The Law Society

The Impact of the Jackson Reforms on Costs and Case Management

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Written Submission of the Law Society

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1 Introduction

1.1 In order to fully assess the impact of the civil justice reforms, which were first proposed by Lord Justice Jackson in December 2009 it is first necessary to remind ourselves about the full programme of reforms which has been implemented as well as those which have yet to be implemented. The most important reforms are listed below:-

(i) Legal Aid Sentencing and Punishment of Offenders Act 2012 (Part 2)

- The abolition of the recoverability of CFA success fees and ATE premiums
- Introduction of Damages Based Agreements (DBAs)
- Prohibition of Referral Fees

(ii) Civil Procedure Rules

- Introduction of qualified one way costs shifting (QOCS) in PI cases
- New CPR rule on proportionality
- New CPR on Part 36
- Case/Costs Management and Budgeting
- Relief from sanctions

(iii) Other

- 10% increase in damages
- Vertical extension of the existing RTA portal to £25,000
- Horizontal extension of the portal process to EL and PL claims
- Non PI small claims limit from £5,000 to £10,000

(iv) Current Government Initiatives

- Whiplash claims/medical panels
- Costs protection in defamation and privacy claims
- Fraud
- Guideline Hourly Rates review
- Continuing review of the PI small claims limit
- Proposed increases in court fees

1.2 The Law Society is generally supportive of reforms which reduce the cost of dispute resolution and improves the administration of justice. However, this cannot be at the expense of access to justice to the detriment of those who have a genuine dispute. This is the overriding principle which has to be considered in any review of the reforms.

2 Impact of the reforms

2.1 CFA success fees and ATE premiums

The general view at the moment is that it is too early to assess the full impact of the changes to the recoverability of success fees and ATE premiums. Many cases were issued prior to the 31st March 2013 “cut off” date and those which were issued post 31st March will take time to filter through the system. Anecdotal evidence indicates that solicitors are continuing to charge success fees which will now be payable by the client from damages.

However, there is increasing evidence available that (contrary to Jackson LJ’s expectations) clients are taking out ATE insurance in personal injury cases at their cost, notwithstanding QOCS. This is because they remain liable for their own disbursements if they lose and also to protect themselves against the risk of a Part 36 offer. Without insurance they run the considerable risk of having to accept a very low offer and under settle. In serious injury cases this in turn leads to increased reliance on state benefits.

There is also a problem in lower value public liability cases in particular where damages are insufficient to reflect risk-based success fees and ATE premiums. It is therefore likely that some people with meritorious claims who would have been able to sue and recover damages before 1 April 2013 are no longer able to find a solicitor to bring the case. .

Another example of a detrimental impact on access to justice is the fact that those claimants who enter into CFAs for non personal injury disputes do not have the benefit of an additional 10% increase in damages or QOCS. However, they are fully liable for the solicitor success fee, ATE premium and any adverse costs.

In his final report on civil litigation costs and funding Lord Justice Jackson made recommendations on the basis that they were an "interlocking" package of reforms, all of which needed to be implemented[1]. One of those recommendations was that there should be no reduction in the availability of legal aid. However, this has not proved to be the case. For example, legal aid is no longer available for housing claims or actions against the police. The availability of ATE has also been an issue with those claims and, where available, the premiums are very high. Because QOCS does not apply to these and many of them are lower value claims they are uneconomical to pursue and claimants are therefore being denied redress.

2.2 Damages Based Agreements (DBAs)

There is currently no indication or evidence that these are being used by solicitors and this is no doubt due to the considerable confusion caused by the drafting of the DBA Regulations. In particular, the application of the indemnity principle to such agreements has also resulted in a reluctance to offer them to clients. In practice, the application of the indemnity principle in a cost shifting environment operates as a windfall to the losing opponent if the assessed costs exceed the DBA fee rather than a true client protection provision.

Lord Justice Jackson recommended in his report that the indemnity principle should be abrogated[2] but, to date, the Government has not accepted this recommendation. The Society has given its views on the difficulties concerning DBAs and made suggestions for amendments (including the need to allow so-called ‘hybrid’ agreements) but, at this stage,

[1] Review of Civil Litigation Costs: Final Report – December 2009
[2] Chapter 5 at 4.1

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it would appear that the Government is unlikely to make changes to the indemnity principle in any event as a matter of policy.

2.3 Referral fees

Since the prohibition of the payment or receipt of referral fees in personal injury claims there has been anecdotal evidence filtering through that some forms of payments continue to be made by some solicitors. There is no real evidence that such payments are unlawful but the situation is being closely monitored.

The prohibition has, however, caused two major impacts:-

- an increase in ABSs as insurers and others seek to maintain and increase their share of the personal injury market due to the loss of referral fee revenue by sharing profits through an ABS with a law firm instead of receiving referral fees from an independent law firm

- firms of solicitors ceasing to undertake personal injury work (or becoming insolvent) because of the high cost of alternative marketing and the reduction in recoverable costs.

Despite the prohibition, claims management companies (CMCs) still operate and many believe that their methods are very dubious and not in the best interests of accident victims.

Also, the Society has been informed that some CMCs may be entering into DBAs with victims who, in addition to the contingency fee payable to the CMC, will also be responsible for any CFA success fee and ATE premium payable to the solicitor.

2.4 Qualified One Way Costs Shifting (QOCS)

As there has been little evidence forthcoming of the implications of this in personal injury actions it is difficult to fully assess the impact on those claims and access to justice but this is under constant review by the Society.

As referred to above, the introduction of QOCS has not negated the necessity for ATE cover, the cost of which is payable by the victim. This was a point which was made by the Law Society when the concept of QOCS was first mooted.

One problem which as been identified to the Law Society as being unfair is in respect of mixed claims. For example, in a group action where some of the claimants have personal injury claims but others only have a contractual claim (such as occurs frequently in travel/holiday disputes where damages can be relatively low), only those with an injury claim will have QOCS protection. This can leave a disproportionate burden of costs to fall upon those whose claim is a contractual one only. The application of the rule is also unclear in other mixed cases (e.g. for housing disrepair where there is an ancillary personal injury claim). It is not very satisfactory that a claimant does not know (subject to court of appeal clarification) in advance what If any costs liability they will have. The Law Society would press for an extension of QOCS to housing and other similar cases where there is an imbalance of power between the parties, as recommended by Jackson LJ in the Final Report and even more urgently required now because of the dismantling of civil legal aid,

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2.5 New Part 36 Rule

It is too early to assess the full impact of this change, particularly as it only applies to cases determined at trial.

2.6 New Costs Proportionality Rule

There continues to be a degree of confusion as to how this will be applied. The only evidence is anecdotal and relates so far to costs budgets which suggest inconsistency in the application of the new rule by the judiciary. More guidance may be forthcoming in due course but this will be a slow process as it will rely upon authorities from decided costs cases which will take some time to filter through.

It is not really acceptable that litigants are beginning cases without either they or their solicitors having the slightest idea as to whether the costs being incurred will be considered proportionate until the end of the case or part way through as the result of judgments of the court of appeal in other cases.

2.7 Costs Budgeting

The changes introduced in April 2013 have had wide implications for solicitors dealing with these claims who are required to complete, and agree if possible, costs budgets for the conduct of the claims which will result in potentially serious penalties if exceeded.

There is a widely held expectation that solicitors will agree budgets, thereby saving the court's time and costs. However, in many case this is not possible because budgets cannot be agreed by solicitors unless, and until, they have their client's instructions to do so. Some of the Society's members, representing both claimants and defendants, have reported difficulty in getting the funders to authorise the agreement of budgets.

In personal injury cases there is little incentive for insured defendants to agree the claimant's budget because of QOCS (which means they will not recover their costs budget if they win and can only recover up to the damages if a Part 36 offer is not beaten). There is huge scope for tactics for both sides.

Budgeting has led to significant front-loading of costs – both the costs of the budget process itself and because solicitors may delay issuing proceedings to avoid control by costs budgets in respect to pre-issue costs.

There are far more CMCs being listed (previously many directions would have been ordered by consent without a hearing) and hearings are being listed for much longer, leading to considerable strain on court resources and long delays in getting CMC hearings. Sometimes cases are delayed while one side or both await the directions hearings. In others, directions are virtually completed voluntarily by both sides in accordance with 'agreed' directions before the CMC when the budget is set which makes it pointless.

Reports from our members indicate a lack of consistency, and in some cases a lack of interest, by the judiciary in how they deal with budgets at CMCs.

Many solicitors believe that the judiciary should receive additional training in budgeting and solicitor's costs and that guidance for "good practice" for the judiciary should be published.

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2.8 Sanctions

There can be no doubt that this is the main area that solicitors have experienced the impact of the Jackson reforms. A number of firms have had sanctions imposed for failure to comply with the new rules which has resulted in cases, being struck out or significant costs penalties and/or refusal to allow evidence. This is one area where a number of firms may be at risk of claims for negligence and there is a significant danger that professional indemnity insurance (PII) premiums will show a general increase for all firms at renewal later in the year.

There is a good deal of uncertainty and confusion surrounding the use of sanctions and also the consistency of judicial decisions.

Whilst there have been a number of cases recently regarding failure to comply with a court order/direction and applications for relief from the sanctions imposed the Society is still attempting to identify all of the issues which have developed as a result of the new CPR and their interpretation by the judiciary. However, one example is the unfairness caused to clients by forcing them to sue their solicitors in professional negligence (PN) claims where a sanction has resulted in strike out of the original claim. In any successful PN claim damages are paid out on the basis of the estimate of the merits of the original claim. So, for example, where the struck out claim had an estimated 80% chance of success, the award of damages will be 80% of the original claim value. The new CPR sanctions will therefore increase the incidence of this.

The climate of litigation has changed. Co-operation between solicitors on opposing sides is breaking down as no one can trust anyone not to take the slightest point. This is a severely retrograde step that has put the clock back to before Woolf.

It is not putting it too high to warn that the reputation of British justice for fairness is now at very serious risk indeed as a result.

At the moment the main causes for concern are:-

- Lack of certainty caused by different interpretations of the rules
- Possibility that the stringent application of the rules prioritises court administration over access to justice
- Risk of serious injustice to clients
- Serious reputational risk for solicitors
- Impact on PII renewal premiums (which could substantially increase)
- Increased risk of satellite litigation
- The sanctions which are imposed are disproportionate
- The impact on clients is unfair and disproportionate
- The impact on international dispute resolution
- The total confusion which is being caused in many cases

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2.9 10% Increase in Damages

There is currently no empirical evidence available that defendants are increasing damages offers/payments by 10%. As previously noted by the Society, there is no method of "policing" this and the MoJ will not confirm that it will, as previously stated by them, monitor the level of damages being paid.

One problem identified is in respect of infant settlements which require court approval and where a formal and reasoned judgment is not usually given. The Civil Justice Committee has recommended that solicitors request Counsel to include in any advice a specific mention of the "original" value of an infant claim and then add on 10% so that this can be taken into account when the court considers the application.

The latest Judicial College guidelines for the assessment of general damages in personal injury cases now include a 10% uplift in all categories which is helpful.

2.10 Fixed Costs reduction for RTA claims

The latest Portal Management information (MI) indicates that fewer claims are leaving the portal which, it is assumed, that insurers are dealing with them at an earlier stage, presumably to get the benefit of the lower legal costs.

2.11 Streamlined Fixed Costs Portal Claims extension to EL and PL work

Again it is too early to assess the full impact of these new protocols. Whilst there had been a reduction in the number of EL/PL claims issued in the third quarter of 2013, this is likely to be as a result of many existing claims having been issued before 30th July 2013 when the new protocols were introduced.

Recent MI published by the Claims Portal indicates that these claims are now beginning to increase slightly but generally the number of claims has reduced. This is possibly due to the fact that the risks are high but the damages are often low and therefore they are uneconomical to pursue when the success fee and ATE premium has to come out of the damages.

A relatively higher proportion of these claims leave the portal than RTA claims but this is likely to be mainly because of the higher proportion of cases where liability is not fully accepted.

2.12 Non – Personal Injury Small Claims Limit

The Government increased the non PI small claims limit from £5000 to £10,000 on 1st April 2013. It has also indicated that it will be reviewing the limit at a later stage with a possibility of it being increased to £15000.

There is currently no empirical evidence available on the impact this has had on non PI litigation. However, many report an increase in litigants in person as a direct result.

2.13 Current Government Initiatives

Whilst the current Government initiatives (see section 1(iv)) are not specifically under consideration by the Civil Justice Council at this time they must not be ignored and it is therefore essential that they are taken into consideration in any review. Some of these initiatives may have a further and significant detrimental impact on access to justice.

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3 Conclusions

3.1 The sheer tidal wave of reforms designed to reduce solicitors' costs in order to lessen the burden on the public purse, liability insurers and other compensators has also had the effect of reducing access to justice, increasing the number of litigants in person and swelling the already overburdened court waiting lists.

3.2 The significant impact of the new rules on sanctions is in danger of creating a perception of a changing the role of the judiciary in order to support Government policy to focus on resources of the court system as a whole rather than the administration of justice in individual cases.

3.3 There can be no doubt that the extent of the reforms has had a significant impact on the way that civil litigation is conducted and funded. It is widely considered that the extent of the reforms has been "too much - too soon" and that there are many unforeseen and unintended consequences which have impacted most significantly on access to justice for those who have a dispute.

3.4 The most significant impact of the reforms has fallen upon the clients who are parties to any dispute.

3.5 Claimants are struggling to find solicitors who will undertake lower value non RTA claims and, in most cases where they are represented, they are faced with paying out substantial amounts of damages in legal costs.

3.6 Defendants are at a disadvantage with the costs budgeting requirements in personal injury claims where QOCS applies because of the relatively small chance that they will actually recover any costs.

3.7 Sanctions are also causing an imbalance to Defendants. Claimant's solicitors are now more likely to delay the issue of proceedings until they have everything prepared so as to comply with any subsequent court directions timetable. Defendants are then faced with a strict court timetable in order to prepare documents and statements etc. and this is causing considerable concern for them and their solicitors.

3.7 It is increasingly difficult for solicitors to explain litigation funding to clients. The sheer volume of information which needs to be provided, together with the very complicated nature of that information, is completely baffling to most clients. Many of those clients therefore fail to grasp the risks they may be taking and the costs which they may be liable for despite the explanations, which has to be repeated several times in many cases, by their solicitors.

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