

Vanishing point

Coupling costs reform with legal aid cuts could cause calamity for clinical negligence claimants, argues **Malcolm Underhill**

The Ministry of Justice's business plan for the next four years sets out drastic reforms of the justice system as a whole. But the Lord Chancellor's proposals to dramatically slash the legal aid budget could have a significant impact on clinical negligence cases in particular.

Mounting costs are likely to create a chilling effect on the riskier cases as claimants fear bankruptcy and cash-strapped lawyers avoid losses. A substantial reduction in the number of progressive court challenges and landmark decisions could easily be the result.

Half of the clinical negligence cases brought to court are with the support of legal aid. It is the intention of the government to withdraw the availability of this funding completely, arguing that alternative sources can plug the hole. But what these alternative sources will look like remains at best unclear and, at worst, worrying.

Conditional fee agreements (CFAs) are one obvious candidate, but the government has been keen to show its discontent with the 100 per cent success fees they are built on. With after-the-event (ATE) insurance also being given the thumbs down, how the claimant's bills will get paid remains to be seen.

The government argues costs reform is necessary because defendants have been put at a disadvantage by spiralling fees. But there is a significant risk that the abolition of aid, cou-

pled with the costs reform, will see the power shifting too heavily in the other direction. In cases of clinical negligence, remember, these defendants are not individuals but public bodies. It seems the government's insistence that access to justice cannot suffer is flawed.

Coin toss

In the Lord Chancellor's speech to the House of Commons and subsequent consultation on proposals for reform of civil litigation funding and costs in England and Wales, he makes much of the potential to recover a success fee of 100 per cent. While this is certainly the case, he fails to note that the ability to recover a success fee of 100 per cent will only generally arise if the dispute proceeds to trial.

The case will only proceed to trial if the

defendant has denied liability or the latter has not made a realistic offer of settlement. Very few claimants want to go to court; they much prefer a sensible compromise. It is the tactics of defendants and their insurers, who pull the purse strings, to hold out for as long as possible in the hope claimants will buckle and withdraw.

If the costs have escalated since CFAs were introduced then that is due to the behaviour of defendants who fail to make early admissions of liability and who also fail to make reasonable offers of settlement.

In addition to withdrawing success fees, or perhaps capping them at a much lower percentage, there is a proposal that claimants be prevented from recovering after-the-event insurance premiums. Whereas CFAs allow a claimant to bring a case to court, without having to pay their own fees, ATE insurance also protects them from having to pay the defendant's costs in the event the claimant fails at court.

At first glance, abolishing ATE premiums appear to create an uneven playing field in favour of defendants. However, the government proposes adopting Jackson LJ's recommendation that there be qualified one-way costs shifting. By this proposal a losing defendant would continue to pay a winning claimant's costs, but a losing claimant would only pay a winning defendant's costs where in all the circumstances it is reasonable to do so. This is a rather nebulous statement and will leave the claimant exposed.

Defendant insurers will be keen to show their opponent has not been reasonable to enable them to recover costs. There is much complaint about surveillance in our society, but surveillance has been a weapon in the insurers' armoury for some years. There are cases of entrapment and cases where inquiry agents instructed by insurers have entered a claimant's home to obtain compromising evidence. Even where such evidence is not damaging to a claimant's case, the mere existence of such evidence is deployed by insurers to create doubt in a court's mind as to the integrity of the claimant.

I cannot see that diminishing with these

proposals as insurers will take appropriate action to show unreasonable behaviour on the part of claimants. As there will always be a risk that claimants could be held liable for their opponent's costs, they are likely to seek some insurance protection. However, unlike now, this will not be recoverable from the defendant.

As indicated, defendants and their insurers will delay admissions of liability and settlement of offers, hoping to take advantage of a claimant's vulnerability so that a lower than reasonable offer is accepted. We are likely to see much more of these tactics if a secondary set of proposals are adopted.

Get a fix

Jackson LJ has proposed that there be fixed fees in personal injury cases, and this has received some endorsement from the government. First, if those fees are fixed, without any escape route for claimants (to recover hourly rates), then it will be in the defendants interests to delay cases and make demanding and unreasonable inquiries of claimants – all designed to eat away at the claimant's costs. Knowing the claimant is limited in what he can recover from the defendant, the latter will be able to take advantage of the former's limited entitlement to costs.

This imbalance is heightened when considering the more difficult cases in personal injury, such as industrial disease. Cases such as deafness, repetitive strain injury, vibration white finger and stress are paper intensive and time consuming as evidence from many sources has to be unearthed. The injuries are frequently caused by events many years before symptoms are diagnosed.

Tracing of eye witnesses and even the relevant employer can be fraught with difficulties. Damages in these cases can be substantial, particularly where there has been exposure to asbestos, but there are also

many industrial disease cases where damages are relatively small but nevertheless significant to the injured party. As the Lord Chancellor said, access to justice is the mark of a civilised society. However, the adoption of fixed fees is likely to deny access to justice if the claimant is required to fund his action to such a level that it extinguishes his damages.

Union time?

Although membership is declining, a large proportion of employees suffering injury or industrial illness at work can still call on their trade union to support for legal advice through the instruction of their panel solicitors. Trade unions are responsible for the development of health and safety law, and have particularly pushed back the boundaries in worker industrial disease cases. They

have done so knowing that if their member won the union would be able to recover a reasonable level of their costs. If those costs are limited and do not adequately represent the work involved, could we see less enthusiasm for running the more difficult cases?

Trade unions have a proud record of assisting workers in distress and fighting their cause. It is unlikely they will give up the fight for workers rights and may well see the government's proposals as an opportunity to increase membership.

Lord Young has made clear his criticisms of claims management companies. If the latter's activities are curtailed, then it may be that trade unions will see an opportunity to grow membership by highlighting the legal services they provide. We know the government is keen on legal expense insurance, of which union membership is one form, and thus the latter may see the time is right for a campaign of growth.

The radical lawyer

Personal injury and clinical negligence solicitors have historically run difficult cases because they believed in their client's case even though the claims have borderline prospects of success. If there are to be fixed fees and a significant reduction or elimination of success fees, then those same solicitors may be less enthusiastic about running the very difficult cases.

Despite what is suggested in the consultation paper, solicitors do not cherry pick and only run winning cases. They will readily run difficult matters, but, with legal aid to be withdrawn in clinical negligence cases, there is a risk some cases with merit will not be fought and we will see less cases advanced through the courts. Those who have caused suffering could escape liability. Thankfully, forward-thinking lawyers continue to exist, who will take financial risks to see their client achieve justice notwithstanding the government's restrictions on access to justice.

For all the arguments in defence of cutting legal aid, there will be an inequality of arms. Consequently, one can see these proposals being strongly resisted and potential human rights challenges on the grounds that claimants are being denied access to a fair trial.

At present we have a system which allows a claimant, of whatever financial standing, to take their case against the most powerful defendants, without fear of being bankrupt should they fail. The government proposes to change that fair system, with one that will only allow those with the strongest of cases and deep pockets to succeed.

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