Civil Procedure Rule Committee

Consultation on extending fixed recoverable costs (FRC):

how vulnerability is addressed

A response by the Association of Personal Injury Lawyers

June 2022

Introduction

APIL welcomes the opportunity to respond to the Civil Procedure Rule Committee's consultation on vulnerability in the extended fixed costs regime. We welcome that a rule is being developed to allow for extra costs in cases where there is vulnerability, and that there is a recognition that the vulnerability of parties and witnesses does attract additional costs. This appears to be a departure from the approach taken by the Court of Appeal in *Aldred v Cham*[1], which we would support. However, there must be further development of the rule to ensure that it is workable in practice, and that its existence is not simply tokenistic.

Exemption for all abuse cases

Before commenting on the suitability of the proposed vulnerability rule, we wish to reiterate our stance that the exemption from fixed costs for child sexual abuse cases should be broadened to all abuse cases – including emotional and physical abuse and neglect, and abuse of adults as well as children.

All child abuse cases require specialised and experienced representatives, to ensure that the vulnerable claimant can get access to justice. The evidence required for these cases is extensive and document-heavy, including medical records, education records and any records from social services. The complexity of child abuse cases has been recognised by cost judges historically. It is extremely hard to obtain disclosure from defendants in these cases, which leads to a protracted disclosure exercise before it is even possible to obtain the necessary documents to plead a case. All child abuse cases require extra time and care by the legal professional in ensuring that the claimant trusts them and is properly organised to attend appointments and assessments where needed. Furthermore, victims of child abuse often litigate when they are under 18, which means there is a need to liaise with those dealing with them in the care system such as social workers and carers, etc. This adds an extra layer of complexity to client contact which cannot be streamlined. The nature of this type of litigation is also front-loaded. There is significant work to be done in considering a claimant's background and reviewing historic records. Including abuse/neglect cases within the fixed costs regime would introduce an element of lawyers needing to be less thorough in their work, or worse, to decline the work entirely.

There is a wider issue to consider regarding access to justice. Victims of child abuse come forward when they feel ready and able to do so. They require considerable support and to know that their cases will be taken seriously and given the investigation they deserve. Without a civil legal system to support them, this is taking away a route to justice for these clients, once

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1 [2019] EWCA Civ 1780

again removing their voice and their ability to seek help. Fixed costs in child abuse cases send a message that our legal system is not prepared to support the victims of child abuse. Any steps which limit the ability of survivors to do this would be extremely detrimental to some survivors' health and recovery. Litigation in this area also holds defendants – local authorities, schools, for example - to account, and encourages them to implement measures and processes to ensure nonrecurrence. Defendants in these cases will also have the means to access experienced and well-resourced solicitors. Ensuring equality of arms in such a sensitive area of law is vital for all the reasons set out above.

Adult sexual abuse cases must also be excluded from the fixed costs regime, due to the sensitiveness and complexity of such cases. As with cases involving child abuse, these cases require extensive evidence gathering and detailed further work from legal professionals, for example *Commissioner of Police of the Metropolis v DSD*[2]. As with cases involving children, there are often feelings of shame, and survivors are often vulnerable and suffering from the effects of trauma related to the abuse – all of these issues add to the complexity of these cases. Often in adult sexual abuse cases, there are also complex arguments raised around consent which will need to be handled.

From our members' experience, in cases where it is very hard to prove sexual abuse, it is possible to establish neglect. If the exemption from fixed costs is not widened, then those cases will fall within the fixed costs regime, affecting the, claimants' access to justice. The claimants in the recent cases involving Chelsea Football Club alleged that in addition to a barrage of disgracefully offensive racist abuse, there were physical assaults of a sexual nature. The defendants denied the sexual element. Significant abuse cases such as these, and other cases related to sports coaching may not fall within sexual abuse and as such will fall outside of the exemption to fixed costs. Given the complexity of these cases, claimants may find it more difficult to obtain representation as it is simply not affordable to run these cases within a fixed costs process. The Chelsea cases also demonstrate that the line between different types of abuse is not necessarily clear, and in addition to the unfairness that would be generated through treating one type of abuse differently to another, there will be uncertainty and likely satellite litigation as it is determined whether a case falls within or outside of the fixed costs regime.

Comments related to the proposed vulnerability rule

We welcome the proposed vulnerability rule, but it should not be introduced in isolation. We are concerned that as it stands, the rule would operate in a similar way to other rules relating to exceptional circumstances and uplifts, which are simply not used because the threshold is deemed too high, and applicants do not wish to risk incurring costs penalties if they are unsuccessful. This risk is exacerbated in a fixed costs environment. We suggest the following provisions be put in place to ensure that the vulnerability rule is workable in practice:

Guidance on what "vulnerability" is

While we agree that vulnerability should not be defined, there should be broad guidance on the sorts of circumstances in which an uplift would be granted for a vulnerable client. The guidance cannot and should not be all encompassing, but should provide sufficient detail and examples to enable vulnerability to be flagged up. Successful application and use of the rule will be best achieved by the development of a body of jurisprudence to provide an illustration of the sorts of cases in which an uplift will be granted. However, parties must have the confidence to bring an application in order for this jurisprudence to develop. There must not

[2] [2018] UKSC 11

be barriers in the way of people attempting to establish the sorts of cases where an uplift will be granted, and there must be some initial broad guidance to encourage people to use the rule. Additional guidance on vulnerability would be in line with the updated overriding objective of the Civil Procedure Rules, and the introduction of Practice Direction 1A.

Guidance should also encourage representatives to flag vulnerability at the earliest possible opportunity, for example in pleadings.

No costs penalties attached to vulnerability applications

It is essential that any "vulnerability rule" is implemented without costs penalties attached to an application. Claimants should not be penalized for applying for additional costs even if they do not reach the threshold for vulnerability and their application is subsequently rejected by the judge. We are concerned that, considering that this is a fixed costs regime, the risk of applying and getting sanctioned for not reaching the threshold is significantly higher than in cases outside the regime. There should not be barriers preventing people trying to establish what the court will consider as "vulnerability" and whether the threshold has been met. We believe that the time and effort required to apply for additional costs and establish the claimant's vulnerability will act as a mechanism to avoid non-genuine applications. There is, therefore, no need for costs sanctions for unsuccessful applications.

Judicial training

It should be made clear in the rules and in accompanying guidance that it will be for the court to determine whether an applicant is vulnerable and whether additional costs have been generated by this vulnerability. Judges should already be training on vulnerability, as was recommended throughout the Civil Justice Council's 2020 report on vulnerability of parties and witnesses, but we reiterate the importance of this, here. In order for the rule to operate effectively, judges must be trained on vulnerability and how a claimant's vulnerability can increase costs in a case.

Vulnerability in current fixed costs cases

As we have stated previously, the current exceptional circumstances uplift for fixed costs cases is not sufficient to cater for vulnerability, as the threshold is too high. The vulnerability rule should apply to all fixed costs cases, not just those in the extended regime.

CPR 45.29J provides that the court will consider a claim greater than fixed recoverable costs only if it considers that there are "exceptional circumstances" making it appropriate to do so. Case law demonstrates that "exceptional circumstances" is a very high bar – see *Ferri v Gill*[3], where the High Court held that it was not enough that the case was "outside of the general run" of cases falling within the Road Traffic Accident portal. In *Hislop v Perde*[4], Coulson LJ that: "It goes without saying that a test requiring "exceptional circumstances" is already a high one". It is unlikely on this interpretation, that claimant representatives will be able to argue generally in cases where there is a vulnerable client that fixed costs should be disapplied.

[3] [2019] EWHC 952 (QB)

[4] [2018] EWCA Civ 1726

The unsuitability of current arrangements for those who are vulnerable in the current fixed costs regime are also demonstrated by the case of *Aldred v Cham,* where costs relating to counsel's opinion on quantum for a child's case were deemed not recoverable under CPR 45 29I (2)(h). Disbursements can be recovered if they are "reasonably incurred due to a particular feature of the dispute". It was held that the claimant's status as a child had nothing whatever to do with the dispute itself. Therefore, the costs of counsel's opinion were not recoverable. Similarly, translator fees would not be recoverable, because the fact that someone could not speak English was not something that arose out a particular feature of the dispute. It is clear that currently, in fixed costs cases, there is not a suitable framework to ensure that extra costs generated by vulnerability are recoverable. This will lead to those who are vulnerable being unable to obtain legal representation. We strongly urge that the vulnerability rule is made applicable to all fixed costs cases, not just those in the extended regime.

Disbursements

There must be a departure from the approach in *Aldred v Cham,* with recoverable disbursements covering translator fees, interpreter fees, and any other special measures that are required, regardless of whether the vulnerability is a feature of the case itself. There should also be scope for the court to agree items that may be unexpected or novel. The rules on disbursements should not be restricted to a definitive list, as vulnerability can be unpredictable and vary from case to case.

Any queries about this response should be addressed, in the first instance, to:

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