- The Defendant Costs Specialists

Costs Law Update – 25/7/08

Ministry of Justice Response

The Government has now published its *Response* to the consultation paper: *Case track limits and the claims process for personal injury claims*.

This has already received a mixed reaction in the legal and insurance press but here we will simply deal with the costs issues, which appear to have only received limited commentary to date.

The Straightforward Bits

The small claims limit for personal injury claims will remain unaltered and so there will be no costs implications as a result.

The fast track limit will be increased to £25,000. This will have limited impact in terms of costs. There may be some reduction in trial costs as more claims will now be subject to fixed advocates fees. Whether this leads to a demand for the level of these fees to be increased remains to be seen.

The radical proposals to prevent recoverability of ATE premiums if the policy is taken out at the outset of a claim have been entirely abandoned.

The New Claims Process

A new claims process will be introduced. Although it was previously envisaged this would apply to all personal injury claims, except clinical negligence ones, that fell within the new fast track limit, it has now been decided that this will only apply to RTA claims with a value of no more than £10,000. This will significantly limit the impact of the new scheme, and as a result has met with much disappointment from defendant organisations. Nevertheless, RTA claims do account for 70-75% of the personal injury market.

The new claims process will be divided into three stages which, in simple terms, will cover:

Stage 1 – The initial consideration of the claim and submitting a "claim notification form" to the defendant and the defendant's response on liability, within a 15 day time limit.

Stage 2 – Where liability is admitted: obtaining medical evidence and details of special damages and the making of the claimant's offer to settle, and settlement negotiations.

Stage 3 – If quantum is not agreed at Stage 2, an application will be made to the court for a quantum hearing.

It is proposed that each of these three stages will be subject to fixed fees. The amount of these is yet to be determined and this will be done by the Advisory Committee on Civil Costs.

The Problems

A claim will leave the new claims process in a number of situations. These include: the defendant not dealing with matters within the very tight deadlines, liability being disputed, contributory negligence being alleged, causation being disputed. There is no suggestion in the Response that there will be fixed fees for a period when a case falls outside the new claims process.

Consider these examples:

Example 1

An RTA claim with a value total value of £6,000 that includes a personal injury element of over £1,000. The defendant initially disputes liability but the claim then settles without proceedings needing to be issued.

Currently

This case would currently be subject to the Predictable Costs fixed fee regime, under CPR 45.7, in relation to the whole claim.

Under the new scheme

This case would start in the new claims process and would therefore attract the new fixed fees for Stage 1. Once liability is disputed it would leave the claims process. What costs will apply at this stage? Will there be a combination of fixed fees, for Stage 1, and costs on the standard basis thereafter? If so, an enormous number of cases that currently have fixed fees applying throughout will now be subject to negotiation or detailed assessment in respect of at least part of the costs claimed. It is suggested in the Response that it may be possible for this type of case to return to the claims process once liability is resolved and that the Ministry of Justice "will be working with stakeholders to see how this might work." Indeed. How will this work in relation to costs? Will costs on the standard basis be recoverable for the interim period when the claim is outside the process? What would be the interrelationship between the two? If a claimant solicitor has obtained medical evidence whilst the claim is outside the process, can they claim the costs of doing this work on the standard basis and then claim the full Stage 2 fixed costs in addition once the claim returns to the process, despite the Stage 2 fee being designed to cover the same

work? If not, how will the rules deal with this issue? Unless there are fixed costs introduced for periods when a case falls outside the process, and the Response makes no suggestion that they will be, how would one begin to draft the rules? One would need the wisdom of Solomon to get this right and the end result would be likely to be an incredibly complex set of rules.

Example 2

An RTA claim valued at £6,000 but not involving a personal injury element. Liability is admitted within 15 days and quantum is agreed shortly after details of the claim are presented.

Currently

This case would currently be subject to the Predictable Costs fixed fee regime, under CPR 45.7, in relation to the whole claim. There is current criticism of this in that it often produces a costs figure far higher than the minimal work justifies.

Under the new scheme

This case would not fall to be dealt with under the new claims process as there is no personal injury element. There is no mention within the Response that the current Predictable Costs regime will be scrapped. Would this case therefore still attract the current fixed fees? Will there be two fixed fee regimes applying to RTA claims? If so, it seems that the current Predictable Costs regime will need to have its figures amended if only non-personal injury claims are left within the regime. If the old regime is to be scrapped, will these cases now have the costs assessed on the standard basis rather than attract a fixed fee?

Example 3

An RTA claim with a value total value of £6,000 that includes a personal injury element of over £1,000. Liability is admitted within 15 days but quantum cannot be agreed without court intervention.

Currently

The costs in this case would be assessed on the standard basis in relation to the whole claim.

Under the new scheme

This case would be dealt with under the new claims process throughout. The new fixed costs would also apply throughout. This is the one type of claim that would now be covered by fixed fees where previously it would not have been. However, the number of these cases would appear to be less than the number which are likely to fall outside the new claims process and outside the new fixed fee regime for at least part of the claim.

As mentioned above, there is no mention in the Response that the current Predictable Costs regime is to be scrapped but it is hard to see how it can survive the other changes. These rules were introduced on 6th October 2003 and have been subject to virtually unabated test litigation since then: *Nizami v Butt* [2006] EWHC 159 QB (concerning whether the indemnity principle was disapplied for these cases), *Woollard v Fowler* [2005] EWHC 90051 (Costs) (concerning whether medical agency fees were recoverable in addition to the fixed fee), *Lamont v Burton* [2007] EWCA Civ 429 (concerning whether the 100% success fee is payable if a matter that reached trial was one where the claimant had failed to beat an earlier Part 36 offer), *Kilby v Gawith* [2008] EWCA Civ 812 (concerning whether a success fee was recoverable even if BTE insurance was available). Is it seriously being suggested that this set of rules, that has just about bedded-in, is now to be abandoned and a whole new set of rules will be introduced? Just as clarity was beginning to emerge from the last major rule change the whole process seems to be about to start again.

Unless, the Advisory Committee on Civil Costs produces proposals that introduce a new fixed fee regime for all periods on an RTA claim under £10,000, and again, the Response does not suggest this is intended, there are likely to be more claims where, at least part of, the costs are not fixed than is currently the case. Surely this is not the intention.

So far as the costs aspect was concerned, the missing piece of the Predictable Costs regime jigsaw was that it did not extend to issued cases. The answer was surely to extend it to cover that aspect of the claims process. Having abandoned the idea of having the new claims process cover non-RTA claims, the current proposals are unnecessary upheaval in the one area that was becoming less of a problem.

Insurers, who have been upset by the fact the new claims process will be limited to RTAs have already threatened to renew the "costs war". Norwich Union director of claims Dominic Clayden was quoted, in the *Insurance Times*, as saying: "It's going to be messy. … It's back to the courts. We have been sitting down with our lawyers – we are going to make every technical point [in court, challenging cost settlements] that we can."

And Zurich technical claims director Steve Thomas was quoted as saying: "We will be applying increased scrutiny to costs that are submitted and we will challenge through the courts any exaggerated or dishonest billing that we come across."

In relation to Part 36 offers within the new claims process, the Response has stated that the old provisions should continue to apply but "that more emphasis should be placed on judicial discretion. If a party has made an unrealistic offer that has unnecessarily caused the need for a quantum hearing they should be penalised". For "judicial discretion" read "increased uncertainty" and "more test litigation".

Those in the legal costs industry planning early retirement may want to reconsider.

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