PERSONAL INJURIES BAR ASSOCIATION

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PIBA'S SUBMISSIONS ON THE PROPOSAL TO EXTEND FIXED RECOVERABLE COSTS IN ADVANCE OF LORD JUSTICE JACKSON'S REVIEW

PIBA is one of the largest Specialist Bar Associations, with 1480 members who undertake the full range of personal injury work, for claimants and defendants.

SUMMARY OF PIBA'S POSITION

1. PIBA's position is that:
   (a) The scheme of Fixed Recoverable Costs ('FRC'), which already embraces most all Fast Track personal injury cases, should be extended horizontally so that all Fast Track personal injury cases are subject to a FRC regime.
   (b) FRC should not apply to any personal injury case allocated to the Multi-Track. There should be no vertical extension of the scheme of FRC in personal injury litigation.

2. Personal injury[1] litigation was treated as a special case in respect of costs by Lord Justice Jackson in his 2009 Review of Civil Litigation Costs.[2] PIBA would invite Lord Justice Jackson to continue to treat personal injury as a special case in what is a continuation of, or extension to, the review he has already conducted.

3. The particular features of personal injury litigation which together distinguish it from other litigation are that:

(a) All claimants are individuals.

(b) Almost without exception, all defendants are either governmental bodies or insurers.

(c) The claimants have been injured. They are, by definition, vulnerable and start from a position of weakness. In claims valued between £25,000 and £250,000, they may well also be disabled within the terms of the Equality Act 2010. Claims of this scale matter to them.

(d) All claimants, with a claim of merit, can expect to obtain legal representation. This will mostly be by way of a conditional fee agreement ('CFA'), much less often pursuant to before the event ('BTE') insurance. There are no litigants in person to speak of in personal injury litigation.[3]

(e) In accordance with Lord Justice Jackson's 2009 recommendations, claimants in personal injury actions have been singled out for special treatment because of the unique nature of their claims (for bodily injury) and the limited financial circumstances of most PI claimants. In order to obviate the need for such claimants to purchase expensive ATE premiums, the QOCS system was devised. In order to ensure that the damages recovered by claimants was not eroded excessively by lawyers' fees, a cap was placed on the recoverability of success fees and the level of damages for pain, suffering and loss of amenity increased by 10%; these measures are unique to personal injury claims.

(f) It is not possible to predict the value of the claimant's claim at the outset. The severity of an injury and its (actual and financial) effect on a claimant cannot be measured save with the benefit of expert evidence and after a period of time, which will vary from claimant to claimant, usually measured in terms of years, not months.

[1] By "personal injury" PIBA means any claim for damages which includes a claim for damages for personal injuries, including arising out of clinical negligence, or a claim arising out of death.
[2] And by Lord Justice Briggs in his 2016 Civil Courts Structure Review.
[3] Outside of the Small Claims Track.

(g) The amount of time and cost put into a given claimant's claim is not a function of the quantum of damages recovered. Each case is different, turning as it will on the specific features of the injury and the idiosyncrasies of the claimant's life and the effect the injury has on him.

(h) There is now a longstanding and effective culture of seeking to resolve personal injury litigation consensually and without recourse to litigation.

4. Accordingly, under the current regime for Multi-Track cases, the twin arms of the right to a court are achieved for both sides to the litigation:

(a) Access to justice: this is achieved under the current regime for all claimants. The CFA regime, coupled with QOCS, enables all claimants to litigate claims with merit. Defendants also enjoy access to justice under the special regime of QOCS which struck a new balance welcomed by the insurance industry between recovery of costs when successful and the quantum of costs payable when unsuccessful.

(b) Equality of arms: there is a level playing field between claimants and defendants. Claimant lawyers will incur differing amounts of costs on different cases, each tailored to the individual claim. Those costs will only be recoverable if they are reasonable and proportionate to that claim. If the claim is issued and allocated, costs budgeting provides a bespoke fixed costs regime where costs are payable on the standard basis, subject to one or other party contending on assessment that the budget should not be followed.

Defendant lawyers are entitled to incur as high a level of fees as they wish. There is no bar in place. They will self-regulate in the knowledge that, pursuant to QOCS, they are unlikely to recover their costs.

5. There is no need to introduce FRC into Multi-Track personal injury litigation. The current regime works effectively. Indeed, PIBA would go further and submit that reform will be positively damaging to claimants, to defendants, to the courts and to the quality of justice provided. PIBA wish to highlight the following under a FRC scheme:

(a) Setting FRC: If FRC are introduced into Multi-Track cases, it will presumably be by reference to the amount recovered. But, in cases over the proposed range of £25,000 to £250,000, there is nothing approaching a linear relationship between damages recovered and costs incurred. There is no standard amount of work incurred in a case for which damages obtained are £100,000. Nor can it be predicted at the outset how much work will need to be incurred in a case which, very

likely 2-4 years later, settles for that figure. A FRC scheme will not provide the defendant insurer with any certainty as to the amount of recoverable costs in a case until it actually settles for a given amount. Indeed, a claimant who beats his own Part 36 offer will still be able to recover costs outside of the FRC; as such costs will not be budgeted, the defendant will not even know how much these costs will be until assessment at the end of the case.

(b) Reducing access to justice: If FRC are introduced, inevitably they will not reflect the costs that would currently be incurred and recovered in some cases. The effect is that claimant solicitors, when it becomes apparent that the case is one which will require high levels of work, may refuse to take the case on a CFA. Or they may be encouraged to accelerate cases through the FRC stages whilst incurring the minimum spend. FRC put the costs in the hands of solicitors, meaning that counsel will be used sparingly.

(c) An unlevel playing field: Whilst claimant solicitors will, in certain cases, be required to limit the work they can put into a given case (if they are to recover those costs from the defendant), the defendant remains at liberty to incur as much (or little) as it wishes. The quality of investigation, preparation, advice and advocacy is skewed in favour of the defendant.

(d) Consequences:

i. It will be open to claimant solicitors to charge claimants more for their services than can be recovered inter partes. So claimants, who have through no fault of their own, complex claims will have partially to fund them out of their damages beyond the level set by LASPO. That is patently unfair on those claimants.

ii. Where claimants are unwilling to pay beyond the inter partes recovery levels, defendants will secure a key advantage and seek to apply it to encourage claimant solicitors to drop the litigation. This risk has materialised in Fast Track cases which are subject to a FRC regime.

iii. Where claimant solicitors are unwilling to take a case on, the representation vacuum will be filled by claims management companies or the claimants will be forced to become litigants in person ('LiPs').

iv. The work available to the junior Bar will inevitably reduce, thereby impacting upon progress made towards building a socially diverse profession. Barristers add value to litigation, in terms of weeding out weak cases,

promoting settlement by accurate assessment, presenting cases effectively and so forth.

6. PIBA would invite Lord Justice Jackson (and the Government) to assess the impact of the major reforms implemented in personal injury litigation, in particular through LASPO, before proceeding with any further reform in this already highly regulated area of litigation. The impact of any proposed reform, affecting as it will disabled people, should be carefully evaluated. Any vertical extension should exclude claims brought by children for the same reasons that claims brought by children are currently excluded from the requirements as to costs budgeting.

THE CURRENT COSTS REGIME FOR MULTI-TRACK CASES: HOW AND WHY IT WORKS

7. Claimants need representation: Claimants with personal injury claims worth over £25,000 are fairly bound to be under physical, financial or psychological distress. They have sustained a personal injury which will have affected their daily lives. Real issues are likely to arise in terms of losing income, needing to pay for medical treatment, having to pay the mortgage. At the same time, they are not well placed to take the appropriate steps to protect themselves given that:
   (a) They have been injured.
   (b) Personal injury litigation always requires expert evidence. In a case ultimately found to be worth £25,000 to £250,000, there may well be a considerable number of experts involved.
   (c) Personal injury litigation benefits from the skilled expertise of lawyers. Lord Justice Briggs recognised this even when considering whether low value personal injury litigation should fall within his proposed Online Court.

8. Claimants obtain representation: There is a diminished pool of solicitors in light of the various reforms in personal injury litigation. Nevertheless, a claimant who has a claim of merit can be assured that he will obtain legal representation. This will almost always be via a CFA, sometimes BTE insurance. The claimant's solicitor is prepared to take the

case on because the solicitor knows that reasonable and proportionate costs (whatever that amount subsequently proves to be) are recoverable in the event the litigation is successful. That is a workable business model.

9. Front-loading of costs: In a serious personal injury, a good deal of work will have to be done in the early stages. The cost of this work has traditionally been difficult to control. However, since 2013, the court's ability to disallow costs on the basis that they were disproportionate, despite being reasonably and necessarily incurred, has provided real protection to insurers and a disincentive to claimant lawyers to engage in 'costs building'.

10. Furthermore, the amount of costs incurred prior to costs budgeting is a matter the court will take into account when setting a budget, sometimes with dramatic consequences: see, for instance, *Redfern v Corby Borough Council* [2014] EWHC 4526 (QB).

11. Settling claim without litigation: For many years, the courts have actively encouraged parties to cooperate and to attempt to resolve disputes without the need to attend court. In personal injury litigation, this has worked. There are Pre-Action protocols and there is a rehabilitation code for personal injury claims which are designed to and succeed in leading to many cases being resolved without resort at all to litigation. There is no added incentive for a claimant solicitor to litigate as the costs rules are the same whether the claim is issued or not.

12. In a Multi-Track claim, the expectation is that the claim will take over 2 years to settle even assuming collaboration between the parties. This is a product of the claimant being seriously injured. Generally speaking, a firm prognosis cannot be given for at least 2 years. Very often, it will take longer, especially if the claimant is due to have further surgery. Claims simply cannot be valued accurately at the outset.

13. Issuing claim and proceeding to first CCMC: A claimant will generally issue early only if liability is in issue or the defendant is being obstructive, for instance in relation to providing an interim payment. Otherwise, the better approach is to wait until the prognosis is reasonably clear. When a claim is issued, at this stage, the court obtains key power over the case by way of the Costs and Case Management Conference ('CCMC'). At this point, the case is likely to be sufficiently developed that the court can make an assessment as to: (i) whether the claim should be allocated to the Multi-Track; (b) if so, the likely future costs for this particular claim.

14. Costs budgeting: The innovation of costs budgeting enables the court, at the earliest stage it is involved, to control costs expenditure prospectively. This provides the defendant with a degree of certainty as to the costs that can be incurred going forward. Such an assessment can only be made once the case is sufficiently developed that the court can make a prediction of appropriate costs spend in the given case. In the event the claimant issued proceedings very soon after the accident (for instance to seek to establish liability and so obtain an interim payment), then the court will limit its costs budgeting to the issue of liability.

15. The costs budgeting process has now bedded in. District Judges and Masters are very much more efficient at making costs budgets than at the outset – and lawyers more skilled at agreeing them. The result is that CCMCs are now routinely being conducted in 45 minute or 1 hour hearings. Junior counsel almost always attend without additional costs lawyers. The costs associated with budgeting, additional to the cost of attending a CMC at which the court will allocate and provide directions for the ongoing conduct of the litigation, are now modest.

16. PIBA fully supports the introduction of costs budgeting as a key component of the Jackson reforms. It is so successful because it manages to combine clarity for the parties (not just the defendant) as to potential costs liability in a case with an assessment of the reasonable and proportionate costs that should be incurred in that individual case. This can be achieved because the court is making an assessment in relation to the facts of a specific claimant's case and at a time when the claimant's condition resulting from his injury is sufficiently developed to enable it to do so and when the defendant's approach to the claim is also apparent.

17. Detailed assessment: The role of detailed assessment is markedly reduced in the light of costs budgeting. In the ordinary way, costs should be capable of agreement at the end of litigation.

18. The defendant can seek to reduce costs on the basis they were not reasonably incurred or that, even if reasonably incurred, they are not proportionate. This is a powerful tool in the defendant's armoury. There is still a role for detailed assessment, not least where the claim is not litigated.

19. Overall costs levels have reduced significantly: The abolition of recovery of the CFA uplift and ATE premium by LASPO has resulted in a huge reduction in costs paid by the defendant insurer. Any debate in relation to the quantum of costs should proceed only by reference to data obtained for post-LASPO cases.

20. To PIBA's knowledge, no attempt has been made to quantify these savings. In PIBA's submission, this should happen before any further steps are taken to impose further reform in this highly regulated area of litigation. So, too, should evidence be obtained to assess the ongoing frequency and costs of detailed assessments and the additional costs now (not initially) incurred by costs budgeting.

FRC SCHEME IN FAST TRACK CASES: WHAT HAS HAPPENED, WHAT CAN BE LEARNED AND HOW IT SHOULD BE EXTENDED

21. Current FRC schemes: The vast majority of personal injury litigation is road traffic and almost all road traffic litigation is for damages below £25,000. The RTA Protocol captures all this litigation.[4] The RTA Protocol has fixed costs; and where a case comes out of the RTA Protocol[5] then section IIIA of CPR 45 provides a full fixed costs regime.

22. In these cases, there will be variations in the amount that would otherwise actually be spent in litigating the claims but the variations are modest. If the case has an issue, such as an allegation of fraud, which means the trial will last more than 1 day, then the case will likely be allocated to the Multi Track. In those circumstances, the FRC regime no longer applies: see *Qader v Esure Services Ltd* [2016] EWCA Civ 1109.

23. In this way, the risk of obvious injustice – by fixing the claimant with a set amount of costs in a case in which substantial costs need to be incurred – is largely avoided. Variations in the remaining basket of cases are tolerable – claimants' solicitors handling large volumes of cases may be overpaid for work in one case, underpaid in another but should expect to come out roughly even on a 'swings and roundabouts' basis.

[4] Also, the EL and PL Protocols capture employers' liability and public liability cases respectively.
[5] For instance, because liability is in issue.

24. In *Qader* the Court of Appeal recognised, as the Government had done, that this approach did not apply where a case had been deemed sufficiently complex to move out of the Fast Track and into the Multi Track, even where its value was considerably below £25,000.

25. If the court cannot permit a case to come out of the FRC regime in this way, then the temptation is for the claimant solicitor, faced with an allegation of fraud which will inevitably lead to substantial work being involved in pursuing the claim, to recommend settlement at under-value. It is a temptation also faced by the claimant, who may otherwise be expected to pay for his solicitors' costs insofar as not recovered from the defendant insurer. This is a very real problem in those cases where fraud is alleged which are not allocated by District Judges to the Multi Track.

26. PIBA's experience is also that counsel's involvement in Fast Track cases has dropped substantially. It is increasingly rare for claimant's counsel to be involved other than at trial – and surely no coincidence that the FRC scheme provides for an advocate's fee. Defendant counsel are used sparingly but more than claimant's counsel, for instance in Small Claims Track cases where fraud is alleged.

27. PIBA draws a clear link between a rule under which the claimant's solicitor is paid a fixed sum of money, regardless of whether the solicitor involves counsel, and the diminishing use of counsel in FRC cases. One consequence of handing financial control to solicitors has been that it is all but unheard of for claimants' counsel to be offered, as part of their CFA, a share of the success fee. 0% success fees for counsel are now the norm. Another is that a problem emerged of solicitors seeking to pay counsel a lower brief fee than that fixed for the trial advocate in the Fast Track rules.

28. In the RTA, EL and PL cases operating under the current FRC regimes, the relative simplicity of these cases allows the courts to manage them by way of standard directions leading to a trial of no more than 1 day within a period of 26 weeks from issue. The position is quite different from Multi Track cases which require bespoke case management and, in just the same way, bespoke fixed costs.

29. PIBA could mount a proper argument that they should not be extended to other areas of Fast Track personal injury litigation given they often involve difficult areas meriting specialist advice, such as Noise Induced Hearing Loss ('NIHL') cases, clinical negligence

cases and travel cases. However, PIBA recognises the drive for change and, therefore, supports the extension of FRC into all personal injury litigation which reaches the Fast Track; the level of recoverable fees would not necessarily be the same across different areas of personal injury. The case, by virtue of its allocation to the Fast Track, cannot have the level of complexity or difficulty which would mandate bespoke fixed costs; a FRC regime is tolerable even in those cases.

NO JUSTIFICATION FOR EXTENDING FRC INTO MULTI TRACK PERSONAL INJURY CASES

30. No issue over access to justice under current regime: The current regime works. Claimants enjoy access to a solicitor in every case with merit. The claimants pay a proportion of their damages, if successful, to their solicitor by way of a success fee; they have 'skin in the game' and so an interest in the fees. At the same time, in practical terms, claimants are invariably prepared to allow the solicitors to run the litigation in the knowledge that the recoverable success fee element has been capped.

31. Claimants also enjoy access to the junior Bar. So long as the costs of counsel are reasonable and proportionate, they should be recoverable. They will be fixed, along with all other costs, at the CCMC.

32. No issue over equality of arms under current regime: As matters stand, the claimant can expect to enjoy a proper amount of legal service, controlled by the twin tests of reasonableness and proportionality. The defendant insurer or governmental body can incur as much or little as it chooses in the knowledge that, in the vast majority of cases, its costs will be irrecoverable. In fact, the defendant bodies, by virtue of their status as repeat defendants, are invariably able to and do impose highly competitive rates on the lawyers undertaking their work. The Government is a good example of this: counsel on the Treasury panel are paid at a severely low level, well below the market rate.

33. No known issue of excessive costs being incurred in assessing costs because fixed costs regime has not been imposed: PIBA is unaware of any data which suggests that, in light of costs budgeting, an excessive amount of costs is being incurred in assessing costs.

The costs budgeting process clearly required time for practitioners and judges to adjust; this has now happened.

34. No known issue of excessive costs being incurred in Multi Track personal injury litigation: The court now has powerful tools by which to control costs: costs budgeting and the twin tests of reasonableness and proportionality. No costs bill in a Multi Track case up to £250,000 can (nor should) escape these controls. In those circumstances, PIBA contends that there would have to be clear evidence that, in the face of this, costs were nevertheless excessive before reform by way of FRC should even be considered. Even then, the next step would be to understand how the costs are remaining excessive – with proper costs budgeting and the application of the proportionality test, this simply should not happen. Any identified problem should be met with the least invasive response – wholesale FRC is not that.

35. If there really is a concern that Multi Track personal injury cases are being given a 'Rolls Royce' service, then the promoter of reform should be clear in saying that a less effective service is all an injured claimant merits – and in circumstances where the defendant remains entitled to provide itself with a 'Rolls Royce' service. In any event, the solution – if this is deemed to be a problem – is surely for the courts to manage the costs incurred in such litigation through costs budgeting and assessment.

36. What is the stated justification for extending FRC into Multi Track personal injury cases? PIBA asks this question because it is not at all obvious to PIBA what it can be. Lord Justice Jackson is respectfully invited to consider whether there is any evidential basis for interfering in the newly established regime by way of a FRC scheme at all. To PIBA, there is none.

THE DAMAGING EFFECTS OF A FRC REGIME ON MULTI TRACK PERSONAL INJURY CASES

37. 'Swings and roundabout's analogy not appropriate: In Multi Track cases, the progress of a claim is as unpredictable as the human being who lies at the heart of it. A claim could resolve for £60,000 because: an elderly client has multiple, serious orthopaedic injuries

but little financial loss; an employee suffers stress at work, continues to be employed but is at risk of losing his job at some point in the future; a middle aged person with a lengthy history of mental health problems develops chronic pain and is subject to covert surveillance footage; a young claimant has a traumatic brain injury with symptoms which largely settle after 2-4 years; delay in diagnosing cancer leads to early death and a claim under the Law Reform Act as well as the Fatal Accidents Act; cases with a higher value which settle for a lower sum to reflect contributory negligence, risks of liability and/or causation; and so on.

38. Even when seeking to categorise the case – for instance as a chronic pain case or a stress at work case – the variations between cases are legion. In some cases there will be a need for extensive study of pre-accident and post accident documentation; in others, there will be none.

39. What can be said with a high degree of certainty is that different cases ultimately recovering the same amount of money are most unlikely to need the same amount of costs to litigate. Nor can the cases be said to revolve around a common level of costs such that there is a 'swings and roundabouts' element for the claimant's solicitors. Multi Track cases are not the norm: Fast Track cases are. Where the cases are allocated to the Multi Track, the cases cannot be characterised as formulaic or straightforward – this is precisely because they relate to injuries suffered by a person, which injuries are not static at the point of accident. Furthermore, some cases, such as chronic pain cases, will probably become uneconomic for claimant solicitors to run at all under a FRC scheme.

40. <u>FRC regime will lead to less work being invested in some cases than currently occurs:</u> PIBA cannot foresee a FRC scheme being implemented which pays claimant solicitors an amount equalling the highest amount they can recover in any particular claim. It follows, therefore, that the amount will be lower than they can expect currently to recover for at least some of the cases they run. Where they are fixed with a certain amount of costs, which is insufficient to enable them to investigate and run these cases, there is a problem. Either the case is simply not going to be as well prepared or the claimant is going to have to invest more of his damages into pursuing his claim.

41. If it is the former, then the legitimate aim behind the imposition of FRC must be a strong one. Yet PIBA cannot identify one at all. If it is the latter, then first the balance

identified by Lord Justice Jackson when setting the recoverable success fee is being altered in a way detrimental to the claimant. And secondly, the risk of a claimant accepting an under-settlement of his claim is substantially enhanced.

42. The involvement of the Bar will reduce: This is inevitable if a fixed pot of costs is paid to claimant's solicitors whether or not counsel is involved. The loss is not just to the Bar. PIBA believes that junior barristers provide an invaluable service to claimants and defendants alike and to the court in seeking to resolve accurately personal injury claims, if possible without using up court time and resources.

43. Access to justice will be impeded: As set out above, a claimant's opportunity to obtain legal representation is diminished if the claimant solicitor is conscious that more work needs to be done on a case than can be recovered on an inter partes basis. The temptation for claimant solicitors will be to concentrate on those cases deemed to be straightforward.

44. If that happens, a further market will open up for unregulated claims management firms. This will be an unintended but very damaging consequence of the proposed reform. Inevitably the number of LiPs will also increase with all the concomitant expense to the court system that brings with it.

45. Cases will be managed with an eye to maximising costs recovery: Where a claimant solicitor is paid according to the steps taken in litigation, the temptation clearly is to rush through those costs bearing steps. The draw is pursuit of litigation not settlement or resolution. The incentive to undertake all the necessary steps in the preparation of the case is reduced; after all, the same fee will be payable regardless.

46. And there will be an inequality of arms: Claimants under a FRC scheme can expect to enjoy limited services from a solicitor (and almost none from a barrister) in a case deemed appropriate to take on at all. The amount of work that the solicitor will be prepared to do (or the claimant will have to fund privately) will be set in advance by the FRC rules even though, at the outset, neither the amount of work needed nor the fee likely to be recovered can be predicted. These limitations apply only to the claimant; the defendant will continue to enjoy the ability to obtain full legal representation and can apply this advantage by increasing costs that the claimant has to incur so as to pressurise the claimant into under settlement.

CONCLUSION

47. PIBA is very troubled by the proposal for wholesale reform of costs in Multi Track cases and asks that consideration is given, for the reasons set out above, to excluding personal injury litigation from this proposal.

20 January 2017

Robert Weir QC, Chair of PIBA

Darryl Allen QC, Vice Chair of PIBA

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