

CIVIL JUSTICE UPDATE

Survival after the “Big Bang”

Implementation of the Government’s Costs
and Funding Reforms

COSTS REFORMS (1)

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

- CFA success fees to be non-recoverable (s.44)
- ATE premiums to be non-recoverable (s.46)
- DBAs for contentious business (s.45)
- Referral fee ban in personal injury (ss.56 to 60)

Conditional Fee Agreements

Amends to S.58 CLSA 1990

- **S. 44 LASPOA 2012**

“ A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement”

- **S. 46 LASPOA 2012**

“ A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).”

Non-Recoverability Exceptions

- ATE premium for experts reports in clinical negligence claims

(The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013)

- Article 6 CFA Order 2013
 - Mesothelioma
 - Insolvency proceedings (April 2015)
 - Publication/Privacy proceedings
 - Pre-commencement agreements

Conditional Fee Agreements Order 2013

- In force 1st April 2013
- Article 2 - Enforceable CFAs
- Article 3 - Maximum Success fee - 100%
- Article 4 - PI = specified proceedings
- Article 5 - Limits recoverable success fee
- Article 6 - Transitional provisions
- **Note** - No CFA Regulations

Conditional Fee Agreements

- Unenforceable where:-
 - Success fee of more than 100%
 - CFA is not in writing
 - No PI statutory cap (where success fee)

Conditional Fee Agreements (Transitional 1)

CFA signed

Pre 1/4/13

Pre- 1/4/13

ATE Policy

D pays success fee and ATE premium (if any)*

No QuOCS cover

Max. 100% success fee

*** subject to costs assessment rules in CPR**

Conditional Fee Agreements (Transitional 2)

**CFA signed
on or after 1/4/13**

**Post 1/4/13
ATE Policy**

C pays success fee + ATE premium (if any)**

QuOCS applies

Max. 100% success fee but limited to 25% of general damages and past loss

- a) 25% cap is first instance only**
- b) 100% applies to appeals etc.**
- c) General damages for pain, suffering, loss of amenity and pecuniary loss other than future pecuniary loss net of any CRU recovery.**

**** subject to S.70 Solicitors Act 1974 assessment**

COMPARE WITH DBA

Conditional Fee Agreements (Transitional 3)

CFA signed

Pre 1/4/13

ATE Policy

Post 1/4/13

D pays success fee

C pays ATE premium

No QuOCS cover

Max. 100% success fee



Conditional Fee Agreements Termination/Minors/Changes

- Death
- Minor
- Protected Parties
- Change of solicitor post 1/4/13
- Termination
- Assignment?

Conditional Fee Agreements

- Published
 - Law Society model agreement (PI)
 - Guidance
- To be published
 - Practice Note
 - Model agreement (Non PI)

DAMAGES BASED AGREEMENTS

- **S. 45 LASPOA 2012**

Can only apply to proceedings which an enforceable CFA would also be available for (see S.58 CLSA 1990)

- **Damages Based Agreements Regulations 2013**

- **Civil Procedure Rules - Part 44.18**

Damages Based Agreements Regulations 2013

- Article 2 - Revokes 2010 Regulations
- Article 3 - DBA agreement requirements
- Article 4 - Payment (non - employment)
- Article 5 - Pre-agreement information (employment)
- Article 6 - Additional causes of action (employment)
- Article 7 - Payment (employment matter)
- Article 8 - Terms/conditions (employment)

Damages Based Agreements Regulations 2013

- Article 3 - DBA agreement requirements
 - Details of the claim
 - Circumstances of payment by client
 - Reasons for setting the fee level

Damages Based Agreements Regulations 2013

- Article 4 - Payment (non - employment)
 - Payment must be net of any third party costs liability
 - General damages and past loss less CRU
 - Capped at 25% of recovered amount in PI
 - Capped at 50% in non PI matters

Damages Based Agreements

Personal Injury

25% of sum **recovered** in respect of the claim.

Only general damages and past loss minus any CRU recovery

The fee has to include VAT and any counsel fees.

Credit has to be given for any costs **payable** by the opponent.

The indemnity principle applies.

Damages Based Agreement Employment

35% inclusive of VAT but exclusive of Counsel's fees of sums ultimately **recovered**.

Damages Based Agreement Other Matters

50% of sum **recovered** in respect of the claim.

The fee has to include VAT and any counsel fees.

Credit has to be given for any costs **payable** by the opponent.

The indemnity principle applies.

Civil Procedure Rules - DBA Costs

- CPR Part 44.18
 - Normal assessment rules apply (CPR 44.3)
 - NOTE - Indemnity Principle applies

WARNING !-

Do not breach the Regulations!!!

Breach = Unlawful and Unenforceable Agreement

Indemnity Principle = No Costs

See *Garrett v Halton BC* and *Myatt v NCB* [2006] EWCA Civ 1017

DAMAGES BASED AGREEMENTS

- **Model DBA ?**
- **Practice Note to be published**

REFERRAL FEES

LASPOA 2012 Part 2 - SS 56 and 57

- S.56 (1) Rules against referral fees

A regulated person is in breach of this section if—

- (a) the regulated person refers prescribed legal business to another person and is paid or has been paid for the referral, or
- (b) prescribed legal business is referred to the regulated person, and the regulated person pays or has paid for the referral.

Referral Fees

- S.56 (4) Rules against referral fees

“Prescribed legal business” means business that involves the provision of legal services to a client, where—

- (a) the legal services relate to a claim or potential claim for **damages for personal injury or death**,
- (b) the legal services relate to any other claim or potential claim for damages arising out of circumstances involving personal injury or death, or
- (c) the business is of a description specified in regulations made by the Lord Chancellor.

Referral Fees

- S.56(5) Rules against referral fees

There is a referral of prescribed legal business if—

- (a) a person provides information to another,
 - (b) it is information that a provider of legal services would need to make an offer to the client to provide relevant services, and
 - (c) the person providing the information is not the client;
- and “relevant services” means any of the legal services that the business involves.

Referral Fees

- S.57 (5) Effect of rules against referral fees

A breach of section 56—

- (a) does not make a person guilty of an offence, and
 - (b) does not give rise to a right of action for breach of statutory duty.
- (6) A breach of section 56 does **not** make anything void or unenforceable, but a contract to make or pay for a referral or arrangement in breach of that section is unenforceable.

Referral Fees

- S.57 (8) Effect of rules against referral fees

Rules under subsection (2) may provide for the payment to be treated as a referral fee unless the regulated person shows that the payment was made—

- (a) as consideration for the provision of services, or
 - (b) for another reason,
- and not as a referral fee

Referral Fees - SRA Guidance

How has the SRA implemented the ban on referral fees in personal injury cases?

“.....two new outcomes in the SRA Code of Conduct. These can be found in chapters 6 and 9 of the Code. These require that you are not paid and do not pay a "prohibited referral fee". A prohibited referral fee is a payment prohibited under S.56 LAPOA or a payment which appears to the SRA to be a referral fee unless you can show that it was made for services or for some other reason and not as a referral fee”.

Referral Fees - SRA Guidance

Are joint marketing schemes permitted under LASPO?

“Some marketing schemes involve referrals being made to participating firms and LASPO clearly envisages some payments legitimately being made to introducers, for example for services provided by the introducer. Any regulated person involved in such an arrangement will need to be satisfied that any payments they make are purely for the marketing or any other services provided and **not** for the referral of business”.

Referral Fees - SRA Guidance

Can I set up an ABS to avoid the ban?

“Becoming an alternative business structure (ABS) will not necessarily enable you to avoid the ban. The ABS itself will be a regulated person for the purposes of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and its referral arrangements will be subject to the ban and the Code of Conduct. If you merge your firm with another business to become an ABS, any referrals within the new business will not be caught. However, if the ABS is part of a group of companies, referrals within the group will be caught”.

Referral Fees - SRA Guidance

Does LASPO prevent me paying another solicitor for referring clients to my firm?

“Yes, if the payment is for the referral. Both the solicitor making the payment and the solicitor receiving it would be in breach. However, The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) does not prevent you paying another solicitor for work they have done on a client's matter before referring the client to you.”

Referral Fees - SRA Guidance

Are arrangements with trade unions and charities caught by the ban?

“There are no exemptions in The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) for particular categories of introducer. Therefore the same considerations will apply to these arrangements and you will need to be satisfied that you are not paying a prohibited referral fee.”

Referral Fees - SRA Guidance

Are fee sharing arrangements with an introducer caught by the ban?

“Any payment to an introducer of personal injury work is potentially caught by the ban. "Payment" is defined widely as including "any form of consideration whether any benefit is received by the regulated person or by a third party..". In our view this would include a proportion of the fees or profits generated by a particular matter.”

Referral Fees - SRA Guidance

Does the ban apply to defendant personal injury work?

“No. "Client" is defined as "the person who makes or would make the claim". Therefore we do not consider that the payment of a fee in connection with the referral of a defendant in a personal injury case is prohibited. However, if that person subsequently makes a counter-claim in the matter, they will become a client for the purposes of the ban and this may cause problems if a referral fee has been, or is to be, paid.”

COSTS REFORMS (1)

Q AND A

COSTS REFORMS (2)

Civil Procedure Rules

- Introduction of qualified one ways costs shifting
- New Part 36 Rule (Offers to Settle)
- Costs Management/Budgeting/Capping
- New Proportionality Rule
- Portal Claims and Fixed Costs

Qualified One Way Costs Shifting

- Defendant continues to pay claimant's legal costs if the claim is successful
- Claimant does not pay defendant's legal costs if the claim is unsuccessful
- Not applicable where pre 1/4/13 funding applies

- CPR Rule 44.13

Only personal injury/fatal accidents + estate claims under S.1 LR(MP)A 1934

Exceptions to QuOCS

- CPR 44.15
 - Where proceedings struck out because:-
 - No reasonable grounds
 - Abuse of court's process
 - Conduct likely to obstruct disposal of proceedings
- CPR 36 - Failure to beat offer to settle

Exceptions to QuOCS

- CPR 44.16
 - Fundamental dishonesty on balance of probabilities
 - Costs orders can enforced to full extent
- Insolvency/mesothelioma CPR 48.2(2)
(implementation t.b.a.)
- CPR 44.17 (Transitional)
QuOCS does not apply where a pre commencement funding arrangement exists (CPR 48.2)

Pre-commencement funding arrangement

- CPR 48.2(1)
 - (i) Pre 1/4/13 agreement specifically for the purposes of advocacy or litigation services that is subject of the proceedings or the agreement was entered pre 1/4/13 and the advocacy/litigation services were provided before that date.
 - (ii) where the party seeking to recover the insurance premium took out the policy before 1/4/13

Effect of QuOCS

- CPR Rule 44.14
- Enforcement
 - Only after conclusion of proceedings
 - Not registered as unsatisfied judgment

PART 36

(Offers to settle)

- Monetary claims
- 10% increase for claimant on award up to £500,000
- Tapered - £500k to £1million
- Non-monetary claims
- Costs (either assessed or agreed)
- Capped at £75,000
- Offers to Settle in Civil Proceedings Order 2013
- Applies to offers made after 1/4/2013
- QuOCS will not apply up to level of damages

Cost Management and Budgeting

Budget

“An estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings.” Glossary, para 21(a)

Proportionality

“... the forthcoming new approach to proportionate costs, as implemented through the new costs rule, will operate before the issue of the claim form, throughout the life of proceedings, and then at the end of proceedings when costs come to be assessed.”

Lord Neuberger of Abbotsbury, then Master of the Rolls

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>

Case Management from 01.04.13

CPR 3.9

On the application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.



Application of Case Management rules

CPR 3.12(1)

This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013.

Case Management from 01.04.13

- CPR 3.8(7):
 - The court may contact the parties from time to time in order to monitor compliance with directions. The parties must respond promptly to any such enquiries from the court.

Case Management from 01.04.13

- CPR 3.19

- On the application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need -
 - (a) for litigation to be conducted efficiently and at proportionate cost; and
 - (b) to enforce compliance with rules, practice directions and orders.
- www.lexislegalintelligence.co.uk/intelligence/jackson-reforms



Filing and exchanging after 01.04.13

- CPR 3.13
 - Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs.
 - Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference.

Failure to file a Budget after 01.04.13

- CPR 3.14
 - Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only applicable court fees.
- The new CM rules do not apply to Rolls over £2 million.

Case Study

- *Henry v News Group Newspapers Ltd*
[2013] EWCA Civ 19
- The effect of the judge's order was to disallow £268,832 of the Claimant's costs before any success fee was added under Ms Henry's conditional fee agreement with her solicitors.

Case Study

- Whether there is good reason for the court to depart from the court approved costs budget as approved on 20 September 2010
- Compare the post 01.04.13 regime:
- CPR 3.18(b)
 - The Court will “not depart from such approved or agreed budgets unless there is good reason to do so”.

Good Reason

- Budgets are intended to provide a form of control rather than a licence to conduct litigation in an unnecessarily expensive way.
- Equally, however, it may turn out for one reason or another that the proper conduct of the proceedings is more expensive than originally expected.
- When considering whether there is good reason to depart from the approved budget it is necessary to take into account all the circumstances of the case, but with particular regard to the objective of the costs budgeting regime.

- The starting point must be that the approved budget is intended to provide the financial limits within which the proceedings are to be conducted and that the court will not allow costs in excess of the budget unless something unusual has occurred
- Some relevant factors:
 - How the proceedings have been managed;
 - Whether they have developed in a way that was not foreseen when the relevant case management orders were made;
 - Whether the costs incurred are proportionate to what is in issue; and,
 - Whether the parties have been on an equal footing. [What does this mean?]

The future

- The budget imposes a limit on recoverable costs.
- Primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings.
- If budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake.

PROPORTIONALITY

- Jackson LJ - *“defined by reference to the sums in issue, value of monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance, and the test of proportionality should be applied on a global basis”*
- MoJ - *“The test is intended to control the costs of activity which is clearly disproportionate to the value, complexity and importance of the claim”.*

Proportionality

- Costs have to be

“proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred”

CPR 44.3 (2) (a)

Proportionality

CPR 44.3(5) – costs are proportionate if they bear a reasonable relationship to:-

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance.

Proportionality

- CPR 44.3 (7)

“Paragraphs (2)(a) and (5) do not apply in relation to cases commenced before 1 April 2013 and in relation to such cases, rule 44.4(2)(a) as it was in force immediately before 1 April 2013 will apply instead”.



Portal Claims and Fixed Costs

- Vertical Extension for RTA claims to £25,000
- Horizontal Extension to EL/PL claims
- Portal Costs
- Fast Track Costs

VERTICAL EXTENSION TO PORTAL (RTA claims)

- Current limit - £10,000
- New limit - £25,000
- Current fixed costs - £1,200
- New fixed costs - **£500 (£200/£300)**
- 15 day response deadline
- Counsel Opinion = Disbursement (over £10k claims)

HORIZONTAL EXTENSION TO PORTAL

(EL/PL claims)

- EL/PL claims - £1k to £25k
- 30 days response deadline
- Fixed costs - **£900 (£300/£600)**

EXTENSION TO PORTAL COMMENCEMENT

- Claims up to £10k - end April 2013
- Claims - £10k to £25k - end July 2013
- EL/PL claims - £1k to £25k - end July 2013

FAST TRACK FIXED COSTS

	Pre issue £1,000- £5,000	Pre Issue £5,001- £10,000	Pre Issue £10,001- £25,000	Issued – Post issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial	Trial - Advocacy Fee
	Case Settles before Issue	Case Settles before Issue	Case Settles before Issue				
Road Traffic Accident							
Fixed Costs	Greater of £550 or £100 + 20% of Damages	£1,100 +15% of Damages over £5k	£1,930 + 10% of Damages over £10k	£1,160 + 20% of Damages	£1,880 + 20% of Damages	£2,655 + 20% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Employers Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +12.5% of Damages over £5k	£2,500 + 10% of Damages over £10k	£2,630 + 20% of Damages	£3,350 + 25% of Damages	£4,280 + 30% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Public Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +10% of Damages over £5k	£2,370 + 10% of Damages over £10k	£2,450 + 17.5% of Damages	£3,065 + 22.5% of Damages	£3,790 + 27.5% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na

Applicable end July 2013



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COSTS REFORMS (2)

Q AND A

COSTS REFORMS (3)

Government Policy

- General damages for pain and suffering to be increased by 10%
- Small Claims Track Limits
- Guideline Hourly Rates
- Mesothelioma ?

10% INCREASE IN DAMAGES

- Pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit, mental distress
- Suggested to make up for claimants having to pay success fees and ATE premiums
- Impossible to police - there will be no way of knowing if 10% is added to damages in cases which settle without judicial intervention
- Post 1/4/13 judgements (except pre commencement CFAs)

See *Simmons v Castle* [2012] EWCA Civ 1288

SMALL CLAIMS

- Existing non-PI limit to be increased to £10,000
- PI claims limit to be increased (£5,000?)
- Consultation - closed 8th March

Guideline Hourly Rates

- Introduced in 1999
- Fee Earner Bands/Geographical area
- Previously reviewed by ACCC
- Civil Justice Council Costs Committee

Mesothelioma

- ABI/Government discussions
- Consultation - Spring 2013 ?
- Portal ?
- Fixed costs ?

COSTS AND FUNDING UPDATE

GENERAL Q AND A

PUBLIC AFFAIRS

- We need your help in making the case for the membership. Help us by writing to and meeting your local MP, who can raise this with the MoJ. See the handy "campaigner briefing" on the Law Society costs website which sets out how best to lobby your MP.
- We need evidence in order to make the case for a review of all the civil litigation changes. Please send us any evidence of insurer malpractice.

MONITORING

- Please send us any evidence of insurer malpractice
- We need evidence in order to make the case for a review of all the civil litigation changes.
- insidetrack@lawsociety.org.uk
- Look out for requests for data and other research information
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www.lawsociety.org.uk/costs



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