Civil Justice Council:

Costs Working Paper consultation

Response from the Motor Accident Solicitors Society

September 2022

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by our Chair, Sue Brown.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 70 solicitor firm Members, representing approximately 1500 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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Questions

Part 1 – Costs Budgeting

1.1. Is costs budgeting useful?

Cost budgeting is good in theory but does not assist in practice. It is not particularly useful or is simply of limited value. Judges are often irritated by the process. Some will disregard the process altogether, having insufficient time to listen to submissions. There is also an inherent delay in getting the hearings dealt with. Having to apply for additional reports or amendments are counter-productive and costly. When budgeting, sometimes a judge will have a figure in mind and then seek to adopt that figure across the various phases. Defendants often simply play at producing a schedule because of QOCS in PI cases.

1.2. What if any changes should be made to the existing costs budgeting regime?

Budgeting often increases the costs which is against the spirit and purpose of the regime. After the budget has been agreed, there are always disagreements when it comes to the arguments on costs. In its present form it is not fit for purpose.

There are a number of areas where changes might benefit the regime:

- Sufficient notice of a CCMC must be given which require costly relief applications.
- Sanction provisions of no costs for simple administrative errors are too punitive and should be replaced with a fairer sanction, eg. a 10% deduction in costs.
- A more holistic approach to budgeting that would include a global amount for the future costs to be incurred that can be divided in a way that the parties agree upon.
- The issuing of Part 8 proceedings is a waste of time. Hearings are cumbersome and too slow. Processes urgently need to be streamlined.
- Consideration should also be given to having specialist cost judges at the end of a case who know what is required to deal with all the issues.
- There should be a consistent national banding of GHRs.
- At a minimum GHRs should be adjusted annually to take account of changing circumstances, particularly increased costs and inflation.
- Subsequent to this consultation, if there is a review, costs should be paid in accordance with any revision at the time of settlement, as opposed to the time of the inception of the claim, otherwise any impact of rapidly rising inflation would not be addressed.
- Regular uplifts – this has not occurred since costs were introduced.
- Easier and more straightforward approach to revisions to the budgets

- Accept in some cases that costs should not be considered.
- The fees for translation must be included, not excluded.

1.3. Should costs budgeting be abandoned?

The current regime is not fit for purpose in its present form, and requires substantial improvements and amendments, as set out in our response to 1.2, to ensure the purpose of budgeting is met.

On the positive side, budgeting does give surety of a maximum sum to spend, allowing claimant lawyers to assess the appropriateness of our limit of indemnity for our insurance cover. The level of exposure is also really helpful from a perspective of private retainer clients. However, the negatives far outweigh the positives.

1.4. If costs budgeting is retained, should it be on a “default on” or “default off” basis?

There are plenty of instances at Cost and Case Management Hearings where Judges decide they do not want to budget the case. “Default off” would certainly be a better base position unless budgeting is thought to assist.

1.5. For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

See 1.2. We would specifically highlight the following two procedural changes. There are numerous occasions where insufficient notice of a CCMC is given which require costly relief applications; something needs to be done to address this. The sanction provisions of no costs for simple administrative errors are too punitive and draconian. The punishment does not fit the crime. A sanction of 10% deduction of costs would be fairer – or the loss of the budgeting phase and percentages.

Part 2 – Guideline Hourly Rates

2.1. What is or should be the purpose of GHRs?

The entire system needs to be reformed to ensure that there is a realistic commercial return for lawyers. The implications currently are wide reaching, spilling into many non-contentious areas such as wills & probate work, as well as other contentious litigation areas such as family work, albeit most people look to agree an estimate in terms of the work to be done. Some court bandings differ to others for no rationale reason. Instead, there should be a national banding. An example would be a shell office in London where fee earners are dotted around the country working remotely, but able to claim a London rate.

2.2. Do or should GHRs have a broader role than their current role as a starting point in costs assessments?

See above.

2.3. What would be the wider impact of abandoning GHRs?

What we have at present is a fairly archaic system locally whereby we are invited to speak to the court about rates from time to time. Without regular reviews there is a stagnation which is brought into sharp perspective bearing in mind the current economic issues. A wider review is required in view of the fact that legal process (AML, COLP, COFA– more regulatory burdens) and many other factors such as inflation, greater digitisation and cuts at the lower end (fixed costs in PI) have not been borne in mind.

2.4. Should GHRs be adjusted over time and if so how?

Yes, they should be adjusted annually to take account of changing circumstances, particularly increased costs and inflation.

2.5. Are there alternatives to the current GHR methodology?

There unfortunately is no alternative unless there is a wide-scale change to the current approach.

Part 3 – Costs under pre-action protocols/portals and the digital justice system

3.1. What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

There has been a dumbing down of a service to the detriment of justice alongside massive hikes in court fees. Digitisation should be a cost benefit, not a cost burden. There has been a significant cost to the profession with a very poor judicial return. The profession has wasted significant time and resource for under-prepared MOJ IT solutions (A2A through the OIC being a prime example).

3.2. What is the impact on costs of pre-action protocols and portals?

Unless the costs are at realistic levels, it is difficult to take on any matters. This is an access to justice problem that is getting worse. The suggestion of there being a swings and roundabout approach is untenable. It is simply all swings and no roundabouts. Thousands of pounds are unrecovered in Portal cases on virtually every case – the costs are unrealistically low and have never seen an increase.

3.3. Is there a need to reform the processes of assessing costs when a claim settles before issue, including solicitor own client costs, and party costs?

The current systems are outdated. For example, the need to issue part 8 proceedings is a huge waste of time. There should be streamlined processes as a default.

3.4. What purpose(s) does the current distinction between contentious business and non-contentious business serve? Should it be retained?

Processes need to be reviewed and streamlined.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

4.1. To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?

Generally speaking there is a clear restriction of justice issue. This will only work if the fixed recoverable costs are set at an appropriate level and/or regularly and routinely reviewed so they do not stagnate. There will be much satellite litigation in relation to the various bands

which will become the new contentious issue. There are few sanctions in-built for default of the Defendant that have any real bite particularly when compared to the sanctions applicable to the Claimant. For instance, removing costs recoverability for late filing of budgets where the Defendant does not expect to recover costs anyway is not really a sanction at all. The opposite is true for the Claimant where the sanction is, as stated above, extreme.

4.2. Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.

See above. A review will need to be put in place quickly to consider teething and bedding in issues arising from any changes made.

4.3. Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

Each area of litigation expertise should submit their own view, a debt collection matter is entirely different to a Fatal Accident Dependency action, which again is entirely different to a Patent or Partnership dispute.

One size does not fit all. There are clear to access to justice issues.