Costs backlash

A study whose findings support keeping recoverability in CFAs may backfire, writes **Simon Gibbs**

The National Accident Helpline (NAH), a personal injury no win, no fee specialist, commissioned independent research by three academics from the University of Lincoln during the consultation process into implementation of the Jackson Report. In their report, *Excessive and disproportionate costs in litigation*, Professor John Peysner, Dr Angus Nurse and John Flynn cast doubt on government proposals to reform the conditional fee agreement (CFA) compensation regime.

According to the launch publicity, the academics examined data on more than 20,000 civil litigation cases and concluded that in certain cases defendant delay can be a significant factor in increased litigation costs and can cost up to six times as much as other causes of delay.

Furthermore, it said, the findings suggest that defendant delays add unnecessary court costs to cases where there is a failure to reach settlement. If a case goes to court, claimants win 90% of the time.

REWARDING SUCCESS

Traditional wisdom as to cases that go to trial can be found in Master Hurst's comments in *Designer Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC) (No 2)* [2003] EWHC 9024 (Costs), where he said: 'There is an argument for saying that in any case which reached trial a success fee of 100% is easily justified because both sides presumably believed that they had an arguable and winnable case.'

The courts are not meant to apply the benefit of hindsight when determining the reasonableness of a success fee. The costs practice direction says at 11.7: 'when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement'.

However, the courts are often persuaded that an initial assessment that a case has no better than 50/50 prospects of success must have been an accurate assessment if the matter does then proceed to trial.

Now, based on this research, we know that cases that proceed to trial are not carefully balanced but only go that far because defendants fail to make proper admissions of liability in weak cases. Using the court approved 'ready reckoner' to calculate success fees, for cases that proceed to trial, if there is a 90% chance of success, this justifies a success fee of only 11%.

Even where the CFA is entered into after liability has been disputed by the defendant, we now know this means little or nothing. The defendant has probably made an inappropriate decision 90% of the time and the claim will still succeed.

RECEIVED WISDOM

This research also knocks on the head the argument that the 'ready reckoner' method of calculating success fees is unduly harsh to claimant solicitors, as it wrongly assumes that the costs earned in won cases will be the same as the level of costs in lost cases.

The argument put forward by some claimant representatives was that explained in *Smiths Dock v Edwards* [2004] EWHC 1116 QB: 'Mr Morgan QC submitted that because most wholly unsuccessful cases reach trial whilst most successful cases settle before trial, there is a disequilibrium that should result in higher success fees.'

This argument was rejected in *Smiths Dock* with the court approving the general use of the 'ready reckoner'. The claimant argument does nevertheless seem to have been accepted as showing the "ready reckoner" did not produce 'unfairly high' success fees.

However, we now have evidence, kindly supplied by NAH, showing that the 'ready reckoner' figures are almost bound to be incorrect and, rather than being too low, are actually too high. If the vast majority of cases that proceed to trial are won by claimants, the fees earned in won cases will, on average, be higher than the work undertaken on lost cases. The 'ready reckoner' assumption that 'won' and 'lost' cases are of equal value is mistaken, but not in the way claimant representatives have previously argued.

FLAWED ASSUMPTIONS

This research, if it is accurate, also undermines the assumptions that many after-the-event (ATE) insurers apply in relation to staged ATE premiums and the individual 'assessments' that some ATE insurers apply to the final stage (usually the pre-trial stage). In *Rogers v Merthyr Tydfil CBC* [2006] EWCA Civ 1134 the approach of DAS was explained: 'At stage three the risks involved vary significantly, and it was felt better to rate this element of the premium individually. DAS's aim is to make sure that the trial premium is directly proportional to the risk involved, so that each case is individually underwritten, taking into account the merits and the estimated maximum loss figure (EML).

> 'Ready-reckoner' figures are almost bound to be incorrect and too high

'In order to calculate the EML the claimant's solicitor is asked to provide details of the disbursements he has already incurred and an estimate of his own side's disbursements up to and including trial. He is also asked for an estimate of the opponent's total costs and disbursements up to and including trial. The estimates provided in the allocation and pre-trial questionnaires are used when they are available.

'The underwriter is then required to assess the risk and to apply a percentage in order to calculate the premium. In this case liability had been denied and there was no part 36 offer. The prospects of success had been assessed by case handlers as 'acceptable', which in effect meant 51%. Mr Bellamy would not expect prospects of success to be rated much higher than this in a case about to go to trial where liability was still denied.

'Based on that information, the underwriter applied a rate of 54% to the EML producing a third stage premium of £3,510 plus IPT. The insurers expect to lose about half the cases which go to trial.'

The NAH research, if correct, shows that this assumption is fundamentally flawed. Instead of losing approximately 50% of cases that go to trial, the success rate is probably nearer 90%. The figures claimed from defendants by way of final stage ATE premiums are almost certainly too high.

The irony may be that research commissioned by NAH to support the current recoverability scheme has shown that the approach of the courts and ATE providers is fundamentally flawed and results in excessive costs being recovered.

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