The Forum of Complex Injury Solicitors
incorporating the Richard Grand Society
FOCIS

CIVIL JUSTICE COUNCIL;

THE IMPACT OF THE JACKSON REFORMS ON COSTS AND CASE MANAGEMENT

FOCIS RESPONSE

1. The types of case being taken on (and not being taken on) by law firms

1.1 Complex personal injury and clinical negligence cases take many years to resolve. The majority of cases still being conducted by the members of FOCIS were taken on prior to the Jackson Reforms. Consequently it is too early to evaluate the full impact on the types of cases being taken on.

1.2 Due to the above point most firms are yet to feel the full force of the Jackson Reforms on their ability to finance their clients' cases. Most of our members are predicting that once pre-Jackson cases have worked their way through the system, the resultant reduced income from their injury practices will be about one-third less than it was pre-Jackson. Few if any firms can withstand such a loss of income and remain profitable. Consequently it is necessary for the long-term financial stability of such Practices (as now regulated by the SRA) to become more stringent in their risk assessment policies relating to new cases.

1.3 Most firms are still in the process of adjusting their business models and risk assessment policy. However, the inevitable consequence is that some claimants who have cases involving serious injuries or fatalities which have reasonable prospects (i.e. 51-60%), in relation to which pre-Jackson they could have readily secured experienced representation and gone onto recover compensation (often reduced for the litigation risk), are in the future likely to struggle to do so.

1.4 As further described below the operation of the caps on the CFAs and DBAs provide inadequate reward for firms litigating high risk cases. The cost of investigating and discontinuing or litigating and losing cases of that type will inevitably exceed the capped success fees earned on winning cases of that type. In the increasingly competitive marketplace for legal services, with tighter margins, it will not prove economically viable to take such risk in the long-term.

1.5 The types of cases most severely affected will include those involving fatal accidents and children, because in these examples the majority of the award is likely to be for future losses and so hence fall outside of the cap applying to CFAs and DBAs. This phenomenon is compounded by the new proportionality test and cost budgeting, particularly in relation to fatal accidents claims.

1.6 A number of firms who previously focused on the high-volume low-value end of the personal injury market now appear to be targeting complex injury and clinical negligence claims because of the difficulty they face attempting to maintain a profitable practice since the extension of the portal and the fixed cost regime.

2. The funding of civil litigation in the light of changes to CFAs and the introduction of DBAs and QOCS

2.1 As an organisation we are unaware of any DBAs in relation to complex injury claims. As a point of principle our members have concerns about taking a percentage share of the damages which seriously injured people need to meet their long-term disability related needs. Even if they were forced to ignore that concern the cap on the DBA fee at a gross figure of 25% for past losses and General Damages is inadequate reward for the work required to achieve optimal outcomes for seriously injured claimants. Therefore this funding model would only ever work for the lawyers quick and easy settlements which are rare in the world of complex injury litigation and in such cases the claimants would have been better off with a CFA.

2.2 The DBA Regulations have been heavily criticised in the legal press for a failure to allow a hybrid (discounted rate) option particularly in the context of commercial litigation and the uncertainties over termination provisions. It is also very unfortunate the DBA Regulations were drafted in the way that causes Practitioners concern that the entire Agreement would be rendered unenforceable even by a minor non-compliance with those Regulations.

2.3 Turning to CFAs there is a considerable degree of uncertainty concerning the consequences for claimants with pre-Jackson CFAs who seek to transfer their instructions to an alternative firm (for instance if they are dissatisfied with their current firm's representation, or that firm becomes insolvent or undergoes some form of merger/acquisition). A rule change or express guidance would be welcomed to clarify this area and ensure that clients who validly have pre-Jackson CFAs are not left in an uncertain position or prejudiced. The worst case scenario if a claimant were to change their CFA to a new firm post-April 2013 would be that they would then have to meet any subsequent success fee out of damages, but at the same time would not have QOCS protection, nor the 10% increment to general damages, because they had a pre-litigation Funding Agreement.

2.4 A modest rule change to address the above would have no adverse impact on paying parties who would only face additional liabilities in relation to CFAs notified to them prior to April 2013.

2.5 Caps on success fees are set at a level which gives inadequate reward for the risk firms take in relation to some complex injury claims. The cap ought to be redrafted to match that which applied under the pre-2000 era of CFAs; that is 25% of all damages, not just past losses and General Damages. Any attempt to ring-fence future losses was artificial and impossible to achieve because complex injury Claimants will have already spent their past losses and will usually have applied their General Damages to meet the shortfall in their accommodation costs consequent to the Roberts –v- Johnstone calculation. Therefore whatever the current capped success fee is in real terms it will be coming out of their future losses in any event.

2.6 The above proposed revised success fee cap would also be much simpler to explain to lay clients, which would be obviously beneficial. In many cases market forces would dictate that the actual success fee charged is lower than that cap, but the proposed revised cap would at least reduce the scenario of clients with high risk and high cost cases struggling to obtain experienced representation.

2.7 QOCS are difficult to explain to lay clients and they completely fail to address the significant problem of disbursement funding. Disbursements and complex injury claims virtually always run into five figures and in approximately one-tenth of catastrophic injury cases exceed £100,000. Vulnerable seriously injured Claimants worry about costs issues and many do not feel able to take the chance of proceeding with their claim at all if in doing so they were exposed to liability for the disbursements.

2.8 Solicitors' firms are not banks and nor are they insurers and they cannot be expected to fund such high levels of disbursements and take the risk of non-recovery (in addition to not being paid for their own work in unsuccessful claims). In addition Claimants can be placed under significant costs pressure to settle pursuant to early Part 36 Offers by Defendants. Even if the Claimant's Solicitors and Counsel advise against acceptance of such an offer, Claimants without ATE often do not feel able to take the risk of holding out for a more reasonable offer.

2.9 Consequently, notwithstanding the introduction of QOCS most severely injured Claimants are still taking out ATE post-Jackson. This would appear contrary to the assumption made by Lord Justice Jackson and the costs of that ATE premium was not factored into his assumption that in broad terms the 10% increase to General Damages would offset the success fees which would be incurred by Claimants.

2.10 Consequently we advocate that the current recoverability of insurance premiums for expert reports investigating liability and causation issues for clinical negligence, should be extended to all complex personal injury cases to try and mitigate the adverse impact of the Jackson Reforms on higher risk but still meritorious complex personal injury claims. For such complex personal injury claims the recoverability of this ATE element could be made contingent on their having been no admission of liability in the Protocol period and value as a proxy for complexity; perhaps £250,000 in line with the current threshold below which injury cases are transferred out of the High Court.

2.11 The costs of post-Jackson ATE is a significant deduction from damages in relation to multi-track claims particularly those that proceed into their latter stages (as Pleadings are frequently staged); see the ATE table in Litigation Funding.

2.12 Although it remains early days it appears that the 10% increment on General Damages is effectively been lost in the wash when settlements are being negotiated for complex injury claims. In any event General Damages are a modest part of the overall compensation packages for such claims. It was always an ironic oddity of the Jackson Reforms that the 10% increment on General Damages was most effective in offsetting the success fees of those with low value temporary injuries (the key target of the Reforms), but left seriously injured meritorious claimants with significantly reduced damages, contrary to the full compensation principle.

2.13 As predicted the referral fee ban has been largely ineffective. Some claims management companies and schemes have restructured to exploit grey areas in the regulations. Perhaps of greatest concern though is the increasing shift towards the insurers setting up their own ABS structures and maintaining ownership and control of both sides of the process. At the very least this is a worrying trend for a freedom of choice of legal representation for those with life-changing injuries and just one opportunity to obtain appropriate compensation and provide for their life-long financial needs.

3. Experiences of costs budgeting and the management of cases throughout the Courts

3.1 The rewording of CPR 3.9 in relation to relief from sanctions has caused considerable extra costs and uncertainty. Even where parties have agreed variations to Court Directions by consent and without any impact on any Hearings, it has become necessary for them to make applications to Court just in case. There have been a number of post-*Mitchell* Court decisions in which process has trumped fairness and which reflect poorly on our civil justice system.

3.2 The greatly increased number of applications for extensions, variations and relief from sanctions would have proved difficult to accommodate within Court lists without delay in any event. However, this has happened in combination with the need to find extra time in the Court list to allow for costs budgeting at Case Management Hearings. This is all before we get to the inevitable stage of repeated Applications for variations of Court Costs Budgets, as so few have been set yet. In the Queen's Bench Division of the High Court we are already waiting several months for the listing of CMCs and any Application in excess of 30 minutes. This is delaying the progress and hence increasing the costs of all cases.

3.3 If the case and costs management rules are to remain as drafted it is absolutely crucial that additional Judges are recruited and trained, notably additional Masters in the QBD.

3.4 The continuing absence of guidance on the new proportionality test is causing uncertainty at all stages, including in relation to costs budgeting.

3.5 Costs budgeting has certainly frontloaded aspects of the work and greatly increased the time and hence the costs of preparing a case for a CMC.

3.6 Even though we are approaching 1 year after the implementation of the Jackson Reforms, the above-mentioned delays mean that most of our member firms have only had a very modest number of cases go through the costs budgeting process. Their experience has been highly variable.

3.7 It remains the case that it is very rare for a Defendant to a complex injury claim to agree the Claimant's budget, even when there is a good working relationship between the parties and a high degree of agreement in relation to Directions and other matters.

3.8 A broader swings and roundabouts approach ought to be taken to costs budgeting at the conclusion of the case. The receiving party ought not to be penalised if they remain within budget overall, even if in doing so they slightly exceed one phase, but come in under budget in another phase. Absent this rule change, Defendants may get three bites of the cherry, firstly on a phase by phase basis, secondly in relation to the overall budget and, thirdly, at Detailed Assessment. We propose that CPR 3.18(b) be amended to read "not depart from the grand total for all relevant phases for such approved or agreed budget unless satisfied that there is good reason to do so". The associated PD should expand upon the point for clarity. A further advantage to this proposal is it would reduce the number of applications to vary budgets.

3.9 A similar provision also ought to be added to CPR 44.2 to make it clear the Court can award costs in the sum of the approved budget without ordering an assessment.

3.10 To discourage Defendants seeking assessments trying to reduce the costs below the level of the approved budget, a 20% threshold of reduction ought to be applied. This is analogous to the pre-Jackson position in relation to costs estimates, which continues to feature in the Practice Directions concerning cases in which costs budgets are filed, but no costs management order is made. The thrust of this proposal is that unless on assessment the Defendant achieved a reduction of more than 20% below the level of the last approved costs budget, they should be ordered to pay the costs in the sum of the last approved budget. Absent a provision such as this, there is little for Defendants to lose in challenging costs budgets at assessment and so it is inevitable that they will do so as a matter of course;

3.11 Whilst the new 10% award pursuant to CPR 36.14 (3) (d) is welcomed, it is only payable to Claimants in the rare cases which fight on and result in a Judgment. In contrast the Defendants get their benefits pursuant to Part 36 for any later settlement outside of the 21 day window, without the case needing to proceed to a contested Hearing. This anomaly allows Defendants to ignore Part 36 offers when made. Claimants have to leave them on the table for them to ever be effective. Defendants can then play the waiting game, hoping the Claimant will crack under the pressure of litigation and accept a lower offer, but retaining a back-up plan of accepting the claimants offer late in the day if they do not.

3.12 A further anomaly in relation to catastrophic injury claims is that the Defendants make their Part 36 Offer early, the costs liability the Claimant may then face could be a significant 6 figure sum, whereas the new award under 36.14 (3) (d) has been capped at £75,000.

3.13 Consequently, we propose that Part 36 be revised as follows:-

3.13.1 Both Claimants and Defendants become entitled to "the rewards" of having made an effective Part 36 Offer once the 21 day period expires, rather than limiting Claimant rewards to upon entry of Judgment only;

3.13.2 The £75,000 cap either be removed, or applied equally to both Claimants and Defendants.

4. Summary of FOCIS' proposals for rule changes relating to the Jackson Reforms

4.1 Clarification that Claimants with pre-Jackson CFAs can transfer their instructions to an alternative firm, retaining recoverability of success fees under the replacement agreement, provided they are no higher than what is applicable to the Pre-Jackson CFA;

4.2 Change the caps relating to both success fees and DBAs so that they are 25% of all damages, not just past losses and General Damages, as they were for pre-2000 CFAs;

4.3 The recoverability of ATE insurance premiums for expert reports investigating liability and causation issues in clinical negligence be extended to include complex personal injury claims in relation to which liability is not admitted within the relevant Protocol period.

4.4 Relating to costs budgeting:-

4.4.1 CPR 3.18(b) be amended to read "not depart from the grand total for all relevant phases for such approved or agreed budget unless satisfied that there is good reason to do so".

4.4.2 A similar provision also ought to be added to CPR 44.2 to make it clear the Court can award costs in the sum of the approved budget without ordering an assessment.;

4.4.3 Unless on assessment the Defendant achieves a reduction of more than 20% below the level of the last approved costs budget, they should be ordered to pay the costs in the sum of the last approved budget, plus the costs of the assessment process.

4.5 Part 36 be revised as follows:-

4.5.1 Both Claimant and Defendants become entitled to the rewards of having made an effective Part 36 offer once the 21-day period expires, rather than limiting Claimant awards to upon entry of Judgment only;

4.5.2 The £75,000 cap either be removed or applied equally to both Claimants and Defendants;

4.5.3 Practice Direction to Part 36 ought to clarify that unless the Court considers it unjust to do so, the Claimant ought to receive an Order in his favour in relation to all aspects of sub-paragraphs (a), (b), (c) and (d). There is a concern amongst Claimant practitioners that Courts may view these provisions, notably (a) and (d), in the alternative;

4.6 The provisions relating to variations of directions by consent and relief from sanctions (CPR 2.11, 3.8, 3.9, 29.5, 32.10, 35.4 and 35.13) be amended to allow variations by consent that do not prejudice a hearing date, along the lines of CPR 29.5(2). Alternatively and in line with the recent addition to the Clinical Negligence Model Directions that CPR could be amended to allow variations by consent for periods of up to 28 days.

5. Conclusion

5.1 The Jackson Reforms were intended to increase access to justice. Whilst it is early days post implementation, the signs are that they are reducing access to justice for claimants with complex injuries but whose claims are subject to serious liability disputes.

5.2 The Reforms have undoubtedly impacted upon the full compensation principle as seriously injured claimants are now having to pay a success fee and ATE premium out of their damages, with the 10% increase to general damages either being lost in the wash or only modestly contributing to those cost elements.

5.3 The Reforms have also front loaded and increased costs, plus caused delays to the progress of litigation as the Courts struggle to cope with the volume of applications and the time required to cost-budget effectively.

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