised in the discussion. There should instead be an onus on the LIP in straightforward cases to **access a system online**, go to **MedCo** for report and send that to defence insurer to admit or deny liability. If the defendant denied liability, the possibility of **costs shifting** should be introduced. If liability admitted, the defendant should make offer to settle with defendant possibly paying for advice on merits of that offer. Fixed fee and damages payable by the insurer. If liability denied, and claimant wins case, claimant would pay % of damages to solicitor. Would also pay % of damages to solicitor if offer refused on their advice, and if the eventual award was 15-20% more than the original offer. There would thus be an incentive on the defendant to make a reasonable offer.

If claiming directly on a website, entering a car registration could automatically fill in some of the information. There could be dropboxes showing what you could and could not claim for. Could be structured so that large parts were filled in for the claimant, with the case coming out to ADR or SCT at certain prompts, or with a prompt 'you may need legal advice at this point'. It was desirable for the claimant to be a long way through answering questions and gathering information before there was any interaction with a case manager or the court.

The system should help a claimant value their claim, establish liability and point the way – but with bespoke advice where there was a dispute (or for more complicated cases). That was where mediation should also come in. **ADR** was not just about mediation, and a form of adjudication could give a non-binding indication to both sides on the likely direction of travel with regard to liability and valuation. This would encourage settlement before a trial. The ADR element – Ombudsman style – may be paid for by an insurer – and not be binding on the claimant or defendant. But costs consequences arose if a case progressed to court.

Concern was expressed that a solicitor still had to do client checks, look at the Rules and implications, conflict check, identity – the SRA rules on client care would still apply and take **time and resource** with costs arising.

Was it possible to devise a system where a claimant could reach a view and settle a claim without any contact with a lawyer? Need to achieve objectives, but without simply raising small claims limit. No-one thought that was the right thing to do. There were reasons CCSR had excluded PI claims – mainly because no fix was needed with the existence of the Portal. Might be a change of tack in implementation of

those final CCSR recommendations if different scenario for PI claims. Possibly the solution was to create a third system, or working with HMCTS reform to **coordinate a pilot** for any new online system.

The chairman thanked everyone for their contributions to a thought-provoking discussion. The consultation paper would be published later this year and arguments for and against made and the practicalities as debated at this event would be raised. The CJC may consider holding a further event when the details of the proposals were known.

AD
11 July 2016