CIVIL JUSTICE COUNCIL

THE IMPACT OF THE JACKSON REFORMS ON COSTS AND CASE MANAGEMENT

Submission by the Motor Accident Solicitors Society (MASS) March 2014

Introduction

1. This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Craig Budsworth.

2. MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 150 solicitor firm Members, representing over 2000 claims handlers. We estimate that member firms conduct upwards of 500,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

3. The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

The Impact on the Accident Victim

4. Since the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act and Jackson Reforms came into effect, whilst it may appear that some firms continue to offer 100% compensation, the reality is that it is not a sustainable and viable business option for legal firms undertaking personal injury work. Consequently accident victims will be paying a percentage of their damages in order to obtain legal assistance.

5. Paying for Legal Assistance and Legal Expenses Insurance - MASS members are noticing that since the reforms, clients seem to have accepted that they have to pay for an insurance premium (as maybe they do not expect something for nothing). However, as many now have to also contribute towards their own legal costs, they expect more by way of client care. Firms are now finding themselves in the unenviable position that due to the significant reduction in fixed fees, not only are they having to cut costs still further, this is having an impact on the level of service that can be provided.

6. Clients will often ask their representative to negotiate a higher figure for damages to compensate for the 25% deduction. Whilst this is not how our legal system works, many clients feel that they are losing out. This concept is often difficult for the clients to accept as they do not feel they should be paying anything towards their claim if the third party is at fault and they should be able to recover that premium. Clearly the concept of 'no win, no fee', is still largely misinterpreted and many clients feel that they haven't "won" their claim.

7. Whilst QOCS avoids the need for the client to obtain an ATE policy, they still clearly require protection so far as Part 36 offers are concerned and the risk of not beating a defendant Part 36 offer. Therefore legal expense insurance is still required and once again is an expense the claimant has to bear but there is the potential to wipe out all of their damages if they fail to beat an offer. We find this very difficult to explain to clients that even if they win, they might still lose unless of course they have Part 36 protection.

8. Another consequence we are experiencing is that some clients try to negotiate the premium and are shopping around more than they used to, not necessarily going for the right or best expertise and client care but purely the cheapest option. MASS finds this extremely concerning as in the long term many accident victims may receive poor advice and possibly lower settlements. In addition it is very clear that with only a 10% increase in damages and then having to pay up to 25% towards their legal costs, the accident victim is in effect losing 15% of the value of their claim. This is not access to justice.

9. One positive aspect of the new process and reforms is that up to 90% of RTA PI claims are now operated through the Claims Portal, which significantly improves the time to settle a claim. However, MASS is concerned that it only takes a carefully placed Part 36 offer from the defendants to put the claimant at extreme risk of losing everything. By contrast the insurance industry continues to benefit enormously by the reforms as shown by one of the biggest insurers, Direct Line, who recently announced group profits of nearly £424 million for 2013 compared with £249 million in 2012.

10. Pre-Medical Offers - It has become common for the insurers to make pre-medical offers and 'dangle carrots under claimants noses' at a time when it is impossible for either claimant solicitors or the insurers to properly value a claim. It is one thing that the medical expert does not often get to see medical records when preparing a report but having no report at all is detrimental to claimants as solicitors cannot give proper advice as to what they should be entitled to. It is our experience that on the majority of cases where a pre-medical offer has been received and rejected, the claimant has gone on to recover more by way of damages following a medical report.

11. Child Claims - Child cases are often more complex and lengthy because of the age and nature of the injury and yet still the costs are fixed. Whilst on some occasions no percentage is taken from the damages, in order for firms to be able to service those claims, they invariably have little option but to charge 25%. This has to be granted by the Court to be paid out of the damages, which MASS considers to be detrimental to that child.

12. Whilst MASS agreed that the personal injury claims handling process was in need of some improvement and we feel the RTA Claims Portal is working well, we have always been, and remain opposed to, the introduction of the client having to pay out of their damages in order to obtain the legal assistance that they are entitled to. We believe that this impinges on access to justice.

13. The new regime as a whole has meant that claimant solicitor firms have had to undertake a massive restructuring of their businesses to the extent that less qualified and experienced fee-earners have to be used for RTAPI claims. Whilst many may think this is a good thing and excess money had to be filtered out of the overall process (ie banning of referral fees), MASS feels it is extremely important to recognise the effect this has had on the accident victim. Whilst the process and level of the fee-earner may have changed, the type of claim and the work / expertise required has not. Many claims remain complex with difficult arguments on causation for example, and therefore require an experienced fee-earner who is an expert in the particular issue or area of law. The dramatic reduction in fixed fees has impacted firms ability to provide the level of service,

which accident victims deserve and have a right to receive. To add to that potential reduction in service level, it is our experience that insurers continue to exploit the vulnerability of the accident victim, which is clearly taking place through pre-medical offers and third party capture, yet at the same time appear to be failing to pass on the full savings that they are clearly profiting from through the reforms.

The Impact on Claimant Stakeholder Businesses

14. The affect that LASPO has brought to the claimant stakeholder businesses has been dramatic. It has had a direct effect on business planning and continuity for the last 3 years.

15. LASPO has had an effect on every part of claimant stakeholder businesses whether they are claims management companies or claimant law firms. For both to be able to manage, maintain and provide successful businesses, they require continuity and business plans for 12, 24 and 36 months ahead. This has been almost impossible over the last 3 years with frequent amendments required to reflect the changes brought about by the LASPO Bill as it made its way through Parliament. The Bill, which came into effect on 1st April 2013, was substantially different to that which was originally presented before Parliament and even when the final Bill was presented it still meant fundamental review and restructuring of claimants stakeholder businesses. Furthermore, all-important details of how the Act would be implemented (the regulations / secondary legislation) were published late allowing only a short period of time before coming into effect.

16. The effect of LASPO must be considered not just in the context of a ban on referral fees which is directly contained within the Act, but also the other changes upon the personal injury legal landscape. Portal costs were significantly reduced (approximately 60%) and their implementation widened to include cases up to the value of £25,000. Fixed costs for litigation were implemented together with new processes on the PI Portal to include EL and PL cases. Recoverable additional liabilities for claimants were revoked resulting in success fees and ATE premiums being deducted from claimants damages. These substantial changes had a fundamental effect upon the claimants stakeholder business.

17. According to Government statistics the number of regulated claims management companies reduced from 2553 in December 2011 to 1400 in January 2014. In addition, law firms have been required to make staff at all levels redundant, with some law firms going into liquidation whilst others have moved out of the PI market. For those law firms remaining, they have had to revise their business models to incorporate the reduced fixed fees, whilst ensuring they can still carry out business. In this post LASPO environment, firms have also had to spend time, effort and money in ensuring that their business models were amended to ensure compliance with their regulator. Claims management companies still exist and provide clients to claimant law firms but have to ensure they do so in a compliant fashion. Businesses have had to reconsider their practises from top to bottom.

18. Whilst incumbent upon the owners of the businesses to plan for the future, it has also been necessary to retrain and re-skill staff at all levels to deal with the extensive changes which include the extension PI Portal to incorporate EL and PL accidents. Claimant stakeholder businesses have been required to be absolutely focussed on increasing internal efficiencies in order to run their business in a cost effective way in a post LASPO environment. To that end, it comes as no surprise that the SRA has recently voiced its concerns as to the financial viability of law firms stating; "...confirmed our view that

financial difficulty is a widespread current risk"[1]. The financial viability of law firms is now a priority in its governance.

19. Whilst claimant stakeholders had to endure substantial and fundamental changes to their business at every level, it would appear that the reduced fixed costs and deductions from claimants damages for additional liabilities has resulted in a potential and significant savings for insurers.

20. Following 3 years of constant planning, change, and adaption with an end result of vastly reduced fixed fees, claimant solicitors in particular have been trying to operate a successful and profitable business in order to ensure and maintain the provision of good quality legal services to the accident victim, which they are entitled to. However, as expressed above, MASS has considerable concerns that this service and overall access to justice is being fundamentally eroded by Government policy and insurer profit margins.

The Impact on the Fee-earners

21. In addition to the overall impact the reforms have had on claimant stakeholder businesses, MASS has also considered what impact the change in Rules have had on the individual fee-earners and the subsequent effect on their cases.

22. The changes to the CPR accompanying LASPO were significant. Most importantly the overriding objective was amended to include the need to deal with cases at proportionate cost and the need for enforcing compliance with the rules, practice directions and orders. In addition, CPR r3.9 lost its checklist of factors and was replaced by the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules and orders. One significant case that has highlighted this is the Court of Appeal decision in the case *Mitchell v News Group Newspapers Ltd [2003] EWCA Civ 1526* which has given its definitive interpretation to the new version of CPR r3.9 and this has had a radical impact on the way in which fee earners must conduct litigation.

23. The 'Mitchell' case established that when seeking relief from sanction the factors mentioned above are of paramount importance and having regard to all the circumstances of the case should be given less weight, the reason for the non-compliance should be trivial and there should be a good reason for it. Consequently there is a shift away from doing justice in the individual case and relief from sanction should be granted more sparingly than usual. The effect of this on the conduct of litigation is seen most starkly in 3 particular areas:

    i) <u>Service of Witness Statements</u>

24. CPR r32.10 states that if a party does not file a witness statement within the time allowed by the court the witness cannot be called to give oral evidence without the court's permission. CPR 32.10 therefore contains a sanction and thus by virtue of the effect of CPR 3.8(3) the parties cannot agree to extend the time for service of witness statements between themselves.

25. Pre-Mitchell, claimant and defendant solicitors routinely co-operated in making small variations to the timetable without formal court approval, where the delay did not have any effect on trial dates or involve any prejudice to either party. Post-Mitchell no fee-earner would risk relying upon an agreement with the other side and will now have to

[1] Legal Futures 13th November 2013

apply to the court before the deadline even where the extension is agreed. There is an argument to say that a full application with a hearing is needed and not just a letter to the court with a Consent Order attached, thus increasing the costs and inevitably causing a delay in the proceedings whilst waiting for the hearing date. This is now standard procedure in many firms. However, MASS questions whether the implications for the increased workload of the courts (and the resulting delay in getting cases to trial) and the increase in the average cost of a litigated case is contrary to the intention of the Jackson reforms - the risk of not doing this in every instance is too great.

26. This not only applies to cases going forward but to cases where such agreements between the parties were made pre-Mitchell. This however could be argued that defendant solicitors acting in the best interests of their insurer clients are probably under a duty to inform claimant solicitors that those agreements are invalid and that an application should be made for court approval. Inevitably such applications will be outside the deadline and thus should be looked upon less favourably by the court. Again, this has an impact upon court time and costs.

ii) Service of Expert Reports

27. Following 'Mitchell' it can be argued that parties cannot agree between themselves to extend the time for serving expert reports without formal approval of the court. Although CPR r35.14 does not contain the words "by the time specified by the court" the Court of Appeal in 'Mitchell' stated that the costs budgeting rules in CPR 3.14 (which also does not refer to service at a time specified by the court) were to enable the court to manage litigation which could only be done if costs budgets were filed in time. Analogous reasoning can be applied to CPR Part 35 - the court can only manage expert evidence if expert reports are served in accordance with the directions timetable, thus a sanction applies for breach and CPR 3.8(3) applies. Fee earners have a further difficulty here in that complying with service involves an outside party (the expert) over whom the fee earner has little control. Most firms for reasons of cash-flow use medical agencies to obtain medical reports, notes and records. In practice such agencies offer variable levels of service in delivering reports on time, involving the fee earner in extra work chasing up the reports. Whilst experts are independent the courts are likely to say that experts' failings are the result of the instructing party and that if the report is served late and relief from sanction is refused, the solicitor can bring a claim against the expert.

28. Pre-Mitchell claimant and defendant solicitors regularly agreed to extend time for service of experts' reports (where such delay did not substantially affect the timetable) without formal recourse to the court. As in paragraph 25 above, this is no longer the case post-Mitchell. Full applications to extend deadlines will have to be made in each case going forward, and defendants will need to take the point in relation to pre-Mitchell agreements or risk negligence actions from their insurer clients. The already over-stretched court service will have to deal with these applications and costs per case will increase.

iii) Increase in the length of court timetables in the future

29. The obvious response to the pitfalls described above is to ask for much longer deadlines in the first place. Mitchell quotes the Jackson report "the courts should set realistic timetables for cases and not impossibly tough timetables in order to give the impression of firmness". The practise in many firms is to now ask for much longer timetables so that they reduce the risk of having to apply for an extension. This approach is likely to be standard procedure in the future leading to longer timetables across the board and later trial dates for all litigants.