

Ministry of Justice

**Post-implementation review of Part 2 of LASPO Act: initial
assessment**



A response by the Association of Personal Injury Lawyers

September 2018

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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Introduction

The Government's perception is that the reforms to the civil litigation process under the Legal Aid Sentencing and Punishment of Offenders Act 2013 have been a success. While lawyers have worked hard to adapt to difficult situations arising from the reforms, and have to a large extent made the reforms workable through sensible collaboration, there are a number of issues remaining. For example, Lord Justice Jackson's report on civil litigation costs, which formed the basis of the LASPO reforms, recommended that the indemnity principle was abolished. Despite this, the indemnity principle remains, causing issues in relation to Damages Based Agreements, and leading to overly confusing Conditional Fee Agreements. There are also a number of areas where the LASPO reforms are clearly preventing access to justice.

Uncertainty also remains as to whether some of the reforms are going to be successful in practice. It must be recognised that the whole package of reforms still needs time to bed down. A number of Court of Appeal rulings are awaited on some key points, and there are areas such as fundamental dishonesty and costs budgeting/proportionality, that are evidently in need of guidance.

Executive summary

- Claimant solicitors have worked hard to adapt to the reforms, to ensure that access to justice can continue to be achieved in as broad a range of cases as possible. Due to the nature of fatal cases, and those where there is divisible liability, the reforms have been felt most keenly in those areas, with claimants being noticeably worse off post LASPO.
- The indemnity principle remains an issue in cases outside of the fixed costs regime, and should be abrogated.
- Qualified One Way Costs Shifting is working well, and should be extended to cases where there is an imbalance of power between the parties (applying the rationale for QOCS in personal injury cases to a wider selection of cases).
- It is vital that ATE premiums remain recoverable in clinical negligence claims.
- Damages Based Agreements are not used greatly in the PI sector at present, and must be reformed if they are to provide a viable alternative method of funding. The percentage cap must be revised, and the success fee model must be introduced.
- Part 36 is generally working well. It drives good behaviour and gives the provision teeth, preventing cases from going to court unnecessarily. There must, however, be an incentive to encourage early acceptance a claimant's Part 36 offer by the defendant.
- Costs budgeting is generally getting more consistent, and judicial training has improved substantially.
- Further guidance is required on fundamental dishonesty, particularly in light of the likely increase in litigants in person as a result of the impending increase in the small claims court limit.
- This review must include a review of fixed costs

CFA's

1) Section 44 abolished recoverability of Conditional Fee Agreement success fees. In your experience what have been the impacts of this reform, and the regulations made under it?

Claimant solicitors have made the new conditional fee agreements work on the whole, however there are certain categories of case where the reforms have caused problems.

Cases where there is divisible liability

In disease cases where the liability is divisible between a number of defendants, for example in hearing loss and asbestosis cases, claimants may be at a disadvantage due to the LASPO reforms. There are frequently apportionment issues in these cases, where perhaps only 50 per cent of the defendants have been successfully traced. Defendants may have gone out of business, or cannot be identified due to the length of time that has passed since the claimant's employment. In these cases, the claimant will only receive half of their full damages. The solicitor may need to deduct the full success fee from the damages, in order for it to remain viable for the solicitor to take these cases, which often involve complex arguments on breach, causation and apportionment, on. The effect of the 10 per cent uplift on general damages, which is intended to counteract the deduction of the success fee from the claimant's damages, is negligible, and inadequate to compensate the claimant for the deduction.

Case study 1 - Divisible liability, not all insurers could be traced

Solicitors acted for a claimant who had worked for 8 employers who had exposed him to asbestos. Insurers could only be identified for one of the defending companies who had a 25 per cent share of the claimant's overall exposure. Although the gross damages were assessed at approximately £24,000, the claimant only received £6,000. The 10% uplift in general damages made little difference to the claimant's damages. The case was vigorously defended and proceedings needed to be issued. The ATE premium was £2,500. Deducting the success fee and VAT in the policy would leave the claimant with less than £2,000 in damages.

Fatal cases

Another area where the effects of the LASPO reforms have been acutely felt is in fatal cases. In these cases, particularly where the victim is an adult with no dependents, the value of the case will be low, consisting of funeral expenses, and a token amount for pain, suffering and bereavement. These cases can again be complex and involve a significant amount of evidence. They can also involve attendance at inquests¹ and require the legal representative to liaise with various bodies including the Health and Safety Executive, police and coroners. There is often also a lack of evidence from the outset, and a large amount of work is necessary to determine the facts of the case, as the main witness is deceased. As such, there is a high risk for the solicitor in these cases, and it is necessary to deduct the full

¹ APIL has reiterated the need for all bereaved families to have access to non means tested legal aid for inquests in response to the Ministry of Justice's recent call for evidence on legal aid for inquests.

25 per cent cap in order for the case to be viable. Again, the ten per cent uplift is negligible, and is not sufficient to compensate for the deductions for success fees and ATE premiums that must be taken from the claimant's damages, as demonstrated by the case below:

Case study 2 - Inadequacy of 10 per cent uplift in fatal cases

Baby H died at 3 days old as a result of a mismanaged delivery. Claims brought under the Fatal Accident Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934 were brought by H's father, and H's mother brought her own claim for PTSD as a result of the circumstances of baby H's death.

Damages were estimated at £23,980. The 25 per cent success fee of general damages (£1,000) and past losses (£10,000) was calculated to be £2,750, leaving damages of £21,230 from which the ATE insurance premium would also have to be paid. This left the estate with a total award of £19,270. The uplift of 10 per cent on general damages, which was a maximum of £100, does not compensate for the deductions made to the claimant's damages as a result of the LASPO reforms.

Baby H's mother's claim was estimated to be £35,000, of which £10,000 was general damages. The 25 per cent deduction of generals (£2,500) and ATE insurance premium (£1,960) would result in her damages being reduced by £4,450. The ten per cent uplift would be only £1,000, which is clearly inadequate.

Due to the low damages in fatal cases cases, the capped 25 per cent success fee under LASPO may dissuade solicitors from taking on these cases, as there is very little/no reward for doing so. In some fatal cases, there are no general damages, so no success fee can be taken at all.

Case study 3 - Fatal case, no general damages

The deceased was a single 30 year old man, with no dependents, who was asphyxiated at work. There were three potential defendants and 2 defendants were ultimately pursued. Liability was not admitted and proceedings were issued. Investigations involved liaison with police before a corporate manslaughter charge was dropped and matters passed to the Health and Safety Executive. A 2 week inquest proceeded, with 25 witnesses. The civil claim was settled before a case management conference for £40,000. The award for pain, suffering and loss of amenity was £0, with no past losses, and therefore no success fee could be taken under LASPO. Grade D, grade B and grade A fee earners spent a combined 162 hours on the case.

i) are you aware of categories of cases where the numbers of meritorious cases have increased or decreased as a result of the non-recoverability of the success fee

It is too early to establish the impact of non-recoverable success fees on the number meritorious cases brought. Claimant solicitors are doing their best to adapt to the reforms, to ensure that access to justice can be achieved in as broad a range of cases as possible. There has been a decrease in more difficult employers' liability cases being taken on, but it

is not possible to know whether this is as a result of the reforms to success fees. Anecdotally, the reforms to success fees have made it more difficult for solicitors to take on riskier cases, as there is simply not sufficient reward for this risk.

Another area where members report that there have been difficulties as a result of LASPO is in fast track cases where a claimant has instructed one solicitor but then tries to change to a different solicitor part way through the case. In these circumstances, it is simply not cost effective to transfer the case, and in order to do so, the claimant must pay a substantial amount up front. A person who makes a wrong decision in their choice of solicitor, perhaps being put in touch with a particular firm after being cold called, cannot later change their mind and use another firm, because the funding mechanism put in place by LASPO means that it is not cost effective for another firm to take the case over. As a result, the injured person may receive less in compensation, or may even lose a case that they may have been successful in had they been able to change solicitors.

The indemnity principle

The indemnity principle also remains an issue in cases outside of the fixed costs regime. This simply provides another area for wasteful litigation, with insurers spending time and money on challenging the funding agreements between the claimant and their solicitor. The indemnity principle also makes CFAs unnecessarily complicated. Under the principle, the costs 'belong' to the individual claimant, and since the funder is not a party to any court action, the funder has no right to indemnity in relation to costs. Accordingly, all client care documentation, and the CFAs themselves, have to be unnecessarily complicated by the imposition on the individual client of a liability for costs followed by an indemnity from that funder to that individual. This leads to a situation where solicitors are obliged to try to explain these matters to lay clients where, whilst the documentation imposes liability for costs, the true nature of the arrangement is such that the cost will be met by the funder. If the indemnity principle were to be abrogated, CFAs would be easier for solicitors to use, harder for defendants to unreasonably challenge, and more importantly, easier for clients to understand. APIL believes that the indemnity principle can be easily abridged through secondary legislation – for example through the Civil Procedure Rules.

QOCS

2) Section 46 abolished the recoverability of after the event (ATE) insurance premiums (except in relation to clinical negligence expert reports). Qualified One Way Costs Shifting (QOCS) was introduced in its place in personal injury claims. In your experience, what have been the impacts of this reform?

We believe that QOCS is working well, and should be extended to all cases where there is an imbalance of power between the parties (applying the rationale for QOCS in personal injury cases to a wider selection of cases). QOCS should kick in where an "individual" is bringing a claim against a larger entity, and we suggest that the definition of "individual" should mirror that in the pre-action protocol for debt claims, and should include a sole trader. This would include all professional negligence cases, where the claimant is an individual bringing a claim against a professional. There should also be an extension of QOCS to actions brought by individuals against any emanation of the state, against the

police, cases where an individual is bringing a judicial review (as suggested by Lord Justice Jackson in his 2009 report), and human rights cases.

Non-recoverable ATE

There are cases that are clearly worse off under the LASPO reforms, due to the introduction of non-recoverable ATE premiums and success fees. This is particularly so in fatal accident cases and cases where there is divisible liability, but only some insurers can be traced. In these cases, the 10 per cent uplift to compensate for the amount deducted from the claimant's damages is negligible – see case studies 1 and 2 above.

Clinical negligence and ATE premiums

ATE cover remains an absolute requirement for clinical negligence cases. There must be continued recoverability of ATE premiums for experts reports in clinical negligence cases. The rationale for providing this exemption when the reforms were first introduced, remains – to provide a means of funding experts fees and reports to ensure that those with meritorious claims would not be deterred from bringing their claim. In clinical negligence cases, expert reports are required before it is clear (and in order to ascertain) whether there has been a breach of duty. It is rare for any clinical negligence cases to be investigated with less than 2 experts reports. Often, there are several more reports needed. Additionally, once quantum investigations are undertaken, additional expert costs arise. As a point of principle, in successful cases the funding of disbursements for the investigation have arisen as a consequence of the defendant's negligence, and it follows that the defendant should be required to contribute to the cost of the ATE premium in those cases.

It is important that ATE premiums in clinical negligence cases remain recoverable, because their cost is substantial. This is because in almost half of clinical negligence cases, the claim is not successful². The ATE policy must cover the costs of the disbursements, and in most of these unsuccessful cases the ATE premium is not required to be paid. It must be borne in mind that premiums are calculated based on a "basket of cases". The cost of investigation of liability is significant in clinical negligence cases and no ATE recovery occurs in the majority of those cases. The premiums are set so that the winners cover the losers, so it is important that in successful cases, the ATE is recoverable.

The cases below illustrate the amount of disbursement costs involved in typical clinical negligence investigations.

Case study 4 – Clinical negligence case discontinued post-issue

Solicitors were instructed in a complex spinal injury case. 6 liability experts and a conference with counsel were required to consider liability. Expert fees were around £35,000. Following this investigation, the case was abandoned due to lack of prospects.

² 49 per cent of clinical negligence cases registered to the NHSLA in 2016/2017 closed without the payment of damages

Case study 5 – clinical negligence case, lost at trial on liability

There was a delay in diagnosis of a subarachnoid case against 2 defendants – a GP and an NHS Trust. The claimant instructed five experts – A&E, neurosurgeon, GP, a speech and language therapist, who was obtained at an earlier stage because it was unknown if the defendants would agree, or the court would order a liability only trial, and a neuropsychiatrist, necessary for a capacity query. The claim for disbursements on the ATE policy was around £37,000.

If there is a concern about the amount that is paid out in ATE premiums, the amount could be reduced by trusts being more open and honest about what has happened, compliance with the duty of candour, to reduce the amount of investigation required.

3) Section 45 introduced Damages Based Agreements as a funding method for civil cases. In your experience what have been the impacts of this reform?

The impact of DBAs

DBAs are not used greatly in the PI sector, but with amendments they could work in the small claims cases in particular, because of the lack of costs shifting. It is suggested that DBAs are not used because they are too complicated. DBAs are not too complicated, but there are several issues with them which means that they are still an underused alternative method of funding:

- In cases outside of the small claims court and fixed costs regimes, the indemnity principle still applies. This makes DBAs unattractive in these settings because the claimant solicitor may end up getting less than they are entitled to when the proportionate recoverable costs are more than the DBA fee.
- Under the current DBA regulations, recoverable costs have to be offset against the DBA cap. If the DBA fee is £30,000 but recoverable costs are £20,000, the maximum amount that the solicitor can recover is £30,000. This makes DBAs a less viable option than CFAs for taking cases forward, because if the case was run under a CFA, the solicitor would be entitled to both the recoverable costs plus the CFA success fee. Because the recoverable costs are offset against the cap, it is also difficult to explain to the client how much they will need to pay at the outset, because this all then depends on the amount of recoverable costs that are awarded. One of the advantages of a DBA should be that they are straightforward and the client is clear about their costs liability from the outset, but this is not the case under the current model.
- The percentage cap, set at 25 per cent of general damages and past losses, is too low, and as such DBAs in their current form are not viable.
- Another difficulty is that the percentage cap is taken from what the client ultimately recovers. Under the current wording of the regulations, 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.

Amendments to the DBA regulations, as set out in the following sections, could improve access to justice, by providing a funding mechanism in cases where CFAs are unsuitable.

Should the DBA regulations be revised in line with Part 1 of the CJC report?

The CJC working group recommended that the drafting of the 2015 DBA Regulations should be amended such that counsel's fees should always be treated as an "expense" i.e. outside of the cap.

The CJC working group recommended that the term expenses should be deleted from the 2015 DBA Regulations, wherever occurring, and replaced with the term, "disbursements", which has a widely accepted meaning.

We agree that expenses should be changed to disbursements. This reflects the rest of the legislation in this area. In relation to what should count as disbursements, and therefore should not be included in the percentage cap, we do not believe that counsels' fees should be a disbursement outside of the cap. One of the most important features of a DBA is that the liability to the client is clear. The solicitor will be unable to advise at the outset how much counsels' fees will be, so there will be uncertainty for the claimant if counsels' fees are an additional disbursement.

The CJC working group considered that, on balance, VAT should remain within the cap, where that VAT was not recoverable by the client. Where VAT is recoverable, it should be excluded from the cap.

We believe that VAT should remain within the cap, to ensure certainty for the claimant.

The CJC working group recommended:

- *The term "financial benefit" means that it should be open for a legal representative and his client to define the trigger for payment in the DBA itself where the case is won. The question of what amounts to a "financial benefit" in the particular case in question should be left to the parties on a case by case basis, so that they can agree that the solicitor's fee can be payable whether or not the client actually recovers any damages*
- *If the recommendation above is not adopted, the working group recommends that the drafting of the 2015 DBA Regulations should make provision for what should happen where a counter-claim or set-off is brought against C.*

We believe that the figure from which the percentage amount is taken should be the amount that the claimant is awarded, regardless of any liability to the other side, set off, or contributory negligence. At present, the regulations are drafted in such a way that any liability for contributory negligence could substantially reduce the potential costs that the lawyer could recover for conducting the claim, which means that DBAs are unlikely to be seen as a viable funding mechanism.

Should there be sliding scale payments?

We believe that a tapered approach to the percentage cap for DBAs, as proposed by Sheriff Principal Taylor in Scotland, is the best approach to achieve viable DBAs. We set out the detail of our preferred approach in the discussion of policy points below.

If DBAs entered into pre-suit (whether by a solicitor or by any other entity), in respect of “non-contentious business”, are not regulated, the CJC working group recommends that the Government may wish to reconsider the necessary amendments to primary legislation to permit DBAs to be regulated, pre-commencement of litigation.

The DBA regulations should apply to all those who offer damages based agreements, to ensure protection for consumers of legal services.

The CJC working group recommended that the DBA Regulations should only apply to first instance decisions, and that the claimant and his legal representative should be free to negotiate different funding terms for any appeal.

We agree that the statutorily imposed cap should only apply to first instance decisions. Appeals can be extremely costly, and if a main claim is carried out under a DBA, there is no need for the appeal to also be carried out under a DBA. We do not believe that DBAs are an appropriate funding mechanism for appeals.

CJC working group recommended that the regulations should be clarified to provide that the representative and the client may agree that, regardless of whether or not C receives any financial benefit in the claim or proceedings, the client is obliged to pay the disbursements incurred in the conduct of that claim or proceedings.

We agree with this recommendation. The arrangement under the DBA is that the claimant should not pay their lawyer their costs if they are unsuccessful. This should not include disbursements. The DBA regulations must be amended to make DBAs an attractive alternative funding mechanism, and if there is ambiguity about whether the legal representative will be responsible for all expenses if they lose the case, and there is a risk they might be so responsible, this is likely to make DBAs even more unattractive.

DBA policy issues

1) Success fee model

We believe that the success fee model is the best option for DBAs (except for in small claims cases, as there are no recoverable costs). This model would allow for recoverable costs plus the percentage cap on damages to be taken by the solicitor. For DBAs to be a viable alternative funding mechanism, recovered interpartes costs should not be included within the percentage cap. The indemnity principle must be abrogated for the success fee model to apply (see below point 4).

2) Percentage cap on costs, heads of damage

The percentage cap on recoverable costs, set at 25 per cent of general damages and past losses is too low to allow many meritorious cases to be brought. We suggest that the percentage cap should apply to all damages, with no ring fencing of future losses, as this makes DBAs an unviable method of funding, particularly in catastrophic cases where a large proportion of the damages awarded are for future loss. The work that needs to be done to bring a high value case with an element of future loss to a successful conclusion is substantial. Lawyers need to be paid fairly to enable them to undertake this work if high value, complex and meritorious cases are still to be considered viable.

A tapered approach to the percentage cap would provide a safeguard for the claimant, preventing carefully calculated damages for future loss from being eaten away by solicitors' fees. There must be a balance between creating a viable funding model to allow these cases to be taken on, and also leaving the claimant with sufficient damages to warrant the trouble and anxiety most litigants experience. The tapered approach achieves this.

We suggest that for cases valued over £25,000 (and those above the small claims limit and below £25,000 where fixed costs do not apply), the percentage cap should be as follows:

20 per cent of the first £100,000

Up to 10 per cent of the next £400,000

Up to 2.5 per cent of damages over £500,000

In cases valued below £25,000 where fixed costs apply, we suggest that the percentage cap should be up to 50 per cent of damages. Because fixed costs apply, even if there is a success fee model, the recoverable costs are often not commensurate to the amount or complexity of work that is carried out. Damages Based Agreements are designed to assist with access to justice where otherwise a case would not be brought. If DBAs are to be a workable alternative model, they must be viable in cases where CFAs are not, to provide a solution where a case would otherwise not be taken on. This may mean that a higher percentage of the damages will need to be taken by the solicitor to make it attractive to run the case.

The percentage cap should also be increased to 50 per cent in cases valued within the small claim track limit where there is no costs shifting. If these changes could be made to make DBAs viable in these lower value PI cases, they would be a more attractive option for claimants. It would mean that instead of providing the solicitor with a blank cheque to charge hourly rates, as would currently happen in a small claim, with a DBA, the claimant would be told at the outset the set percentage that will be taken from their damages. This would be more more straight forward for the client to understand.

3) Hybrid DBAs

We are doubtful as to whether the introduction of hybrid DBAs would make DBAs more attractive as a funding mechanism. One of the issues with current DBAs is that because the maximum that can be taken from damages is 25 per cent of past losses, this cap is the same as for CFAs, so if a DBA rather than a CFA is used, base costs will be lost. The introduction of hybrid DBAs would remove this problem, as base costs would be awarded. However, this then means that DBAs are identical to CFAs, so there is little point in having DBAs. In fixed costs cases, hybrid DBAs may work because they may be simpler for the claimant to understand than a CFA.

The introduction of the success fee model, and a 50 per cent percentage cap in small claims and fixed costs fast track cases, with a tapered percentage cap for other cases which applies to all damages, would be the best approach to make DBAs viable in personal injury cases.

4) The indemnity principle

The main problem with DBAs outside of the small claims and fixed costs environments is the indemnity principle. In order for DBAs to be attractive and viable outside of the fixed costs environment, the indemnity principle must be abrogated. Currently, the DBA regulations provide that the 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. 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, the most the defendant will have to pay is the contingency fee cap, notwithstanding that the additional fees have been incurred by the winning party. The indemnity principle means that solicitors may get less than they are entitled to, and less than their client is willing to pay. The principle prevents a more workable version of the DBA regulations from being introduced, and therefore prevents DBAs becoming a viable option for personal injury claims funding in claims outside of the small claims and fixed costs environments.

5) Should legal representatives be able to recover on a quantum meruit basis?

We believe that insurers should not be permitted to escape liability for costs simply because of a mistake in a DBA retainer. Due to the uncertainty around the DBA regulations at present, and the risk of creating an unenforceable DBA, some practitioners are discouraged from exploring DBAs as a potential alternative funding option. If the regulations were to be amended to allow recovery on a quantum meruit basis in the event of an unenforceable agreement, this would go some way towards encouraging greater buy in for DBAs.

4) Section 55 reformed Part 36 offers to settle. The statutory charge introduced by LASPO Part 2 was primarily that where the defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%. In your experience, what have been the impacts of this reform, and the regulations made under it?

The "carrot and stick" (as it has been described) nature of Part 36 is generally working well. It drives good behaviour and gives the provision teeth, preventing cases from going to court unnecessarily.

There must, however, be a real "carrot and stick" for late acceptance of a claimant's Part 36 offer by the defendant. Whilst the claimant faces largely the same sanction, on late acceptance, as a judgment which is not "more advantageous" than the defendant's offer there is no parity so far as late acceptance by the defendant of a claimant's Part 36 offer, a problem that is particularly acute in fixed costs cases following the Court of Appeal ruling in *Hislop v Perde*³.

In a non-fixed costs case the claimant will recover costs from the end of the relevant period until the date of acceptance but following the reforms to the CPR in 2013 those costs are unlikely, certainly if assessed on the standard basis, to meet the costs actually incurred by the claimant, yet those costs have only been incurred because the defendant has failed to accept, in a timely way, a reasonable offer. Furthermore, the claimant may have to pay an irrecoverable success fee on those further costs. These costs, in a personal injury claim, are likely to be met by the claimant out of damages, subject to any cap, hence even when the

³ [2018] EWCA Civ 1726

claimant makes a reasonable, and timely, offer to settle that may not prevent the defendant exploiting superior resources and ability to absorb costs.

In a fixed costs case the claimant, following the ruling in *Hislop*, may not even recover base costs, unless a further stage of fixed costs has been reached if there is late acceptance of an offer by the defendant.

Furthermore, whilst a Part 36 offer is expressly deemed to be inclusive of interest only up to the end of the relevant period no account seems to be given, on late acceptance, of the need to award the claimant interest on the sum accepted from the end of the relevant period down to the date of acceptance.

A solution to this problem would be for the terms of Part 36.17(4) to apply when there is late acceptance of a claimant's Part 36 offer by the defendant.

That would incentivise claimants to make offers and defendants to accept, promptly, reasonable offers.

Additionally, since the reforms to funding arrangements mean that many claimants are now required to contribute to irrecoverable costs out of their damages, it is vital that as full a recovery of costs as possible can be made.

APIL is keen to incentivise the use of Periodical Payment Orders in catastrophic injury cases. One way of doing this is through amendment to Part 36, an issue that APIL has raised with the MoJ.

5) Sections 56-60 prohibited the payment of referral fees in personal injury cases. What have been the impacts of this reform?

LASPO is primary legislation which is clear in its wording. The regulation of the ban on referral fees is a matter of interpretation and enforcement, which must be dealt with by the Solicitors Regulation Authority and Financial Conduct Authority (depending on the regulated entity).

We believe that claimant solicitors, medical agencies and insurers should be transparent about their arrangements and how they comply with LASPO. Compliance with the LASPO provisions is a matter for the relevant regulators to enforce. There should also be transparency about any other referral arrangements within the claims system, such as those involving credit hire companies and rehabilitation providers.

Comments on other areas

There are a number of areas that formed part of the LASPO reforms which require additional guidance.

Costs budgeting and proportionality

Costs budgeting is generally getting more consistent, judicial training has improved substantially. The process still needs time to bed down, however, and further guidance would be welcomed in this area. There has only been one Court of Appeal decision on costs budgeting, clarifying that the court should not depart from the agreed costs budget unless

there is a good reason, and it was held that what amounts to a “good reason” could be left to the judge. There are other key points that await higher court clarification.

One particular issue is the delays caused by costs budgeting hearings. At present, the requirement for costs budgeting applies to all multi-track cases. There is discretion in the rules for judges to decide how and whether there will be a costs management conference in a particular case, and what form this should take, but this is not widely used. A costs management conference can add 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 in the future. There must be more common sense in the application of costs budgeting, and issuing guidance on this would assist, particularly where parties are well advanced in exchanging and would favour a quick trial.

Fundamental dishonesty

Further guidance is required on fundamental dishonesty, particularly in light of the likely increase in litigants in person as a result of the impending increase in the small claims court limit. We are concerned that faced with an unrepresented litigant, defendants will abuse their ability to allege fundamental dishonesty, doing so where for example the claimant has mistakenly described a “neck injury” in one section and “a neck and back injury” in another. This behaviour is likely to scare off otherwise genuine claimants from making a claim. Claimant representatives see inappropriate allegations used often, but are equipped to deal with these. If an inexperienced litigant in person is faced with a threatening letter which accuses them of fraud and threatens a fine or possibly even imprisonment, it is likely that they will simply drop the claim. There must be clear guidance on the circumstances in which fundamental dishonesty can be alleged, and litigants in person must be able to access legal advice if such allegations are made against them.

APIL also calls for a corresponding provision for defendants who are fundamentally dishonest in their defence of claims. The whole defence should be struck out if found to be fundamentally dishonest in some part of the defence.

The need for review of fixed costs

As part of this review, there should be a review of fixed costs. The costs of running cases has increased, but the amount of costs paid to the claimant solicitors in successful cases has remained the same since they were first introduced in July 2013. If fixed costs are not regularly reviewed and increased, the ability of solicitors to take on more complex and borderline cases will be further impeded.

When fixed costs were introduced as part of the original RTA Protocol in 2010 it was agreed there would be such reviews.

- Ends -

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