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29th August 2018

**PIBA Comments on the BSB’s draft Annex for personal injury claims and example for the application of the “*transparency rules*”**

**Preliminary observations**

1. The BSB’s draft text and example have been considered by members of the PIBA Executive Committee. None have any experience of acting on a Public Access basis. The comments which follow are to be seen in that context; they are intended to assist the BSB in understanding practice in personal injuries litigation, as opposed to practice as a Public Access barrister.

**Recovery of costs**

1. We are concerned as to the accuracy/content of the advice in the example as to the recovery of “*expenses*” from “*the other side*” in the event that the claim is successful.
2. We anticipate that a client will wish/need to know if he/she will be able recover the cost of the work done by the barrister under the Public Access arrangement. The reference to recovering “*expenses*” from the “*other side*” does not clearly address this issue.
3. The template CFA suggested by the Bar Council for use in Public Access cases [copy attached to the Bar Council July 2018 note, “*CFAs and DBAs in Public Access Cases*”] makes it clear that the client is acting as a litigant in person. If so, then it would appear that the client, if successful, would only be entitled to recover costs under Rule 46.5 for pre-trial work done by a barrister as a disbursement on a detailed or summary assessment of costs [see CPR 46.5(1)]. However, in the vast majority of personal injury claims allocated to the Fast-Track, costs are limited to fixed costs payable and calculated under Section IIIA of CPR 45. Those fixed costs do not provide for assessment of counsel’s fees for pre-trial work on a disbursement basis.
4. The BSB may wish to obtain advice from specialist costs counsel as to (a) the basis upon which a Public Access client may recover the costs of pre-trial work[[1]](#footnote-1) done by a barrister, and (b) the limit, if any, on the amount that may be recovered for such work.

**Introductory paragraphs**

1. Paragraph 1 states, “*If you are, on a Public Access basis, providing advice and representation to clients in relation to personal injury claims (claims for physical injuries, diseases or illnesses, or psychological injuries or illnesses), …*” In almost all other contexts, the phrase “*personal injury claims*” includes claims arising out of death[[2]](#footnote-2). A claim on behalf of (i) the estate of a deceased person[[3]](#footnote-3), or (ii) on behalf of the dependants[[4]](#footnote-4) of a very old or very young person, may not exceed £25,000. The definition of personal injury claims in the current draft, on its face, would not appear to include claims arising out of death. If that is the intention, then the current wording is perfectly acceptable. If it is intended to include claims arising out of death, then the wording requires amendment.
2. Paragraph 2 states, “*Note that additional price transparency rules only apply in relation to claims which are allocated to the fast track (claims which are not worth more than £25,000).*” A case which is worth less than £25,000 *may* be allocated to the multi-track due to the complexity of the issues involved. Equally, a case worth more than £25,000 *may* be allocated to the fast track. As currently drafted it is unclear whether the trigger for the application of the transparency rules is (a) allocation to the fast track, or (b) allocation to the fast track and a value less than £25,000, or (c) simply a value of less than £25,000 irrespective of whether it is allocated to the fast track or the multi-track. Fees for a complex claim worth less than £25,000 but allocated to the multi-track will be more than the fees for a straightforward claim allocated to the fast track. The text in the example refers to claims “*up to £25,000*” irrespective of which track it is allocated to.
3. At the outset of a case when instructions are first taken, the ultimate value of the claim will very often be unknown. By way of example, a soft tissue “*whiplash*” neck injury will usually be expected to recover within two years with a full recovery to normal function and a valuation less than £25,000. However, where somebody does not recover within that timescale and goes on to have chronic symptoms then damages will often far exceed £25,000 and the case would not be allocated to the fast-track. What might seem like a straightforward case worth less than £25,000 at the outset may prove to be more complex and of greater value at its conclusion. This may need to be reflected more clearly so that consumers understand that the value, complexity and level of fees may change as the case progresses.
4. It is also perhaps worth emphasizing that a claim might be valued at well over £25,000 **at full value** and may be allocated to the multi-track, but the claimant may still recover damages less than £25,000 as a result of a reduction for contributory negligence. The BSB may wish to give thought to clarifying that the reference to the £25,000 limit is a reference to the **full value** of the claim without reduction for contributory negligence.

**The “Orchard Chambers” example**

1. “*However, more straightforward cases will ideally settle four to nine months after a claim is made. If a trial is required, as a guide the courts tend to have a hearing date nine to twelve months after a claim is made.*”– The reference to “*after a claim*” is made may be confusing. Almost all low value [up to £25,000] road traffic, employers liability and public liability personal injury claims are submitted via the online Claims Portal. We would expect “*straightforward*” claims submitted under the Portal to settle within six months of the claim being submitted to the Portal. If the case did not settle and a trial was required, then we would expect the trial to take place within approximately two years of the claim entering the Portal. Medical negligence claims [which we consider later] are not submitted via the Portal and take far longer to reach a conclusion, whether via settlement or determination at trial.
2. “*However, your barrister’s fees will not be more than 25% of the compensation you receive.*” – We are unsure as to what this is based upon. Under a conditional fee agreement, the **success fee** cannot exceed 25% of the compensation awarded for (a) general damages for pain, suffering and loss of amenity, and (b) past losses. **Base fees**, i.e. the estimated fees set out in table, are **not** capped or limited to 25% of damages, or 25% of any element of the damages. Further, the success fee can be, subject to the 25% cap on PSLA and past losses, up to 100% of the base fees. This is made clear in the Bar Council note in relation to “*CFAs and DBAs in Public Access Cases*” [copy attached].
3. “*The other side will also normally reimburse our expenses (for example, the cost of obtaining a medical report).*” –
   1. The reference to “*our expenses*” may be misleading. Our understanding is that a barrister acting under a public access arrangement cannot instruct a medical expert [unless authorized to conduct litigation] and cannot fund medical reports. The reference to “*our expenses*” may be misleading as the expenses should be the client’s; therefore “*your expenses*” might be a better description.
   2. **More significantly, the “*other side*” will not be liable to pay any of the success fee: success fees are not recoverable from the paying party [save for a small number of exceptions including diffuse mesothelioma claims] and will therefore have to come out of the client’s damages** [see ss.58 and 58A of the Courts and Legal services Act 1990, as amended] . As currently drafted, a prospective client may not appreciate that (a) there is a success fee under a CFA which can be up to 100% of the base of the fees, and/or (b) that the success fee is payable by the client out of his/her damages subject to the 25% cap [see §11 above].
4. “*If your claim is unsuccessful, you will not pay your barrister’s fees, or the other side’s legal fees or expenses.*” – A number of points arise:
   1. Under a conditional fee agreement, a barrister is entitled to terminate the agreement in certain circumstances. In those circumstances he/she may be entitled to payment of his/her base fees. It would be wrong to say “*you will not pay your barrister’s fees*” in those circumstances.
   2. Similarly, if a barrister advises the claimant to accept an offer of settlement, in particular a Part 36 Offer, but the claimant rejects that advice and fails to beat the offer, the barrister will be entitled to his/her base fees and success fee up to the date of the offer and his/her base fees thereafter. Again, it would be wrong to say “*you will not pay your barrister’s fees*” in those circumstances.
   3. As for payment of “*the other side’s legal fees or expenses*”, if a claimant is found to be guilty of fundamental dishonesty then he/she is likely to be ordered to pay the other sides legal fees and expenses. The statement that you will not have to pay the other side’s legal costs if the claim is unsuccessful, without qualification, overstates the position.
   4. It might be better to state, “*As a general rule, if your claim is unsuccessful ….*”
5. “*However, you will may still need to reimburse our expenses.*” – Two points:
   1. “*will*” or “*may*”?
   2. What expenses?
6. The table includes a suggested fee for “*Assistance with drafting of claim form*” – It would exceptional for a barrister to assist with the drafting of the Claim Form. If such assistance was given it would be minimal. A far more relevant [and costly] exercise would be “*Drafting a statement of case*” such as the Particulars of Claim. We therefore suggest that the table of costs includes “*Drafting a statement of case*” instead of “*Assistance with drafting of claim form*”.
7. The current example does not draw any distinction between conventional personal injury claims [road traffic accident, employers’ liability or public liability] and medical negligence claims. Many medical negligence claims are worth less than £25,000 but the fees charged by barristers are far greater than those charged for conventional personal injury claims. Further, very few medical negligence claims valued at less than £25,000 are allocated to the fast track. This is due to (a) complexity, (b) number of experts, and (c) likely length of hearing. A fees matrix based upon fees in conventional personal injury claims would not provide a meaningful estimate of fees for a medical negligence claim. The BSB may wish to give consideration to identifying the types of claims included within the definition of “*Personal Injury Claims*” in the text of the example. An alternative would be to make clear that it does not apply to medical negligence claims.

**DARRYL ALLEN QC**

**Chair of the Personal Injuries Bar Association**

**29th August 2018**

1. The advocate’s fees for Fast-Track Trial costs are dealt with separately and are fixed by the Civil Procedure Rules. [↑](#footnote-ref-1)
2. For example see the Civil Procedure Rules and the Limitation Act 1980. [↑](#footnote-ref-2)
3. Under the Law Reform (Miscellaneous Provisions) Act 1934 [↑](#footnote-ref-3)
4. Under the Fatal Accidents Act 1976 [↑](#footnote-ref-4)