

Review on Fixed Recoverable Costs by Lord Justice Jackson

Submissions on the proposal to extend the Fixed Recoverable Costs by Farleys Solicitors LLP

Introduction

Farleys Solicitors LLP are a North West firm with offices in Manchester, Preston, Blackburn, Burnley and Accrington. We have a specialist Abuse Claims Department headed by Jonathan Bridge who has over 20 years experience of acting for abuse victims. Our lawyers are members of the Association of Personal Injury Lawyers and the Association of Child Abuse Lawyers. The range of work we deal with includes historic abuse and institutional abuse. We have a particular specialism in claims on behalf of children who have been failed by Social Services resulting in avoidable abuse. Instruction in such cases is normally received from the Official Solicitor and these are often termed “Failure to Remove” claims.

The specialism of the department is recognised by the Legal Aid Agency and we are franchised by them to carry out this area of work.

We have also been invited to assist the Independent Inquiry into Child Sex Abuse.

These submissions are therefore made in relation to the perceived impact that any extension of the Fixed Recoverable Costs regime may have on victims of abuse.

Failure to Remove cases

A typical Failure to Remove case involves a group of siblings who over a number of years have suffered physical, emotional and possibly sexual abuse and neglect at the hands of parents or other family members. Such abuse was avoidable because a reasonable and competent Social Services department should have intervened to remove the children sooner.

The claim is therefore brought by the Official Solicitor on behalf of the children against the Local Authority for negligence and breach of duty and on occasion a breach of the Human Rights Act.

These children are the most vulnerable members of society. Notwithstanding the abuse they will often have come from very difficult backgrounds and pre-existing genetic problems or conditions such as foetal alcohol syndrome are common.

These are complex cases dealt with by a limited pool of specialist lawyers. Cases are extremely complex and expensive to pursue.

Before liability can be established the children's full Social Services records need to be reviewed. These can often run to 20 or 30 lever arch folders of documents which have to be carefully considered.

Thereafter an Independent Social Work Expert needs to prepare a report. Such reports will normally cost upwards of £5,000.

Only at that stage can liability be established. In the majority of cases Social Services accept that they have failed the child and the dispute is often restricted to the date on which the child should have been removed from its parents care. The Claimant often alleges removal at birth whereas the Defendants concedes removal at some point between birth and the eventual intervention.

In terms of liability therefore these are extremely difficult cases and have a significant "upfront" cost burden.

The other significant difficulty in these cases is that quantum can often not be addressed until liability has been resolved. The date on which the child should have been removed is crucial to quantum. If the child should have been removed at birth it is likely that all psychiatric injury caused will result from the avoidable abuse.

If the child should only have been removed a matter of months before the eventual intervention the Defendant's may have a strong argument that a lot of the damage caused to the child would have been caused in any event regardless of their negligence/breach of duty.

It is therefore often important to establish the date of removal before medical evidence can be commissioned.

The significant costs in doing this therefore have to be incurred before we have a clear idea of the potential value of these claims.

Medical evidence is also extremely expensive. An expert is not merely looking at the injury but at causation. The expert may have to consider pre-existing genetic or other factors. The expert may have to consider the extent to which abuse and neglect prior to the date on which the child should have been removed would have caused long term problems regardless of the subsequent abuse. The apportionment of symptoms is an extremely difficult process and only once that medical evidence has been obtained can consideration be given to quantum. Often an Educational Psychologist is required in addition to the Child and Adolescent Psychiatrist and again experts fees are often £5,000 or more.

Once all of this work has been done quantum can be considered. We have two Infant Approval cases in Court today where the children are receiving £5,000 each for a "Failure to Remove" case. These two siblings were extremely lucky, were placed in a fantastically supportive home and have emerged from their early life experiences completely unscathed. Two other brothers for whom we act have been less fortunate and at a recent Joint Settlement Meeting were offered a combined total of over £1.5 million for failings by the Local Council during their childhood.

At present these cases are all treated as multi-track cases and there is never any suggestion that fixed costs should apply. The Defendant's recognise the complexities of these cases and whilst proportionality is always an issue it is widely acknowledged that it is impossible to predict quantum until a significant amount of work has been carried out. For this reason it is rare that you see Part 36 offers from the Defendant's in these cases and the court would not be able to approve any settlement until detailed medical evidence was to hand outlining the extent to which ongoing symptoms are attributable to the Defendants failings.

It would be simply impossible to try and run these cases if fixed costs were to apply. We would have no idea at the outset as to the potential value of the claim. These cases are far more like Clinical Negligence cases than Personal Injury cases. You only begin to build a picture of the child and the extent to which their education may have been affected when you have had the opportunity to review Social Services records, GP records, Hospital records, CAMHS records and Educational records. If there is some suggestion at the outset that a complex case of this nature may be subject to a fixed fee which may in some way be proportionate to the value of the claim it would be impossible to risk assess the case and decide whether it was feasible to accept the claim and whether it was cost effective and proportionate to commission expert evidence.

The first point we would wish to make therefore is that it would be wholly inappropriate to apply a fixed costs regime to these complex "Failure to Remove" cases and if this were applied many abused children would be deprived access to justice.

Independent Inquiry into Child Sex Abuse

There are points that were raised in submissions put to the Independent Inquiry into Child Sex Abuse and also at the discussion forum which we were invited to attend on 29 and 30 November 2016. The link to the transcript of the discussion with the Inquiry is https://www.iicsa.org.uk/key-documents/919/view/iicsa291116_a.pdf

Representatives from leading Claimant abuse firms and from Defendant Insurers discussed the many issues facing abuse victims and costs and in particular the suggestion of a fixed costs regime were to the fore in our discussions.

We believe that Professor Alexis Jay OBE and her team will be looking very carefully at costs in relation to abuse claims and this may ultimately form part of her recommendations when the Inquiry has concluded. We would encourage Lord Justice Jackson to work with Professor Alexis Jay and ensure that careful consideration is given to abuse victims being treated separately from mainstream Personal Injury Claimants in light of the particular difficulties they face and the unique issues raised by this area of law.

Legal Aid Agency

The Legal Aid Agency already recognise Abuse Law as a separate entity from mainstream Personal Injury work. The Legal Aid Agency grant franchises in "Actions Against Detaining Authorities". We have such a franchise and it primarily covers actions against institutions as a result of abuse. This can include the aforementioned "Failure to Remove" cases but also includes any situation where a client or adult is abused in a school, prison, hospital or as a result of Social Services failings. Examples of cases we have recently dealt with under the franchise include acting for victims of the Rochdale paedophile gangs and representing adult victims of historic abuse at Stonecross School in Cumbria.

The Legal Aid Agency already recognise that Abuse Law is a different area from normal Personal Injury work and we would therefore contend that any extension of fixed recoverable costs should consider treating Abuse Law as a discrete separate area.

Historic Abuse Cases

We have indicated above the difficulties of litigating a "Failure to Remove" case.

Similar problems apply in historic abuse cases. Damages are rarely significant. Even if a Claimant suffers multiple rapes during childhood damages for Pain, Suffering and Loss of Amenity will rarely exceed £100,000. Other heads of claim are often difficult to pursue. It is a sad fact that the majority of abuse victims are already vulnerable possibly

because of learning difficulties or a childhood spent in the care system. It is often difficult to argue that the abuse has made any significant difference to the lifetime trajectory of the victim particularly in terms of Loss of Earnings.

The costs in pursuing these claims are significant and “front ended”. When you take initial instructions you have to consider that the abuse often took place decades ago and that you will immediately need to get together as much corroboratory evidence as you can to establish whether there is a strong enough claim to pursue.

This can include collecting and considering many sets of records from Social Services, GP, CAMHS, Hospital, employer and school. You may be trying to trace witnesses to an event which took place over 30 years ago. You may be trying to trace witnesses in whom the Claimant has confided during the last three decades. You will be discussing very sensitive issues with a Claimant and it takes a considerable time to address these claims properly. Expert evidence in the claims is expensive – an expert is often not only looking at quantifying the claim but also addressing limitation issues and causation problems where there may be pre-existing medical conditions. An average report from a Consultant Psychiatrist in an abuse claim will cost at least £3,500 and the writer recently received a jointly commissioned report from an expert which cost £10,000 in a claim that eventually settled for £20,000.

Victims of abuse would undoubtedly find it much harder to find solicitors willing to act for them if a fixed costs regime were to apply.

Benefits to Abuse Victims

In the majority of Civil Claims and Personal Injury work the only desired outcome to litigation is financial. This is not the case for abuse victims. Abuse victims want recognition for what they have been through. They want “closure”. The extent of damages recovered is not always the main priority of the victim and any award is seen by them as an end to years of suffering.

Position of Defendants

It would be interesting to learn how Defendant’s feel about the possibility that fixed costs be extended to cover abuse claims.

As a firm specialising in the Claimant side of this work we find that there is a similar limited pool of solicitors who act for the Defendant Institutions and insurers. If you have a Claimant who was abused whilst a Cub Scout you know there is a fair likelihood that the response to the Letter of Claim will come from BLM. Defendant firms have specialist teams dealing with this complex area of work and they too recognise the difficulties in litigating such cases. It is rare if ever for us to face arguments about proportionality of costs when we come to try and agree them at the conclusion of these cases.

Equality of Arms

Were a fixed costs regime introduced we would have to radically reconsider the way in which we litigate these cases. We would have to attempt to deal with the cases without reviewing the documentation fully. The Defendants would have no such financial limitations. Claimant abuse victims would be put at a considerable disadvantage. If the value of the claim was potentially not significant we could not justify spending many hours reviewing records for a Claimant. The Defendant's would still carry out that process and have a significant advantage over the Claimant.

Incentive to Litigate

Another concern about the proposed costs regime is the encouragement to litigate. The further a claim progresses the higher the costs recoverable. This would be wholly inappropriate for abuse victims. In the vast majority of cases that we deal with as a department settlement is achieved without the need for issue of proceedings. A moratorium on limitation will normally be agreed at an early stage. Evidence is then gathered and the parties will discuss the merits of the claim. If the Defendant's are prepared to make a concession (as is usually the case) medical evidence will be considered. The vast majority of the cases we presently deal with are concluded at a Joint Settlement Meeting without the need for proceedings being issued. This is in all parties interests. In particular it is not in the interests of the Claimant victim to have this matter put through the Courts. The stresses of coming forward in the first place are immense and many victims would not want to pursue matters if they thought that the claim had to be progressed through the Courts towards a Trial. Conversely, on the basis of the proposals, the only way to make the case cost effective may be to issue proceedings at an early stage and try and push towards Trial as the stepped fees increase at each stage of the litigation.

Access to Justice for Abuse Victims

As a result of the above we believe that any extension within the fixed costs regime that would impact on abuse claims would restrict access to justice for abuse victims. Lawyers simply could not afford to carry out the work to a requisite standard if fixed costs were to apply. We already have difficulties finding experts who will work at Legal Aid rates and if fixed costs were to be introduced these rates are likely to be reduced still further. Not only will the Claimant be at a disadvantage in terms of the work that the lawyers could carry out but they will also be disadvantaged in the experts they can choose to instruct and in many cases they will be forced to proceed as litigants in person.

The nature of their claims means that this is something that the majority of victims would not contemplate. It is hard enough opening up to the solicitor they instruct without having to then take on the Defendant in person who they feel was responsible for their abuse.

Judicial Acknowledgement of the Complexities of Abuse cases

You find in most major Court centres that specialist Judges are appointed to deal with abuse cases. In London Master McCloud has intervened in the Royal Court of Justice and gathered together a working party to look at child abuse cases and revision of Pre-Action Protocols to help lawyers in the early stages of these claims.

As well as encouraging Lord Justice Jackson to work with Professor Alexis Jay of the Independent Inquiry into Child Sex Abuse we would also strongly encourage Lord Justice Jackson to work with Master McCloud.

Conclusion

For all of the above reasons as a department specialising in claims on behalf of abuse victims we feel that any extension of the fixed costs regime to cover this area of work would be a disaster for victims. These are complex cases with heavy initial cost burdens which could not be properly investigated or litigated if severe restrictions were placed on the funding available to victims.