Commission on Justice in Wales
Call for evidence
Evidence submitted by Thompsons Solicitors
June 2018

About us

1. Thompsons Solicitors is a UK-wide law firm with a network of offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland. As the largest trade union and personal injury law firm in the UK, we specialise in personal injury and employment law for trade union members, their families and private clients. At any one time we will, as a firm, be handling over 50,000 cases.

2. In the field of personal injury, as well as running thousands of cases within the fast-track and multi-track, Thompsons is a leading specialist in handling serious injury cases, fatal accident claims, spinal cord injuries, traumatic brain injuries, amputation claims and serious medical injury claims.

3. Thompsons Solicitors handles a significant number of cases in Wales from our office in Cardiff and a small number of Welsh cases from our office in Liverpool. The cases we run for clients based in Wales reflect our focus at a national level: personal injury and employment rights. We also bring particular expertise to Wales-based clients in the field of asbestos-related diseases, where cases in Wales are run in a different legal context to England. Since 2016 Thompsons Solicitors have partnered with the law firm JM Parsons & Co, based in Llanelli, offering specialist industrial disease legal support for victims of asbestos-related diseases in South Wales.

4. We participate regularly in government consultations on a wide range of issues relevant to our trade union and private clients and as a leading solicitors firm in Wales, are pleased to submit evidence to the Commission on Justice in Wales.

Introduction

5. Thompsons Solicitors notes the positives of having a devolved justice system - bills that have passed through the National Assembly for Wales, such as The Union (Wales) Act 2017, show the advantages of Wales being able to make its own laws for employment rights and health and safety.

6. Having a devolved justice system would also provide the Welsh Government with an opportunity to redress justice system reforms pursued by the UK Government in recent years where they conflict with what the national assembly for Wales considers to be in the best interests of the Welsh people. Policies of consecutive Governments in Westminster have seen the fundamental right of equal access to justice for all being undermined both through primary and secondary legislation. The ongoing policy of austerity has resulted in the Ministry of Justice's operating budget being squeezed to the point of system-failure. The uncertainty and governmental incompetence surrounding Brexit has created an environment where rights and protections underpinned by EU membership, including in the areas of workers' rights and health and safety, are at risk.

7. We concede however, that there are potential technical aspects to devolution of the justice system which, if not addressed, would have a negative impact on our business and for access to justice for people in Wales.

8. For instance, there is currently a lot of work that is shared between our offices across England and Wales and that expertise and sharing of skills is a benefit to our clients in Wales. A separate justice system would present operational challenges for Thompsons and other firms that practise in both Wales and England, for the reasons below.

9. Currently Thompsons Solicitors work under the same courts management system in both England and Wales. If Wales had its own justice system and adopted a different management system, this would mean different offices having to handle cases in two different ways. For a Thompsons office that handles both Welsh and English cases, such as our office in Liverpool, two systems could prove very difficult. Requiring our staff to be proficient in two different court management systems would create administrative hurdles and impact the amount of work they are able to undertake.

10. In Thompsons it is common that cases we take on in Wales are settled in courts in England, particularly out of our Sheffield office, where we have a specialised fast-track team. The transfer of cases is done in order to get more cases processed and enable our clients to have their cases heard. If a Welsh justice system deviates from the English justice system, this could stop this practice from happening and whilst this could result in a positive - more cases being settled in Wales – the burden on the Welsh courts would have to be anticipated and provided for. The aim would be to avoid a limit being placed on the number of cases that Thompsons would be able to take on or, where necessary, cases being settled in court, if that is in the best interests of the client.

11. Under the current system, a lawyer's hourly rate is set by the courts and is consistent for England and Wales. Any change to the funding regime would require Thompsons Solicitors to change the charging structure regime for Welsh clients. This could limit the number and type of cases Thompsons Solicitors is able to take on.

12. A devolved Welsh justice system could mean new requirements are needed to practice law in Wales, as is the case in Scotland. Currently all Thompsons Solicitors are part of the same law society, allowing them to practice in both England and Wales. Would a Welsh justice system require new qualifications for solicitors in order to practice? Would our solicitors have to join a new law society to keep practicing in Wales? Any of these measures might restrict the number of solicitors being able to practise in Wales. If this is mirrored across other UK-wide law firms, there may be a threat to the extent to which Wales has the legal personnel required to meet demand.

13. In our view, a devolved Welsh justice system should prioritise above all ensuring access to justice for the people of Wales and promoting a strong and healthy legal services sector. We suggest that the measures outlined below would ensure that a Welsh system could learn from the mistakes of the UK Government in recent years and build a system that works to protect victims and the vulnerable, is not marked by a fundamental (and growing) imbalance between the relative strength of the defendant versus the weakness of the claimant, and provides equal access to justice for all.

Small Claims Limit – Personal Injury

14. Currently, anyone who is injured in a workplace accident or on the road can claim back the cost of getting legal help to advise them on a possible claim if their injuries are worth more than

£1,000, which is the position for the vast majority of cases. It is only very few claims that are below the £1,000 'small claims limit', which means that only a small number of people have to take on the insurers on their own or pay for a lawyer from money that is meant to be compensation for their injuries and losses.

15. Through a combination of primary legislation (the Civil Liability Bill, which re-defines the kind of injuries that should fall into an extended Small Claims Track) and secondary legislation (the mechanism for changing the upper limit of the track), the UK Government appears committed to ploughing ahead with changes which would increase the small claims limit from £1,000 to £5,000 for all road traffic accident cases, and from £1,000 to £2,000 for all other cases, including accidents at work.

16. The two main justifications for these changes are fraud and claims numbers. The issue of fraud and an increase in claims has only ever said to be a problem in whiplash cases. There has been no suggestion of fraud in workplace injuries and non-motor claim numbers have been falling for some years. The Westminster government appears intent to push through fundamental changes in all areas of personal injury where the identified 'problem' is actually only in one area, that of whiplash. If these measures are pursued, they would take away free legal advice from thousands of people every year who suffer an injury through no fault of their own.

17. In the Impact Assessment to the Civil Liability Bill, the government states that 133,000 claims per annum[1] will not proceed. We believe this is a significant underestimate. Given that there was a drop–off of 90% of employment liability claims when tribunal fees were introduced and given that, when Unison surveyed their members about pursuing a personal injury claim on their own, they found: "63% of our members said they would not have proceeded or been at all confident to bring their claim without legal representation" our estimate is that around 350,000 claims will not be pursued if the small claims limit is increased as proposed. In 2017, had the small claims limit been increased to £2,000 in non-Road Traffic Accident cases and £5,000 in Road Traffic Accident cases, it would have captured 40% of Thompsons' successful cases, or 4,190 people, with total damages of £10,231,857. The breakdown is:

a) 25% or 1,886 individuals would have been caught by the non RTA £2,000 limit. They recovered (between them) £3,216,109.

b) 77% or 2,304 individuals would have been caught by the £5,000 limit for RTA cases. They recovered (between them) £7,015,748.

18. If just one firm can calculate such a significant impact on the victims of personal injuries, it is clear what the impact would be if the experiences of all firms were combined. These changes would apply to England and Wales, but omit Scotland: a devolved Welsh justice system should urgently consider, potentially though an assessment of the Scottish model, recalibrating the small claims limit for personal injury, to ensure genuine access to free or affordable justice for the people of Wales.

[1] The Civil Liability Bill, Reforming the Soft Tissue Injury ('whiplash') Claims Process, Impact Assessment, page 23, March 2018 https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/whiplash-IA.pdf

Personal Injury Discount Rate (PIDR)

19. The discount rate is the assumed rate of return that those receiving damages from a serious, long term personal injury will be able to earn on their lump sum award. It determines whether victims receive the correct level of damages over the duration of their disability. It is only right that claimants are compensated in full, yet the UK Government's recent approach to the PIDR has led to the establishment of a revised rate which will reduce the long-term value of the damages secured by seriously injured people to cover a lifetime of needs. The UK Government's position appears to be motivated, in part, by the power of the insurance lobby which has secured the status quo when the Lord Chancellor made a long-overdue decision to revise down the PIDR to better-reflect the true long-term value of an injured person's compensation. The Government's stance is also, worryingly, based on an assumption that "over-compensation" is a regular occurrence, when in our experience that is almost never the case.

20. A devolved Welsh justice system should ensure that the PIDR is set to ensure that all who suffer an injury receive a full level of damages over the duration of their injury to meet their needs. Those investing a lump sum award of damages should not be expected to take any more than a minimal risk. Injured people who receive lump sum payments in damages must always be provided with the best investment advice. Mechanisms should be put in place to make sure no one is captured by inappropriate financial advisors, whose best interests may not always be the same as their clients.

Fixed recoverable costs

21. In a system of fixed recoverable costs, the fee paid to solicitors for their work on a case is determined by a fixed tariff, instead of being agreed to be fair and paid by the defendants or subject to challenge and assessed by a judge on a case-by-case basis. Proposals were put forward last year by the UK Government that the scope of the existing fixed costs regime covering accident claims up to £25,000 should be extended to claims involving much more serious, life-changing or fatal injuries, potentially up to a value of £250,000.

22. We have a fundamental principled problem with fixed costs. Our experience is, sadly, that where there are fixed costs, lawyers can do the minimum amount of work so as to maximise their own return. This is never more starkly shown than in the miner's compensation schemes for vibration white finger and chronic bronchitis and emphysema. In those schemes Thompsons recovered more in average damages than any other law firm. Despite the fact there were hundreds of law firms who became involved in the schemes, most firms recovered substantially less in average damages for their clients than Thompsons. Given the universality of the conditions in which the men worked and which they suffered, the stark differences in compensation are not easily explained away.

23.We accept that fixed costs are now a major feature of the personal injury world in the United Kingdom, however, an extension of it as proposed by the Westminster government, would, we believe, be a serious mistake. It would mean that the complexity and difficulty of establishing the extent of and liability for an individual's injuries, particularly when they are very serious, may not be fully and fairly taken into consideration when costs are assessed. The risk is that it would encourage law firms to do less work and cut corners.

24. As a firm, we are fundamentally opposed to the expansion of fixed costs. The case against them can be summarised as follows:

a) It is morally right that when someone has caused injury they should meet not only the compensation for the injury but also the full reasonable, necessary and proportionate costs incurred by the victim in obtaining proper damages. This is the basic principle of social justice – "the polluter pays".

b) Fixed costs remove the financial incentives on insurers to 'behave' in litigation. Where defendants can run all manner of fanciful arguments with no fear of punishment through increased cost liability, a perverse incentive is created to deny the undeniable and contest the unarguable in order to force claimants' solicitors to incur costs which cannot be recovered.

c) It is notable that those fixed costs already applied have elicited changes in the legal services market place. A dramatic squeeze on firms' operating models has led to ever greater consolidation and alternative ownership models which move away from traditional, small and medium, solicitor-owned firms in favour of large, corporate-led entities which may be managed far more aggressively in order to seek swifter, higher returns for corporate investors. This in turn has led to firms going out of business or getting into major difficulties as witnessed in the notorious example of Slater and Gordon[2].

d) Some unscrupulous lawyers unfortunately respond to fixed costs by under-settling cases rather than pursuing them rigorously and thoroughly in the best interests of their clients. Such behaviour allows for an unfair competitive advantage against more professional rivals by the recovery of the same fixed costs for less work done.

25. Furthermore, fixed costs should not be introduced in clinical negligence claims under any circumstances.

26. A devolved Welsh justice system ought to ensure that if fixed recoverable costs are implemented at all, it should only be for the lowest value fast-track cases and never, under any circumstances, should they be implemented for clinical negligence or other similarly complex cases.

For further information please contact:

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[2] https://www.lawgazette.co.uk/practice/slater-and-gordon-plans-uk-closures-after-493m-losses/5053906.article