Costly Mistakes

Patrick Allen (Solicitors Journal 22 April 2008) seems to have hit a nerve with Andrew Parker (Solicitors Journal 24 June 2008).

Background

Before 1995 insurance lawyers were complaining a problem for their clients was the ability of claimant lawyers to be paid win or lose, certainly with legal aid cases, and the inability of a successful defendant to recover costs.

Conditional fee agreements were seen as a solution to these concerns yet defendant lawyers, who remain in the comfort zone of risk free retainers rewarding good and bad advice alike, are still complaining.

Those funding reforms closely followed procedural reforms which introduced the concept of proportionality.

Proportionality

Costs, at least when assessed on the standard basis, must not only be reasonably incurred but be proportionate.

Mr Parker considers the courts have been unable to use proportionality as an effective control mechanism. I must say that this is at odds with my own experience of assessment where proportionality is often cited as the reason for reducing costs.

Furthermore, costs which, at face value and assessed purely by reference to the value of the claim appear disproportionate, may be recovered where a defendant should have accepted a reasonable offer to settle made by the claimant, so that assessment is made on the indemnity basis.

Rates

It suggested that it is the defendant who risks abuse, generated by the use of conditional fee agreements, on the basis the claimant does not have to pay any charges. Just the same point, of course, could be made about claims run with the support of BTE insurance.

This view pre-supposes that the defendant is able to insist on fixed fees and, 'competitive' rates. Is that so? Costs estimates and schedules of costs from defendants often make interesting reading when considering this question.

It is right the rates claimed by defendants will sometimes be lower than the relevant guideline rate but often the rates are in the same region as the guideline rate and it is not unusual to see rates, apparently agreed with insurers, above guideline rates.

Abuse by the claimant?

Even assuming there is a difference in typical rates for claimant and defendant lawyers respectively, is that likely to mean abuse of the kind described by Lord Bingham in Callery a reality?

Such a risk would only materialise not just if solicitors acting for claimants agreed an excessive hourly rate with their clients but where the court were to allow such rates at the stage of assessment.

However, guideline hourly rates restrict, in the majority of cases, the rate that can be recovered by the successful party, whatever the terms of the retainer.

Furthermore, if it is considered the nature or value of the claim is such that it should have been handled at a lower level the hourly rate allowed will be only that for a fee earner of the appropriate grade, whatever the seniority and experience of the lawyer actually involved.

Abuse by the defendant?

The proposed solution to the perceived problem is fixed costs.

But would this proposal increase the risk of abuse by the defendant?

Defendants are often prepared to spend money, above and beyond that which is recoverable, in the event of success including, of course, cases involving technical challenges.

Fixing, unilaterally, the costs of the claimant gives the defendant, who so chooses, free reign to deploy greater resources which could make pursuing a claim uneconomic.

This risk is compounded by the funding arrangements made by defendants with their lawyers remaining largely opaque.

The real solution

Perhaps many of the problems perceived by Mr Parker arise from defendants not using the opportunities which are already there to deal with claims quickly and efficiently.

The pre-action protocol has been around for a decade, encouraging early admissions of liability, disclosure of information on quantum and settlement.

Part 36 of the Civil Procedure Rules encourages claimants, as well as defendants, to make offers and perhaps defendants need to engage with ADR more readily in many cases so that indemnity costs are not incurred.

The current system, although no system is ever perfect, helps apply a level playing field to parties who, in terms of resources and legal sophistication, are usually in very different positions. Unilateral imposition of fixed costs on claimants would be a very blunt instrument indeed likely to cause injustice, certainly where there is no reciprocity.

Effective use of procedures already in place, rather than the cost and difficulties of endless reform, would surely deal with the concerns raised.

Technical challenges should indeed now cease. These incur costs about costs. They polarise the representatives when it is well recognised that good working relationships lead to less behavioural issues and better outcomes for all concerned.

That seems to be the clear view coming down from the Court of Appeal. For example, in Jones v Wrexham Borough Council [2007] EWCA Civ 13456 Waller LJ noted that the court had "… sought to discourage the taking of technical points by defendants …" Perhaps it is defendants, not claimants, who are turning a blind eye to this message just as Lord Nelson, prior to the Battle of Copenhagen did to his commanding officer.