

Civil Justice Council

The impact of the Jackson reforms on costs and case management



**A response by the Association of Personal Injury Lawyers
March 2014**

Introduction

1. 2013 brought major changes to the way in which personal injury cases were conducted. Not only was the Legal Aid, Sentencing and Punishment of Offenders Act¹ (LASPO) implemented, changes were made to how liability admitted road traffic accident, employers' liability and public liability cases valued up to £25,000 were run², and the Enterprise and Regulatory Reform Act³ was introduced. The impact of reforms on this scale should not be considered in isolation, however, for the purposes of this paper the focus will be on the changes originally proposed by Jackson.
2. Whilst it may be too early to see the full effects of these reforms on the injured person, APIL's very early impressions are that there is detriment and cause for concern.
3. APIL has particular concerns around:
 - Access to justice for vulnerable people. Those with complex, riskier cases are being turned away by solicitors who advise that their cases are not financially viable to run. Equally lower value cases (abused dementia sufferers for example), may be told their cases are disproportionate to pursue.
 - Overall impact of reform on the justice system. Reforms implemented in the last 5 years are putting increasing pressure on the legal sector to push down the work to the most junior level of fee earner in order for practices to remain profitable. This reduces the quality of advice and service and this coupled with the increasing complexity of regulation and CPR produces an inherent conflict between a firm's ability to stay profitable and their desire to provide a quality service for injured people.
 - Damages received are falling in real terms.
 - Local geographical access to justice for injured people is diminishing as the legal market restructures.
 - The neutralising impact of Part 36 on QOCS means the positives aren't felt by the injured person. ATE is still needed.
4. From a lawyer's perspective there are several adverse consequences:
 - Redundancies and closure of PI firms as the market contracts.
 - The shift of inexperienced practitioners into the clinical negligence market.
 - The lack of clarity and consistency around relief from sanctions.

¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012

² Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims

³ Enterprise and Regulatory Reform Act 2013

- The delay to progressing the injured person's case resulting from cost budgeting and cost management.
- The additional burden on the Courts resulting from cost budgeting and case management and the robust approach to order, rule and practice direction compliance, and relief against sanctions.

Types of cases not being taken on

Impact on the injured person

5. Damages for personal injury have been falling in real terms for a number of years. Despite the 10 per cent increase in general damages claimants now receive considerably less damages than the loss they have suffered as a result of someone else's negligence.
6. The 25 percent CFA success fee cap on general damages and past losses affects the financial viability of the more difficult cases. They involve complicated liability arguments, complex medical evidence and are often hard fought by defendants because of the sums at stake. This often means that the risk of taking on the claim, running up work in progress (WIP) and disbursements outweighs the financial reward on a successful conclusion two or three years later. Solicitors face the additional challenges of funding the WIP and disbursements on these cases.
7. Children with high value cases are likely to be adversely affected as their awards are largely made up of future loss, thus significantly reducing the success fee earned, and therefore making the commercial viability of their cases challenging or even impossible.

Impact on the personal injury sector

8. Reforms have led to significant changes in the legal marketplace. These changes have taken a number of forms in terms of the structure of the PI market, including:
 - Consolidation - merger and acquisitions by PI firms and newly formed alternative business structures (ABS);
 - Growth of caseload farmers - firms, or groups of firms, purchasing PI work-in-progress (WIP) caseloads; and
 - Closure of PI departments / firms - law firms choosing to close their PI departments and/or firms going out of business

9. Those staying in the PI market are changing the way in which they risk assess cases. Anecdotally members report that they are budgeting for a 30 percent drop in work following the reforms with redundancies across the PI sector as firms re-evaluate their business models. However, the full effects of these reforms will not be seen until pre-LASPO cases are settled. It is still early days.
10. A recent survey of APIL firms showed that many are pulling out of lower value claims valued between £1 - £10k because they are no longer financially viable. 94 percent indicated they were no longer taking on motor claims valued between 1-10k and 98 percent indicated they were no longer taking on employers' liability disease cases.
11. Liverpool firm O'Connors has carried out a number of surveys of PI firms in the north-west looking at the impact of the Jackson reforms and produced the following figures:
 - "Almost a third of personal injury law firms in the north-west have seen fee income drop due to the introduction of LASPO reforms on 1 April 2013.
 - More than 70% of respondents said that the regulatory and structural changes have had a negative impact on their businesses.
 - Of more than 300 managing partners asked just 15% believed the impact is likely to be positive.
 - A total of 41% said there had been a noticeable decrease in new business enquiries since the introduction of the referral fee ban."⁴Whether this has been replicated in other geographical areas would need to be established by further research.
12. Lord Justice Jackson recommended a ban on referral fees, stating that they added to the cost of personal injury litigation. This ban was never adequately considered in the context of the lawyers' ability to market and advertise more generally. Lawyers have a route to market which will cost money, regardless of the referral fee ban. Since the relaxation of advertising rules, all firms undertake marketing activities in order to acquire new business and in all sectors the nature of that marketing has changed radically in recent years. Other forms of marketing are not necessarily cheaper, particularly for practices unable to benefit from economies of scale.
13. Otterburn's report⁵ sampled eight law firms to examine their work acquisition costs. The sums varied from £535 to £880 per case. His report noted that other sectors experience similar high new business acquisition costs. The key is often the relationship between that cost and the income it generates and how long it

⁴ Legal Futures- Exclusive: swathe of personal injury firms reports reduced income since LASPO 5 July 2013

⁵ Personal injury marketing and "referral fees" December 2012, *Otterburn Legal Consulting*

takes to move into profit. To this cost their needs to be added the cost of investigative work and reports, and lost cases, where the success fee, through the operation of the cap is inadequate to commercially compensate the risk.

14. There are additional concerns for the legal profession relate to the cost of professional indemnity insurance. The draconian and in some cases inconsistent approach in the way the courts are dealing with breaches of rules and orders is placing a high burden on solicitors' practices. The consequences of inadvertent procedural default, requires more resources to be allocated to a given matter than are financially viable. This is likely to result in more solicitors withdrawing from the market, possibly as a result of a rise in professional indemnity insurance premiums across the sector, and for some an inability to secure such insurance. The legal sector as a whole has already seen 136 law firms fail to secure PPI cover in 2013.

Funding methods

Damages based agreements

15. There is very little uptake of DBA in contentious PI work. The impact of their regulations are more uncertain than those for a conditional fee agreement and they bring a number of issues into consideration:
 - The effect of the indemnity principle on the costs recoverable by the solicitor. The regulations⁶ provide that, under a DBA, a client must not be required to pay an amount which is over and above the contingency fee payment plus any expenses incurred by their lawyer. The contingency fee is capped in personal injury cases to 25% of damages excluding damages for future loss. If the whole of the contingency fee cap is eaten up by recoverable costs, then the client has nothing further to pay the solicitor. It also follows that, if the amount of recoverable costs exceeds the contingency fee cap, then the most that the defendant will have to pay is the contingency fee cap, notwithstanding the fact that these fees have been incurred by the winning party.
 - There is a need for absolute certainty as to whether or not the after the event insurance premium is included in the contingency fee cap or whether it is paid by the claimant on top.
 - With regard to deductions for contributory negligence or counter claims. The regulations are worded such that any liability by the claimant for a claim for contributory negligence could substantially reduce the potential costs that the lawyer could recover for conducting the claim.
 - VAT and counsel's fees are included in the cap thus reducing the pot of money to fund the claim still further.

⁶ The Damages-Based Agreements Regulations 2013 4 (2) (b)

- The enforceability of hybrid DBAs is uncertain, for example where a claimant agrees to pay its lawyers a reduced hourly rate throughout the litigation as well as a pre-agreed percentage of the damages on success.

16. It would certainly seem that this funding model has proved of little use to those practising PI. We previously made recommendations that capping the contingency fee at 25 percent of general damages and past losses would not allow a significant number of merit-worthy personal injury cases to be brought.

Conditional fee agreements

17. There appears to be very little evidence of claimants negotiating on the success fee, thus driving down the percentages charged as Jackson intended. Early indications also show that lawyers are charging the blanket 25 percent cap to ensure that they are working on a “swings and roundabouts approach”.

18. APIL research has revealed reluctance by claimants to agree deductions from their damages.

19. The Legal Ombudsman has recently raised concerns over the way in which some firms are handling CFAs. Issues over the calculation of success fees (particularly relating to global settlements where it is impossible to separate past and future loss), cases getting struck out because of lack of cooperation by the client and client’s responsibilities for disbursements all create potential further risks for both the claimant and their solicitors. It is essential that funding is clearly explained to clients, explaining the success fee cap is not straight forward.

20. Clarity is required in a number of areas concerning the changes to CFAs:

- **Assignment:** As firms leave the PI sector and the market contracts, files are purchased by other PI practices, and this presents difficulties if there is a pre-LASPO CFA. There has been little guidance as to the validity of the existing (pre-LASPO) funding agreement has. The issues are around when there can be an assignment, novation or where a new agreement needs to be entered. Clients can be put to a disadvantage because of firm closures. They can be required to enter into a new CFA, and a new ATE policy purchased.
- **Counsels’ fees:** It is unclear what the counsel’s fee will be where there is a valid pre-LASPO CFA between the client and his solicitor, but the barrister is instructed post April 2013. Can the Barrister conduct the work on the original CFA or does a new post LASPO CFA needs to be signed?
- **Infants and protected parties:** Will the courts approve a success fee and an ATE policy deduction from damages in cases involving infants or a

protected party? What guidance has the judiciary been given on this? What guidance has the Court of Protection given regarding approval of a CFA where there is to be a deduction from damages in cases on behalf of a protected party? We must ensure that access to justice is retained for minors and protected parties and that there is consistency of judicial approach.

21. A working group should be established to examine these issues as a matter of urgency to ensure clarity and consistency for the profession. The fear is that if guidance is not given, there will be challenges to the viability of the agreement in due course.

Qualified One Way Cost Shifting

22. The basic principle recommended by Jackson was that a successful client would be able to recover their costs from a defendant in the usual way, but if their case was unsuccessful, they would not be liable for defendant's costs. This is "one-way costs shifting".
23. However, the regime actually implemented does not always give the claimant immunity from having to pay the defendant's costs, thus necessitating the need for a residual ATE market. This is 'qualified' one way cost shifting (QOCS) The claimant loses cost protection where:
 - The defendant obtains a strike out;
 - If the claim is fundamentally dishonest;
 - If the defendant makes a Part 36 offer and achieves a more advantageous outcome in the claim;
 - The defendant is successful in any application during the claim.
24. The effect of QOCS is that whilst reducing the cost of the ATE premium (see below) it does not remove the risk altogether, meaning that the claimant has additional ATE cost liabilities to consider when pursuing their claim. The majority of the premiums are less expensive than pre-2013 policies as the insured risks are substantially lower, but there continues to be a clear need for ATE.
25. It is difficult to explain to clients and the intended benefit of QOCS seems to have been lost due to the application of Part 36. It maybe that it is too early to say what benefits, or otherwise, there have been. Monitoring it is essential if there are to be improvements made to ensure access to justice.

After the event insurance

26. The 10 percent increase in general damages for pain, suffering and loss of amenity was designed to compensate for removing the recoverability in successful cases of the success fee and ATE premium. It was not anticipated that there would be a cost for ATE. The uplift in damages therefore needs to be increased to compensate with reference to a representative sample of cases.
27. ATE for clinical negligence cases is different. The retention of an element of recoverability for the ATE premium relating to initial liability reports, has been helpful, but it is not a sufficient replacement for legal aid.

Legal aid

28. Legal aid has of course been retained for a small class of clinical negligence cases, child abuse cases, public law cases involving a PI element and those cases that satisfy the exceptional funding criteria. Our members suggest that these reductions, coupled with changes to the eligibility criteria and the requirement for the claimant to show that no other funding is available, mean that there is little access to public funding in real terms. It is yet to be seen what cases can actually be brought under the exceptional funding test. These changes, in addition to the issues highlighted with CFAs, mean that the vulnerable claimant and those with complex cases struggle to find lawyers to take on their cases. LJ Jackson recommended no change to legal aid when proposing reforms.
29. The number of clinical negligence claims that qualify for legal aid, is limited. LASPO provides an element of recoverable ATE for investigation in these cases, but the investment by firms which consider these cases and obtain evidence sufficient to determine whether the case should proceed is high. Claimants able to fund their own disbursements will be in a stronger position to choose a solicitor, whilst those of limited means will be left to choose from only those solicitors prepared to finance their case. Access to justice will be determined by a client's financial means which is unacceptable.
30. Members also report that the Legal Aid Agency rejects a high number of abuse cases on the grounds that alternative CFA funding is available.

Case management

Relief from sanctions

31. The Civil procedure rules were changed in April 2013 but initially, there was very little difference in the way that case management was being applied. This all changed following the Court of Appeal decision in **Mitchell v NGN Ltd**⁷.

⁷ [2013] EWCA Civ 1537

Practitioners are now feeling the full force of the wider and to some extent unforeseen ramifications.

32. Cases dealing with sanctions for non-compliance with case management directions are now being reported on a daily basis. A significant amount of court time is being taken up dealing with applications for relief and we question if the court system has the capacity to allow this to continue. County court judges report that the vast majority of their time is now spent dealing with interlocutory applications.
33. Whilst the profession has called in the past for tougher sanctions for non-compliance with the rules, it is essential that there is consistency and clarity in the sanctions to be applied in each circumstance of breach or default. Case law in the lower courts is not always showing this at present. The extent to which parties can agree to extend time needs to be clarified to avoid unnecessary interlocutory applications.
34. Currently satellite litigation and disparity appear to be the main by-product of the courts attempts at robust case management.
35. Cases following *Mitchell* have highlighted a number of issues.
 - The lack of clarity of some rules as to the sanctions which can be imposed in particular circumstances;
 - The disproportionate reactions to breaches or defaults. Clarity and proportionality are necessary.
 - The need for certainty when consent orders without court approval may be appropriate. We know that recently the standard directions for extending directions in multi track cases have been reviewed and this is welcome.
36. APIL recommends that a CJC or CPRC working group should be established as soon as possible to examine these issues.

Cost management

Cost budgeting and proportionality

37. It is still too early to fully assess the effect of the new rules on cost management. Many practitioners are still getting to grips with cost budgeting and the rules on proportionality are largely untested and the absence of guidance is causing concern. There continues to be inconsistency as to how the courts approach budgeting.
38. Our members report some courts are prepared to issue specific guidance whilst others are not. The guidance published varies from one court to another. Experiences range from judges dispensing with cost budgets entirely, to requiring full budgets on pre 1 April cases. Judges can spend anything 'waving it through',

to taking three hours and adopting a line by line approach with every cost requiring justification.

39. One member reports that all cost case management conferences are face to face in her local court and cannot be by telephone. This often adds 5 to 6 months to the life of a claim, because it takes 2 to 3 months to get an order from the court, for a CCMC date which is then set for 3 to 4 months time. The overall impression is that it increases cost on cases.
40. It is important that cost management is kept under review to ensure that there is consistency of approach but also to ensure that there is sufficient court time available. In addition we are still unsure how courts will react to applications to vary cost budgets, or how rigid the courts will be to enforce them on conclusion of the case.

Concluding remarks

41. APIL is happy to provide further assistance to the committee if required.

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