Grumpy reflections from the PI Bar

The courts have a lot to answer for, believes **Julian Benson**, as he ponders life post *Mitchell*

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Everyone knows that barristers are always right, scrupulously punctual, great value for money, and never make unreasonable demands of their instructing solicitors. Good, that's settled. It follows that all the problems in multi-track personal injury (PI) litigation must be caused by other people.

Also, given that barristers only gripe about their solicitors behind their backs (knowing the side on which their toast is buttered), the fault must lie at the door of the court. What a satisfying conclusion, and one which enables me to embark.

Clearly bonkers

Moan one is, of course, *Mitchell*. It is now 'clear' from *Denton* that most of the profession (including innumerable district judges (DJs) and circuit judges (CJs)) 'misunderstood' *Mitchell*. Silly us. We thought it was clear – bonkers – but clear; a cudgel to beat the slackers and poltroons of the profession.

Everyone has their favourite *Mitchell* anecdote, mine being a bloodthirsty request from a solicitor to consider whether the service of a document 47 seconds late (albeit under an 'unless' order) required a *Mitchell* 'good reason' or not.

For the months between *Mitchell* and *Denton*, life at the PI bar felt like the Wild West. In fact, it felt like a sequel to the heyday of satellite litigation in the 1990s when the old county court rules introduced 'automatic strike-out' until '*Rastin*' rode into town.

Those were the days: courts clogged with appeals, negligence claims and professional premiums soaring, and a lucky few counsel making a mint from the cases they could nudge to appeal.

And so it has been with *Mitchell*, with the added 'bonus' that parties who previously dealt with each other on a pretty civil basis would now survey the litigation landscape like raptors, looking to pick off any chance error, as long as it was just worse than *Mitchell* 'trivial', and even setting cunning little timing traps to detonate in the hands of the unwary.

And detonate they did, in courts up and down the land, where the self-styled 'robust' DJs wielded the cudgel with alacrity, and even the majority of more reflective DJs could find no way around the actual examples of 'good reasons' for non-trivial default that *Mitchell* itself decreed 'may' constitute a good reason for non-compliance.

Having thus evaded the Scylla that was *Mitchell*, bedraggled PI solicitors, bitter at their opponent's efforts to trigger their indemnity insurance, heaved themselves onto the life raft of limb three

P25-27 SJ Bar Focus.indd 25 10/23/2014 10:11:46 AM

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of *Denton* (even where there is a serious or significant breach and there is no good reason, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application'); in essence, a return to the sunny uplands of the overriding objective, only to face the Charybdis of precedent H and cost budgeting.

Similarly, the DJs, whose workload had been swelled by everything *Mitchell*, now faced a tidal wave of costs and case management conferences (CCMCs).

When criticising DJs, it is easy to forget what they actually have to do. Most work their socks off. They are routinely presented with daunting lists, often laced with difficult issues in a range of disciplines, knowing that their case management decisions are effectively 'final' unless their error is egregious.

Practitioners may also have little understanding of the amount of box work DJs manage outside of 'sitting hours'. All we see and hear is a something termed 'the court service', which increasingly, and obviously to the litigants who pay court fees, it is not.

In my experience (solely in controversial and/or complex PI cases), the CCMC epitomise a wrong solution to the problem perceived and are a time-consuming, costs-building, nonsense and nuisance (even after the parties started working together having exhausted every possible tit-for-tat precedent H *Mitchell* point).

Limited benefit

There are many reasons. First, CCMCs require a great deal of work for the parties. The claimant's side, at least, has to 'budget' for every sensible eventuality. That often requires numerous (cumulative) assumptions about the developing 'shape' of a claim, which is next to impossible in some types of case. Thus, whatever its actual value to the claim, the respective precedent Hs represent a significant expenditure of time and costs, often with next to no benefit.

Second, CCMCs can demand a great deal of reading and thought by judges. From where is this time 'spirited' for them? Are there substantially more DJs than before? Had their previous workload tailed off, leaving them twiddling their judicial thumbs? Were they waiting, breath baited, for a brand-new litigation leviathan to add hours to their daily reading, and gobble up half a day of sitting time?

Third, in most of my PI CCMCs, conscientious DJs from Swansea to Nuneaton have (rightly) adjourned them until much later in a case, because it has been simply impossible, meaningfully, to predict the shape of those cases at the point the budget was required.

Fourth, when the CCMCs do go ahead, the approach of DJs and CJs can be so hair-raisingly disparate, even within the same building, that even in a less difficult case, parties do not know what approach to adopt.

So, even in the same court, experience suggests one judge speaking refreshingly of 'light-touch budgeting' (let's say a 'trim'), while another is a judicial Sweeney Todd, delighting in doling out a 'buzz cut' prospective costs assessment. That approach reflects the views of some judges that a later 'bill under budget' can be 'waved through' on assessment, while others (surely correct) will "not treat the approval of a budget as demonstrating, without further consideration, that the costs incurred… are reasonable or proportionate" (*Henry v News Group Newspapers* [2013] EWCA Civ 19, paragraph 16, Moor-Bick LJ).

And, if that is the correct approach to assessment, is any benefit of budgeting proportionate to its time and cost for all involved?

So we now come full circle. DJs are swamped with CCMCs and practitioners have no less, and no less important, interlocutory applications than before. Season that combination with the fearful aftermath of *Mitchell* compliance, and you have a recipe for disaster.

This typically takes the form of an application for a further expert report in a new discipline, or perhaps a 'replacement' expert. In order to avoid a listing months down the line and increasingly close to a trial window, parties tend to underestimate the time for an application.

So, an application may be listed for one hour,

P25-27 SJ Bar Focus.indd 26 10/23/2014 10:11:53 AM

still usually by telephone, which requires consideration of existing medical evidence (a report or two), statements of case, a witness statement or detailed 'part C' and, in this brave new world, respective skeleton arguments in almost every case.

Given that CPR23 does not require, or allow for, 'reading time' to be estimated or indicated, the DJ may frequently be faced with an hour of reading for an hour-long hearing (usually listed at 10am or 2pm), with an assessment of damages or even a trial at 11am and 3pm.

What gives? Well, what gives is often justice (see box).

Critical decisions are often made 'on the hoof', with the smallest chance of reversal, in cases which the parties have paid substantial fees to have managed and adjudicated upon, professionally and fairly.

In order that the chances of that happening might be increased, CCMCs should be abolished to give DJs a chance to do their job with the care and thoroughness to which the vast majority of them are committed. **SJ**

What often gives is justice

TYPICAL EXCHANGES OF DJ TO COUNSEL:

Example one
DJ (angrily): "I do not have your skeleton argument, when was it lodged?"
Counsel: "A week ago, by email, followed up with a call to [name] who said he would place it on the file."
DJ [despairing but still angry]: "Can you email it now?"
Counsel: "Yes, but it is six pages long and…"
[Skeleton argument emailed – silence reigns for a depressingly short two minutes]
DJ: "Is there anything else you would like to say before I give my judgment?"
Counsel: "Yes."
Oppo: "Yes, please."
DJ (assertive tone): "We haven't got time for all that. There are people outside waiting for justice as well. Judgment: in this case…"

Example two
DDJ: "Good morning, I have just been handed this file, what are we doing today?"
Counsel: "An application to debar a party from relying upon surveillance and consequentially debarring reliance upon evidence from their orthopaedic expert who has seen the footage."
DDJ: "Ah, and I think we have 45 minutes."
Counsel: "Yes, sir, because otherwise it would have taken another three months for a listing, with both parties increasingly in default of the directions, with the trial window approaching."
DDJ: "And I can see [hooray!] skeleton arguments from both of you running to six pages each. Well, I can give you each ten minutes and then I will do my best. I will have to deliver an extempore judgment because I am not sitting here for several months."

Example three
DJ: "For those reasons I find in favour of [party]. I am now going to deal with costs. The solicitor's costs are too high and, what is your fee Mr X (losing side)?"
Losing counsel: "£X madam."
DJ: "Well, I am going to assess the costs at £Y (half of overall sum claimed)."
Winning counsel: "May I explain…"
DJ: "No you may not. Good morning"