Competition and Markets Authority
Legal Services Study
Thompsons Solicitors submission of views
February 2016

THOMPSONS
SOLICITORS

STANDING UP FOR YOU

Thompsons is a UK-wide law firm specialising in personal injury and employment law. At any one time we will, as a firm, be handling over 10,000 employment cases and we run over 35,000 personal injury cases. In this submission we are focussing on the areas of the market in which we operate. We are not commenting on other areas under investigation, such as commercial law, family law or immigration.

Thompsons has strong views about competition, affordability and standards in legal services and we welcome the opportunity to submit to the CMA this brief analysis of recent trends and threats to competitiveness - and to the quality and affordability of the service ultimately provided to the customer.

We would be very happy to meet with the CMA to discuss our views in more detail.

Gerard Stilliard, Head of Personal Injury Strategy
Thompsons Solicitors
Congress House
Great Russell Street
London WC1B 3LW
GerardStilliard@thompsons.law.co.uk

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In our experience as claimant lawyers, the main threat to the quality of the service provided by us in personal injury (P.I.) and employment law is the agenda of the defendant or respondent to - in an adversarial system - neuter the role of claimant-side solicitors, both economically and administratively. This has led to a lack of competition as well as driving down the affordability and standards which solicitors are able to offer their client.

In P.I., insurers in recent years have enjoyed and exploited the support of a compliant government. The increase in their power over the legal market is directly linked to steps taken by this government and the coalition government which stifle solicitors' ability to execute their work in a way that provides the best possible service to their clients.

Thompsons has witnessed a closing-down of competition and a reduction in the number and variety of independent and professional solicitors firms operating in the UK.

There are several critical policy developments which have led to this.

LASPO and the Jackson Reforms

In April 2013 the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) brought most of the recommendations made by Lord Justice Jackson's review of civil litigation costs[1] into full effect. In a number of significant ways, LASPO has radically altered the operating landscape for claimant P.I. lawyers and has reduced the ability of solicitors to secure fee-earning work.

When legal aid for personal injury claims was scrapped in the 1990s, success fees were initially introduced so as to enable claimants to be offered 'no win, no fee' arrangements, with the lawyer able to recover a fee (from the defendant) to recognise the risk that if they lost they wouldn't be paid (hence 'no fee'). LASPO ended the recoverability of success fees from the negligent third party.

After LASPO, claimant solicitors can still claim a success fee but it is now a fixed percentage of up to 25% of the damages and is taken from the injured person's compensation, not from the guilty party.

This change brought about an end to the ability of claimant lawyers to be able to build up funds for cases that are investigated and turned down, as well as cases that are pursued and lost and 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 accessing advice from lawyers and experts such as doctors and engineers as solicitors' ability to spend the money to procure such expertise is limited.

Access was damaged by this move but so too was affordability – no win no fee has been maintained but winning now comes at a price for the injured. 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, or will be more likely to proceed without the expertise of a lawyer. As a result, the number of Litigants in Person has increased.[2]

Following the introduction of LASPO, the reach of the previously established road traffic accident (RTA) Portal - a system purely used 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, which has led to a dramatic rise in the number of claims processed through the Portal, came with fixed costs and, later, limitations on the medical experts that solicitors could use (see 'MedCo Portal' section below).

Due to LASPO and the more uncertain financial footing it has put solicitors on, there has been a consolidation in the marketplace. The result is fewer firms and firms growing in size.

The idea of the local independent firm is increasingly become an outdated concept and with it the access that those who prefer dealing with individuals rather than call centres enjoyed. Bringing more clients into often online instructions can be particularly challenging for those who are less computer literate.

There has been a related change in the ownership of law firms from traditional, lawyer-owned partnerships to firms owned by insurers and private equity firms. This can also impede the emphasis on the customer. One example is the acquisition of Simpson Millar by the Fairpoint Group in 2014, meaning the firm is now owned by a debt management company.

LASPO has resulted in a closing down of competition, to the detriment of the client.

[1] https://www.judiciary.gov.uk/.../Reports/jackson-final-report-140110.pdf
[2] See House of Commons Library briefing Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales', January 14 2016 at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113#fullreport

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 to be extended across all PI cases below a value of £25,000. It is a concept we have always opposed as a firm and whilst some might say "of course you would" (and yes, fixed costs are likely to have negative financial implications for Thompsons) it is on any measure a deeply negative move for injured people.

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

In RTAs we have also seen the introduction in October 2014 of the MedCo Portal, 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. What other business is compelled to select suppliers of which they have little or no knowledge on terms that they have no opportunity to negotiate?

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 we 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.

Small claims limit

With the odds already highly stacked against the consumer, people injured through no fault of their own now face the prospect of yet another attempt to limit their access to legal representation and advice through a rise in the small claims limit from £1,000 to £5,000, proposed by the Chancellor in the last Autumn Statement.

The large majority of all personal injury claims are worth less than £5,000. The change will undoubtedly make the business model of most law firms doing claimant personal injury work economically unviable and, where PI is the mainstay of their business, will drive them to the wall. Those that remain will be swiftly consolidated into a handful of very large businesses, most probably with the insurer or private equity ownership model mentioned above.

This change would make the legal services environment even less consumer-friendly. For more than 70% of existing claims, it will pit the injured individual, alone and unrepresented, against the practically unlimited resources of global insurance giants.[3] Interestingly even the Federation of Insurance Lawyers (FOIL) who act for defendants in PI claims have come out against the move[4].

The changes would disincentivise the injured party from seeking compensation - the drop of over 70% in claims to the Employment Tribunal after the introduction of fees shows the potential for putting off those who may otherwise have claimed. It also puts even more power in the hands of the insurers, who would be suddenly lifted from the burden of having to fight cases against professional solicitors. Without the advice of a solicitor, the injured party will increasingly accept an insurer's valuation of their injury which is almost certainly, in our experience, likely to be an under-valuation.

The anti-consumer practice of buying off claimants cheaply when they at their most desperate and vulnerable with pre-medical offers would be likely to become even more common in future. The increasing use of offers made even before the injured person is medically examined exploits the injured at their most vulnerable, can lead to serious medical problems going undiagnosed and places an extra burden on the NHS.

In the unlikely event of an individual taking an insurer all the way to court, s/he will inevitably face an insurer-funded lawyer in the courtroom.

The validity of these concerns have been borne out in research conducted by the Scottish Government on the impact of small claims procedure on personal injury claimants in Sheriff Courts.[5] This work showed that the small claims limit is a barrier to legal advice, even when set at a low level, such as £750, and that personal injury claimants found it difficult to assess the legal basis of their case without access to free legal advice. The small claims limit was found to have limited the availability of this legal advice to claimants and claimants found the negotiation of a settlement more difficult when their claims fell below the limit. Unassisted claimants were particularly vulnerable in personal injury litigation because they were more likely to come face to face with litigation and reparation specialists in court.

The proposal to increase the small claims limit in RTA soft tissue injuries - and conceivably for all personal injuries - is a major threat to the quality of justice injured people have access to and would take a huge amount of money out of the system to be retained by the insurers, further adding to the difficult financial context in which lawyers already operate due to LAPSO. Taking money out of one side of the justice system is not a method of improving competition; it unbalances unequal scales even further.

[3] The government also intends to remove the right to claim damages for the injury itself from the innocent victim of a road traffic accident, meaning that in most cases, it may simply not be worth bringing a claim at all.
[4] As reported in The Law Society Gazette (02.02.2016), 'Defendant lawyers to oppose small claims limit rise'- http://www.lawgazette.co.uk/law/defendant-lawyers-to-oppose-small-claims-limit-rise/5053376.article
[5] Legal Studies Research Findings No.18 (1998), 'In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation' - http://www.gov.scot/Publications/1999/01/59d47aeb-7b4a-4f82-ac03-7fb212c46801

While the government argues that their planned change to the Small Claims Limit is merely a fair adjustment, if the rise were in line with inflation since the last increase in 1999 the limit would rise from £1,000 to around £1,600, not the £5,000 proposed.

An additional concern is that this policy would open up a vacuum in the provision of P.I. legal expertise likely filled by claims management companies who are happy to offer to take limited returns for non-experts to effectively fill in forms. It is noteworthy that many CMCs are directly linked to insurance firms and their proliferation would give the insurers yet more opportunities to control both ends of the injured person's journey. This is a risk that even the recent insurer-dominated Insurance Fraud Taskforce report admitted was a concern.

The proposed small claims increase is inherently anti-consumer and anti-competition, and is a fundamental threat to the principle of equal access to justice for all. Our objections and our campaign against the change – Small Claims Big Impact – are on Thompsons' website at www.thompsons.law.co.uk/cutpremiumsnow/ .

Market regulation

The CMA statement says that one in ten users of legal services in England and Wales report receiving poor value for money. Thompsons' own customer satisfaction performance was over 97% last year. We assume the greatest dissatisfaction is therefore amongst businesses and users of other legal services.

There are many extant mechanisms to encourage a high quality service for customers. Given that the Solicitor Regulatory Authority has the power to revoke the certificates of any individual lawyer, or indeed of an entire law firm, if it feels there has been wrongdoing which harms the industry or brings it into disrepute, in our view, the legal market is already appropriately regulated.

Thompsons, as is right, has rigorous internal complaints procedures which are modelled on advice from the Legal Ombudsman. If this does not resolve matters, complaints from consumers can be taken to the Legal Ombudsman which will review the case and take forward any investigation necessary. As well as this, solicitors rely hugely on their reputation to make them attractive to clients and if they give a customer bad service or charge them more than the consumer thinks the service is worth, it is likely the customer will take their story online and let other potential customers know.

Importantly where there is negligence there is compulsory professional indemnity insurance which will meet any loss sustained by a poorly served client.

In regulatory terms, the legal services industry is far from a 'Wild West', unlike the loosely-regulated insurance industry.

If an insurer treats a customer badly or under settles a case, it can be extremely difficult to obtain redress. There are seven different regulators in the insurance industry, meaning a sea of mixed messages and excuses to pass consumers from one regulator to the next. In one instance last year, the MP Richard Burden was passed on from one regulator to another when seeking redress from an insurer on behalf of a constituent and was not dealt with effectively due to the mass of organisations to deal with. The insurance regulatory system is a prime example of too many cooks spoiling the broth.

Importantly too – especially if the government moves on PI mean that injured people are increasingly in the hands of the insurance industry for the duration of their claim and they are negotiating with insurers direct on value – insurers have no indemnity insurance if they are negligent or under settle. There is no financial come back for the consumer dealing direct with insurers on the quality of the service they receive.

The lack of clear regulation and the lack of indemnity cover in the insurance market should be a particular worry if insurers are to take over the services currently offered by specialist claimant solicitors such as us. To that there is the impact of limited competition in the market – five companies control over 50% of the motor insurance market[6] for example – meaning that there is little desire for improving accessibility or standards.

[6] ABI Data, Private Motor Insurers Rankings 2014 (gross written premiums)
https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2013/industry%20data/General%20Insurance%20Company%20Rankings%202014.xls