



A FOIL Update **September 2009**

Fast track predicable costs: confidential report to members and request for further input

Introduction

As you know, in Chapter 22 of his preliminary report Lord Justice Jackson reported that his and his panel of assessors' unanimous view was that they should take forward the recommendation included in the Woolf report, to extend predictable (in effect, fixed) recoverable costs across all fast track cases. Working groups have now been established to take forward that plan, across RTA, EL, PL, Disease and Housing Disrepair. The first working group mediations took place during the first two weeks of September, focusing on RTA and EL Accident cases.

The FOIL Response

Many thanks to those members who responded to the FOIL Consultation and fed in comments to inform the debate. It is clear from the responses that there is support for a predictable costs regime for fast track cases across the work types mentioned by Lord Justice Jackson (although concerns still arise on the suitability of some disease cases). Members believe that predictable costs should apply pre and post issue and favour the approach set out in Table 22.2 in the Jackson report (circulated to FOIL members as Appendix 1) which has three post-issue stages rather than one as in Jackson LJ's alternative approach. Members felt that those stages were roughly workable, perhaps with a small tweak to use time before trial as a payment point rather than listing, as practice on listing varies from court to court. Kennedys' client survey conducted at the time of the preliminary report indicated that 94.9% of clients who responded were in favour of predictable costs on a matrix basis as outlined by Lord Justice Jackson.

The Mediations

Two mediations have now taken place, conducted by the CJC and attended by representatives from both sides of the industry. FOIL was represented by Anthony Hughes at the first mediation and Dan Cutts at the second. Data on current costs, prepared by Professor Fenn, was provided to all representatives before the meetings. As reported in the press, before completion of the RTA mediation APIL withdrew from the negotiations, giving as its reason the focus on the figures alone when in its view the process itself should also have been under discussion. All of the other claimant representatives and unions have remained a part of the process.

The details of the mediations are strictly confidential and it is not possible to report on those at this stage. Data is now being gathered for EL Disease, in preparation for a mediation in early October. The process will then move on to PL, again with data collection, with further mediations in October.

General Principles

There are obvious points of detail and principle that will need to be addressed:

- The methodology of the mediation/negotiation process. There is a strong view within the defendant lobby that the process of trying to agree figures must not be simply a horse-trade/split the difference negotiation, but must be based on an analytical approach. It is important that all the implications of the changes are identified to avoid the dangers of "the law of unintended consequences" which has led reforms stray in the past. FOIL also aims to ensure that the overall objectives of Lord Justice Jackson's report are supported.
- The starting point. In general terms, should the outcome be looking to achieve a reduction in costs, an adoption of the level of costs incurred at present but within a defined framework, or an increase in costs on the basis that any information on past cases will be historical? The defendant lobby takes the view that the purpose of a predictable costs regime is to reduce costs from their current high levels, not to embed current figures in a regime going forward, particularly as a fixed costs regime itself reduces assessment and admin costs.

Conclusion

The defendant lobby supports the concept of predictable costs and supports the work of Lord Justice Jackson and the CJC to bring the interest groups together. The defendant lobby is keen to continue the mediation process but a key issue is the need to reduce current costs which are disproportionate and too high. FOIL will continue to work hard to find common ground for agreement.

Of particular interest at this stage are your views on the applicability of fixed fees to EL Disease cases: -

- What class of Disease cases are suitable?
- Should the groupings used in CPR Part 45.23 be used?

The PL mediations are likely to throw up similar issues over what is to be included. The steer given was that Local Authority pavement trips were an obvious target. Again, your views on what might be suitable would be welcome.

If you have any comments on the issue of predictable costs or points to contribute to the mediation process please contact Shirley Denyer on shirley.deny@foil.org.uk.

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