# Access to Justice: The Bach Commission

## Response by Thompsons Solicitors

April 2016

THOMPSONS
SOLICITORS

STANDING UP FOR YOU

## 1. Please provide us with your name, contact details and the name of your organisation and your role within it (if applicable)

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## 2. What are your three biggest concerns about the state of access to justice in the UK?

Numerous, sweeping, unpiloted changes to the justice system in the last 6 years have left the most vulnerable in our society with limited access to justice. Extraordinary rises in Tribunal fees and court fees, significant changes to the availability and scope of Legal Aid, and the introduction of fixed costs in the majority of personal injury (PI) claims, have meant that legal advice and support is not readily available to those who need it most.

The changes to the justice system have further entrenched the imbalance in power between the claimant side and the defendant in PI. Two significant changes in particular have weighed the system against those have been injured.

Whereas the previous funding system in PI relied upon a conditional fee agreement for claimant-side lawyers with a success fee and insurance premium payable by the polluter, we now face a fixed costs regime and deductions from the claimant's damages. The previous ability of claimant solicitors to build up funds for 'risky' cases, cases that were investigated but eventually turned down and cases that were taken and lost, has gone. In PI the individual claimant has all to prove and the corporate defendant has only to deny, and this 'David vs. Goliath' inequality is now even more skewed in favour of the insurers. The result is more claimant law firms in financial difficulties, with a lack of security and a hugely reduced income, and increasingly merging in an effort to remain sustainable.

We fear that the lack of access to justice is having a significant impact on health and safety in the workplace. A union presence and the threat of legal redress have been two aspects which have enormously improved the standards of health and safety in workplaces across the UK over the last century. But, while access to high quality legal advice is still available for those with union membership, for those without the backing of a union, access to free legal advice and representation is becoming increasingly limited. If this continues, many bosses, especially in poorly or non-unionised workplaces, may decide that they do not need to maintain a focus on health and safety as the chances of redress for their actions will be substantially reduced. At its most extreme, with fixed costs and a massively cut back Health and Safety Executive, employers may calculate the cost of non-compliance with health and safety and deem it worthwhile financially.

It is worth noting that the work of claimant lawyers has been made far more difficult and time-consuming by the Enterprise and Regulatory Reform Act which removed civil liability for health and safety breaches and thereby required claimant lawyers to prove employers' negligence in each individual case.

## 3. Please outline in more detail the way in which your organisation's work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice.

Thompsons is a UK-wide law firm specialising in personal injury and employment law. At any one time we will be handling over 10,000 employment cases and we run over 35,000 PI cases a year. We also provide work related criminal advice and representation. We therefore come into extensive, daily contact with the civil and criminal justice system and constantly experience the limitations on access to justice that have come with current policy. The majority of our instructions are from trade union members utilising their union's legal schemes and to that extent our perspective will be different from a High Street or 'corporate' PI law firm.

In this submission we are focussing on the areas of the market in which we operate.

### LASPO

After the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), claimant solicitors can still claim a success fee but it is now a fixed percentage of up to 25% of the damages (for personal injury and past losses) and is taken from the injured person's compensation, not from the guilty party. We have little doubt that this has acted as a deterrent for many solicitors to take on low value or high risk cases. It means there is effectively a constraint on what cases lawyers will run and winning now comes at a price for the injured.

The issue is magnified where the victim is a child or lacks mental capacity with success fees and after the event insurance premiums also expected to be paid out of the compensation. The absence of a workable procedure for the court to approve damages and solicitors' success fee deductions for such cases, has caused unnecessary delays and inconvenience for the families of those victims. Despite a late amendment to the rules to include a procedure in cases up to £25,000, it is our view that there are still serious shortcomings and there is still no procedure in place for cases where the damages are greater than £25,000.

The prospect that up to a quarter of a claimant's compensation might be taken out of their pocket has meant that some will not bother taking action in the first place and others will proceed without the expertise of a lawyer. Yet, in every case that we have taken over from an unrepresented claimant, we have seen insurers offering lower damages to the claimant than we have secured for them.

Following the introduction of LASPO, the reach of the previously established road traffic accident (RTA) Portal - a system purely used until then for RTA claims worth less than £10,000 – was expanded both horizontally and vertically to include employers' and public liability as well as claims worth up to £25,000. This change meant that recoverable costs were fixed at an extremely low level and, it is now proposed, will also see limitations placed on the medical experts that solicitors can use – see MedCo below.

## Legal Aid

Changes to the threshold for Legal Aid have contributed to an overall decrease in access to justice. In magistrates' courts, a household must have a disposable income below £12,475 to qualify for legal aid. This level is so low it even excludes those – such as bus drivers or nurses or teaching assistants - who most people would not consider to be wealthy.

At Thompsons we have a 95% success rate in criminal cases - meaning they either have no further action taken or the client is acquitted. That success rate reflects the specialist expertise that we have in-house.

## Tribunal Fees

The introduction of Tribunal fees and the massive rises in court fees have severely limited access to justice. Being charged to take your case to a Tribunal is a large barrier to most people on average incomes, unless they know that they are likely to win. As most people do not have the luxury of certainty, or, at a time of financial uncertainty after termination of their employment, do not have the money to cover the fees if they lose, the number of cases being taken to Tribunal has fallen dramatically. Even where a union member is loaned fees, there is hesitation about bringing a claim and case numbers have fallen.

A House of Commons Library note (January 2015) showed that between October 2013 and September 2014 over 32,000 fewer single claim cases went to Tribunal compared to the previous year (a decrease of 64%) and there were over 3,500 fewer multiple claim cases (a drop of 67%). An Acas report (July 2015) showed that 26% of claimants who could not settle their case with their employer through Early Conciliation were then put off lodging a claim in the Tribunal due to the fee.

## Court Fees

Thompsons is concerned that recent increases in court fees are indicative of a worrying general direction of travel in the government's approach to the civil justice system. We oppose the increases as we oppose those that were forced on the injured in personal injury claims, and on those with employment disputes by the coalition government.

When the government consulted on 'enhanced court fees' (a six week consultation ending 27 February 2015), the majority of consultees disagreed with the proposals, which included fee increases of over 600%. Yet still the government went ahead. This means that, for example, a claimant seriously injured in an accident caused entirely by the fault of another and whose case is worth in excess of £200,000 because of her subsequent loss of earnings and care needs, must now find £10,000 for the initial court fee in order to bring her damages claim.

Even where a claim is successful, whether through litigation or not, complacent reluctance to pay damages or comply with orders by some defendants, employers and insurers creates an additional hurdle of enforcement when payment of further court fees becomes necessary.

We are concerned that the government's cost-cutting and revenue-raising zeal is blinding them to the range and number of expert voices expressing concern with its fees regime in the courts and the Tribunal.

Increases in court fees have a negative impact on access to justice. While the government points to fee remissions as the solution, in reality they are little more than a fig leaf. For each separate fee incurred, a separate application for remissions, with detailed evidence of income, must be provided. The guidance booklet itself is 31 pages long and the preparation of applications can take up to 30 minutes each, increasing the costs of the case every time a court fee is incurred. Such work also has an impact on the time of court staff, represents unnecessary bureaucracy and a backwards step to the government's stated march towards efficiency and cost-cutting.

## Fixed Costs

Fixed costs now apply in every case with a value of less than £25,000 and it has recently been proposed by Lord Justice Jackson that they should be massively extended across all PI.

If one accepts that an individual pitched against an insurer is a vastly unequal battle, then to restrict what work a lawyer will be paid for whilst representing those individuals impairs them even further.

Fixed costs mean Defendants (both insurers and employers):

i. Can calculate the maximum cost of negligence and choose to take risks accordingly, meaning the deterrent effect of litigation is reduced or eradicated and;

ii. Have no incentive to 'behave' in litigation so as to achieve a speedy and equitable outcome.

Fixed costs also mean lawyers are incentivised to keep their costs in a case below the fixed costs limit – if the costs in a case can be kept below the fixed limit the difference is a bonus for the lawyers.

For lawyers, fixed costs leads to:

i. The levelling down of cost, and therefore quality, of case handling staff;

ii. An incentive to take on easier cases and avoid the difficult (to maintain volume);

iii. Less time being spent investigating prospects of success in cases (if on its face there are not reasonable prospects the matter will be dropped);

iv. The removal of any incentive to spend the time required to maximise damages;

v. Cases settling earlier (to maximise turnover);

vi. A move to ever bigger firms which allows them to develop volume and leverage efficiency.

## MedCo Portal

The MedCo Portal was introduced in October 2014, purportedly to tackle unhealthy business practices in how medical experts are secured and instructed. The impact of the additional regulation has been to prevent claimant representatives from selecting those medical experts and agencies they are confident can provide high quality reports in an appropriate timeframe, and who are able to provide an appointment in a location which is reasonably close to the claimant's home. Now, claimant representatives have to go through an expert selection lottery, frequently being compelled to select agencies or experts of which they have little or no knowledge and with which they have no agreed business terms.

Rather than address problems with identified experts or agencies known to have behaved inappropriately or understood to have terms of business that are in some way anti-competitive (that is to adopt a surgical approach to a targeted concern), the government chose instead to introduce wide-ranging and over-prescriptive regulation. Unfortunately, the random way MedCo operates means solicitors no longer have true freedom of choice, thus undermining an important aspect of the value we add to our clients: if the selection of an expert is random, our ability to exercise our own expertise in finding an appropriate expert for any given client is reduced. This plays into the hands of the insurer-backed defendant and further decreases competition in the market. This move appears to be in stark contrast to the majority of government rhetoric that 'the free market works'.

## Small Claims Limit

Further threats to the ability to access justice in future includes a proposed increase in the Small Claims Limit. Over five months after the Autumn Statement, there is still no independent verification of government and insurance industry assertions that the reason for increasing the small claims limit from £1,000 to £5,000 is to tackle a 'fraud culture'. While we wait for the promised consultation and accompanying impact assessment from the MoJ, the only evidence base is provided almost exclusively by the insurance industry and its representatives. Trust in their transparency must be open to question as they stand to gain substantially from any increase. With access to justice for claimants being reduced from all sides, this shows, yet again, that the government is in thrall to the insurance industry and claimants are being put to the back of the queue.

## 4. In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers.

The first step which should be taken to improve access to justice is the complete, and immediate, removal of fixed costs in PI. This would give claimant-side lawyers more scope to identify and research cases, and would ensure the best possible service is given to claimants. It is not suggested by this that there should be a costs 'free for all'. Costs sought by the successful party should, as they have always been, be open to challenge by the losing party through assessment and would have to be - in order to be recoverable - justified in that process as 'reasonable, necessary and proportionate'

The introduction of Tribunal fees and court fee increases have deterred thousands of people from taking their claim any further. A move to costs following the event in employment cases is controversial as it is thought it may encourage a more litigious attitude amongst the parties but the reality is that there are now few cases where professional help is not engaged in any event. Costs in employment cases would go some way to helping ensure that proper access to justice is applicable throughout the system.

Encouraging trade union membership is a key to ensuring access to justice. As a trade union member, workers can seek legal advice and representation without worrying about the costs. Strong unions with engaged members also help to drive up environmental and workplace standards and hold poor employers to account when they ignore essential health and safety legislation.

## 5. Please outline in more detail, ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system.

The major qualification for any future changes to the justice system must be that they are piloted first, to judge their effects and see how they affect access to justice for claimants. We have seen a number of radical overhauls to the system in recent years and all of these have been introduced without any piloting and all of them have massively tipped the balance towards the defendants.

We agree that there should be a better use of technology in the courts and litigation systems. However, this must be introduced sensibly and with the system at its heart, rather than trying to force complicated and wide-ranging changes to a system which is not currently technologically-literate. See our attached response to the Briggs Review.

Specialisation is key. While a high street presence may be seen as desirable for ease of access, it is vital that clients reach a specialist as soon as possible. A lawyer who provides advice on a range of legal issues without specialising cannot provide the depth or speed of advice or achieve the same outcome as someone who spends all their working time on a particular work type.

Where a legal claim involves a matter which could have long-term effects for the individual and/or the use of public funds, a 'general practice' approach is not sufficient. Most firms now have an armoury of specialists in a variety of fields and this should be the main focus for access to justice.

We believe that a 'kitemark' system could be introduced for specialist law firms based on their strength in depth and their ability to satisfy experience and quality criteria. This might be administered by a nominated victims' rights group and would give members of the public a clearer idea of the best firm for their case.