

## Annex D: Costs protection in personal injury cases – the building blocks for defamation

### Lord Justice Jackson's recommendation

62. In his *Review of Civil Litigation Costs*, Lord Justice Jackson recommended the introduction of a costs protection regime for personal injury claims (including clinical negligence). This regime is known as qualified one way costs shifting (QOCS). He proposed a rule<sup>32</sup> to the effect that the costs that a claimant should be required to pay a defendant:

'shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.'

63. While that rule was based on the 'legal aid shield' which had existed for some time, the Government considered that it needed to be modified in two important respects before the rule could be adopted for personal injury cases, in relation to resources (or means) and conduct. In both respects it was felt that much greater certainty from the outset would be needed than the draft rule allowed.

### Financial resources: a means test

64. Lord Justice Jackson proposed that there should be a financial test for the application of QOCS – i.e. that the 'conspicuously wealthy'<sup>33</sup> should not benefit from this form of costs protection. However, as development of the QOCS regime progressed, it became clear that there was no appetite for a means test in relation to personal injury claims. There are hundreds of thousands of these cases each year, typically brought by an individual against an insured or otherwise well-resourced body. It did not seem proportionate to introduce a means test for all of these cases which would only have an impact in a very small number of cases (there was no evidence that the very wealthy were bringing unsuccessful personal injury claims in any number; in any event, the vast majority of personal injury claims settle, very few fail). The Government therefore accepted that means was not a relevant issue in personal injury cases, although it could well be an issue in other categories of proceedings were the scope of QOCS to be expanded.

### Conduct

65. Secondly, the Government considered that there should be some certainty about when QOCS (costs protection) is lost through the claimant's conduct. The Government accepted that claimants, defendants and judges needed to have greater certainty from the outset about what behaviour might result in the loss of QOCS protection. This would assist the hundreds of thousands of claimants across the country to make better informed decisions about the handling of cases.

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<sup>32</sup> *Review of Civil Litigation Costs: Final Report*, pp. 189–190, para 4.7.

<sup>33</sup> *Review of Civil Litigation Costs: Final Report*, p. 190, para 4.8.

### The QOCS regime for personal injury cases

66. The QOCS regime for personal injury cases is now set out in the Civil Procedure Rules (CPR).<sup>34</sup> It will provide protection limiting the costs that a claimant might have to pay to the other side if the claim is lost.<sup>35</sup> A losing defendant remains liable for the claimant's costs in the usual way. This general protection is subject to exceptions in the light of the claimant's behaviour,<sup>36</sup> and their acceptance of appropriate offers to settle. As a result, QOCS is generally available to claimants in personal injury cases from 1 April 2013, but it is (as its name suggests) a one-way protection: it is not available to defendants.
67. QOCS protection in personal injury claims does not prevent costs orders being made against a claimant (unless one of the exceptions applies). Rather, although costs orders may be made in the usual way, they can only be enforced by way of set-off against any damages (and interest on those damages) secured by the claimant. A losing claimant will accordingly (unless one of the exceptions applies) pay no costs to the defendant because the claimant has secured no damages against which the defendant's costs can be set-off.
68. In the exceptional case where there is a costs order specifically against a winning claimant<sup>37</sup> the costs would be recoverable – but only (because of the nature of QOCS protection) by way of set-off against the damages. Unless one of the exceptions to QOCS protection applies, a winning claimant will never have to pay in costs more than the damages awarded. The rationale for the approach is to retain case management discipline by deterring claimants from arguing unnecessary points or including dishonest elements within a genuine claim which incur costs.
69. The effect of 'Part 36' offers<sup>38</sup> is an important consideration. A claimant who does not accept the defendant's Part 36 offer to settle, but does not ultimately beat that offer will, on the standard Part 36 offer basis, be liable for the defendant's additional costs incurred after the time of the offer that the claimant did not accept and failed to beat. Those additional costs may be recovered by the defendant, but only by set-off up to the level of the damages awarded (on the same basis as costs of 'bad applications in good cases').

### Why not simply extend the QOCS regime to defamation cases?

70. Clearly, if it were possible to do so, it would be a relatively simple process to amend the CPR to extend the existing QOCS regime. The issue would be limited to the merits of doing so, and the Government has already accepted the case for a costs protection regime in defamation cases.

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<sup>34</sup> CPR 44.13–44.17, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#sectionII>

<sup>35</sup> ATE insurance will no longer be necessary, although it remains available to claimants at their own expense.

<sup>36</sup> CPR 44.15 in particular.

<sup>37</sup> For example, in relation to a failed application in the case.

<sup>38</sup> CPR Part 36, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36>

71. However, the Government believes that there are two fundamental differences between personal injury and defamation cases as far as costs protection is concerned that require some amendment to the existing rule.
72. First, means ought to be taken into account in a way which is simply not necessary or practical for personal injury claims: the very wealthy feature regularly as claimants in the relatively small number of defamation claims. The Government therefore believes that it is important to have a means test in defamation cases. The Government does not believe, for example, that an extremely wealthy individual who is able to pay the other side's legal costs should get any costs protection in a case.
73. Second, QOCS works to protect a claimant against a well-resourced defendant. However, in defamation cases, the less well resourced party can often be the defendant, perhaps against a very wealthy claimant. As a result, costs protection in defamation needs to be capable of applying to either (and perhaps each) side.
74. The existing QOCS rule for personal injury cannot therefore simply be extended to defamation cases. That said, the Government accepts – as recommended by the Civil Justice Council – that it provides a sound basis on which to build. This option, which seems more flexible and adaptable to the variety of scenarios that might arise in defamation cases, is preferred as a regime to protective costs orders (PCOs), as introduced in Environmental Judicial Review claims falling within the Aarhus Convention.<sup>39</sup> That said, these proposals do not seek to restrict the court's powers, for example in relation to the making of PCOs more generally.

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<sup>39</sup> From April 2013, the Civil Procedure Rules have been amended (see CPR 45.41–44) to provide a certain and affordable level of costs protection for applicants in judicial review cases within the scope of the Aarhus Convention. Protective costs orders, or PCOs, will limit claimants' liability to pay the defendant's costs to £5,000, if they are an individual and, £10,000 where the claimant is an organisation. The liability of defendants to pay the claimant's costs will be set at £35,000. The fixed recoverable costs for both the claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Convention.