



Personal Injury newsletter

This newsletter is one in a series of publications produced by the clinical negligence and personal injury group within the Private Individuals Division of Penningtons Solicitors LLP. If you would like further details on any of the subjects covered, please contact us at the addresses at the end of the newsletter.

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New claims process for road accident claims

The new claims process applicable to low value road traffic accident claims is now in place as at April 2010. It is hoped that the changes will bring about a more streamlined system.

The new rules will be used where:

- the claim is valued between £1,000 and £10,000
- there is an element of personal injury
- the accident occurred in England and Wales.

The process will be divided into three stages:

Stage 1

The claimant's legal representative will be required to complete an electronic notification form detailing allegations against the defendant and the nature of the claim. This should include enough information for the defendant or his or her insurer to make a decision on liability. It replaces the need for a Letter of Claim. The insurer will have 15 business days to respond with a decision on liability. If liability is admitted, the first stage fixed recoverable costs are payable to the claimant's legal representatives. If liability is not admitted, or contributory negligence alleged (other than failure to wear a seatbelt), or a response not received within the relevant timeframe, the claim will leave the new process and revert back to the current process.

Stage 2

After liability is admitted, the claimant's legal representatives will obtain medical

evidence. Once the medical evidence is received and approved by the client, the claimant has 15 business days to prepare a settlement pack (including any claim for special damages) and send the pack along with an offer to settle the entire claim to the defendant. The defendant has 15 business days to accept or reject the offer and make a counter offer. After this, there is a further period of an extra 20 business days for negotiation. If the claim does not reach settlement, it will be decided by the court. After the 20 business day period, the second stage fixed recoverable costs are payable to the claimant's legal representatives. There is provision for further or updated expert evidence to be obtained where needed and for an interim settlement pack to be prepared. It is not intended that the process should compromise the need to obtain proper medical evidence and a final prognosis.

Stage 3

Where quantum cannot be agreed within the timeframes above, the court has to determine damages. Within 15 business days of the end of stage 2, the parties should agree a settlement pack and this should be sent to the court. Along with the settlement pack, in a sealed envelope, should be details of the parties' respective offers. This is the total documentation that



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The insurer will have 15 business days to respond with a decision on liability.

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will be allowed by the court. It will then determine quantum on a paper basis. If the claimant requests it, he or she is entitled to an oral hearing. On conclusion

of the claim, a further fixed recoverable costs payment is due to the claimant's representatives, including a fixed success fee.

Comment: The success of the reforms in streamlining the claims process will very much depend on the parties' abilities to adhere to the strict timetable set.

A rethink on interim payments for accommodation

Historically in claims for individuals with significant injuries, the courts have taken a fairly relaxed approach to approving interim payments to purchase a property, even where the payments represent a significant part of the ultimate damages award. However, following the more frequent use of periodical payment awards and an important Court of Appeal ruling last year, we are seeing a revised approach.

Queries were raised as to whether such large interim payments fettered the trial judge's ability to make a periodical payments order and whether interim payments should be considered in the context of the likely capital sum awarded with a periodical payments order and not in the context of the claim as a whole.

The issue was addressed in Spring 2009 by the Court of Appeal in *Eeles v Cobham Hire Services Ltd* where the court advised that, in assessing an application for an interim payment, the court should:

- consider the likely award (on a conservative basis) for heads of damages that would not be covered by future periodical payments - this is likely to include therefore past losses, general damages and the claim for additional accommodation costs;
- approve any interim payment which would be regarded as a reasonable proportion (this may be a high proportion);
- if a higher interim payment is sought, consider whether there are additional elements of the claim which the trial judge would be likely to add to the capital sum;
- be satisfied that the request for money to purchase a property is as a result of a real need for accommodation at the time the award is sought and that the amount of

money is reasonable (although the court need not consider whether the particular house proposed is suitable).

The aim behind this is to ensure that large interim payments for accommodation do not result in the court being unable to award periodical payments and to combat the risk that the claimant's future care and therapy needs will not be adequately covered by periodical payments. It is therefore aimed at protecting claimants.

However, it means that claimants and their representatives will need to think much more carefully about what heads of damages are going to be awarded and only seek to purchase accommodation which can be provided for by aggregating past losses, general damages and the accommodation claim and taking a reasonable proportion. This means adopting a sensible approach to what is needed as a suitable property, carrying out an early assessment of quantum for the various heads of damage and being able to justify the interim sought on this analysis.

This judgment is unlikely to stop claimants obtaining interim payments to purchase a property but will mean the court taking a more active role in assessing the reasonableness of the property being purchased in the context of the claim.



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The court will take a more active role in assessing the reasonableness of the property.

Freedom of choice to instruct a solicitor

A recent European Court of Justice decision has made it clear that a legal expenses insurance provider cannot insist that clients use the company's BTE panel solicitors rather than their own choice of solicitor.

If insurers are prescriptive, they are contravening both the European Directive 87/344/EEC and the Insurance Companies (Legal Expenses Insurance) Regulations 1990.

The decision in *Eschig v Uniqa Sachversicherung AG* is already being raised with BTE insurers in the UK, with mixed responses. It will be interesting to see if a test case is forthcoming to determine whether the European Court of Justice judgment should apply in the UK.

The Jackson Report

The Jackson Report was published in January and involves a thorough and comprehensive review of civil litigation costs. This article concentrates on the recommendations which were made with particular focus on personal injury claims. It remains to be seen to what extent and when the recommendations are implemented.

- **A ban on referral fees being paid by solicitors**

This is aimed mainly at claims management companies, primarily due to concern that their involvement increases litigation costs but is likely also to apply to BTE insurers who currently receive referral fees from their panel solicitors for cases.

- **An end to success fees and after the event insurance (ATE) premiums being recovered against unsuccessful defendants**

One of the themes of the report is claimants' costs and risk sharing with their solicitors. The report envisages allowing solicitors to enter contingency fee agreements so that the client pays a success fee out of their damages. To compensate the client, an increase in general damages of 10% is recommended. The introduction of one way cost shifting, limiting the circumstances in which an unsuccessful litigant can be ordered to pay the successful party's costs, is suggested as avoiding the need for ATE cover. One significant issue, however, if ATE is no longer encouraged, will be disbursement funding - particularly in large cases. There is also uncertainty about when claimants might be liable for adverse costs and

concern as to whether the abolition of success fees will mean that only the strongest cases get taken on and those with valid but difficult cases will find it hard to access funding.

- **Expansion of the before the event insurance (BTE) market**

The report promotes wider awareness and provision of BTE insurance to fund claims but with the abolition of referral fees, BTE premiums are likely to rise and this may result in fewer people taking out BTE cover.

- **Introduction of fixed costs to all personal injury claims with a value of up to £25,000**

Again this seems to be with a focus on the client risk sharing and having an interest in the costs incurred and their level.

- **Changes in Part 36 provisions**

The changes focus on improving the impact and effect of Part 36 offers and encouraging early and sensible negotiations. One of the changes is the reversal of the decision in the *Carver* case. This held that simply beating a defendant's Part 36 offer was not enough and that the court had to look at the degree to which it was beaten, conduct etc when deciding what costs order to make. Therefore, just beating a money offer would



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not necessarily result in the Part 36 penalties coming into effect. This had introduced considerable uncertainty because of fears that, despite beating a Part 36 offer, a claimant may be penalised in costs. The other change is additional teeth being attached to claimants' Part 36 offers so that where a defendant fails to beat a claimant's Part 36 offer, not only are they likely to be ordered to pay indemnity costs and interest, but also to pay an additional 10% of the damages awarded to the claimant.

- **Focus on proportionality**

Lord Jackson expressed his concern that the concept of proportionality introduced by the Woolf reforms and CPR has not really been adhered to. The report makes it clear that proportionality of costs will now be much more closely governed.

- **Mediation to be promoted and used as originally expected under the Civil Procedure Rules (CPR)**

- **More proactive and consistent case and costs management by the courts**

Casewatch

Examples of the work undertaken by our team:

- **£500,000 settlement for injuries sustained in collision with uninsured driver**

We recently achieved a settlement of £500,000 compensation for a client who was seriously injured in a road traffic accident.

The defendant driver was drunk and driving without insurance when he collided with our client's car one evening as she returned home from work. Our client suffered complicated orthopaedic and psychological damage, including injuries to her spine, a fractured rib and damage to the pectoral

girdle as a result of which she experiences constant, intrusive and disabling pain radiating from her shoulder. Her mobility is also impaired by damage caused to her ankle for which future surgery is needed. She also suffered post-traumatic stress disorder which has had a profound effect.



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Prior to the accident, our client had worked as a freelance outside broadcast unit manager, a physically demanding and responsible role to which expert evidence confirmed she will never be able to return. She was also active in a wide range of sports, particularly horse riding, but has been unable to resume any of these physical pastimes.

As the defendant was driving without insurance, we brought this case against him and the Motor Insurers' Bureau (MIB). The MIB is a body funded by all motor insurers to provide compensation to accident victims who are injured by uninsured drivers.

Call handler wins £105,000 settlement for hearing injuries suffered at work

Following a three year battle, we recently successfully negotiated a £105,000 settlement of our client's claim for chronic hearing injuries as a result of using defective equipment supplied by her employer.

In late 2005, our client developed a range of acoustic problems including severe

tinnitus, pain in her ears which is exacerbated by loud noises and voices, and mild high frequency hearing loss. It was alleged that this was as a result of wearing a defective headset supplied by her employer to use in her job as a home-based call handling operative for an emergency breakdown service.

Despite various reports of the difficulties she was experiencing with the equipment, which emitted a hissing/feedback like sound, no action was taken. She was subsequently signed off work due to her hearing problems. Her employment was terminated on the basis that she could no longer perform her previous job role and there was no alternative employment available.

The claim was pursued on the basis that her employer had provided her with defective equipment which exposed her to a foreseeable risk, acoustic trauma and injury and failed to act upon repeated reports made by her of the problems she was experiencing with the equipment and her hearing.

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- Travel and tourism

Commercial property

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- Clinical negligence
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