Welcome

Welcome to this week’s edition of BC Disease News.

In the last week, the Ministry of Justice has published its much awaited consultation on the PI reform proposals which suggests that they will be implemented sooner than expected. Elsewhere, the Court of Appeal has handed down two significant costs judgments dealing with the fixed recoverable costs regime and those claims that fall out of the EL/PL portal.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

In the much awaited government consultation, published today, in response to George Osborne’s 2015 Autumn Statement, it has become apparent that the government will push ahead with the proposed reforms sooner than expected.

### Raising the Small Claims Limit For PI Claims

In the consultation, the Ministry of Justice (MoJ) claim that the limit for PI claims in the small claims track has not been increased since 1991 and is out of step with the limit in place for all other small claims, which is set at £10,000.

It also claims that raising the small claims limit for RTA related PI claims would mean that legal costs would no longer be recoverable, thus reducing the costs of these claims and meeting the government’s objectives to disincentivize ‘minor, exaggerated and fraudulent claims’.

However, the government has indicated that it is still undecided about whether to raise the limit for all PI claims or simply for RTA related PI claims, although it has said that raising it for all PI claims is its preference. This would bring into scope a wider range of cases including EL/PL claims as well as low level clinical negligence claims.

The consultation states:

‘Raising the small claims limit for all PI claims would be consistent with the government’s aims to disincentivize minor, exaggerated and fraudulent claims and remove unnecessary costs from the claims process’.

However, a number of EL and PL claims, as well as clinical negligence claims will be unaffected by this as they are generally more complicated than low value RTA related soft tissue injury claims, especially where causation and liability are in question.

### Scrapping Damages For Soft Tissue Injuries

The government’s position on the second element of George Osborne’s proposals, a ban on PSLA for whiplash, appears vaguer. The consultation proposes both scrapping damages for ‘minor’ injuries and introducing a fixed tariff system for all RTA related soft tissue injury claims that last longer than 6 months.

The MoJ state:

‘There needs to be a method for developing the necessary increments which is linked to the increasing seriousness of the injuries suffered. The government is of the view that this is best done in three month increments for an injury duration of greater than six months and not more than 18 month, and a further six month increment for injuries of a duration of up to two years. This allows for an even progression up the scale dependent on the severity of the injury’.

The following tables are taken from the consultation and provide further detail on the tariff:

**Table/Chart 2 – RTA related soft tissue injury claims with psychological injury:**

<table>
<thead>
<tr>
<th>Injury Duration</th>
<th>Current average payment for PSLA, with psychological injury (based on industry data)</th>
<th>Judicial college guidelines amount (12th edition)</th>
<th>New Tariff amount</th>
<th>Psych damages awarded</th>
<th>Tariff with psych</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-6 months</td>
<td>£1,950</td>
<td>£200 to £3,520</td>
<td>£400</td>
<td>£25</td>
<td>£425</td>
</tr>
<tr>
<td>7-9 months</td>
<td>£2,550</td>
<td>£1,705 to £3,520</td>
<td>£700</td>
<td>£50</td>
<td>£740</td>
</tr>
<tr>
<td>10-12 months</td>
<td>£3,050</td>
<td>£1,705 to £3,520</td>
<td>£1,100</td>
<td>£60</td>
<td>£1,150</td>
</tr>
<tr>
<td>13-15 months</td>
<td>£3,400</td>
<td>£1,705 to £6,380</td>
<td>£1,700</td>
<td>£1,760</td>
<td></td>
</tr>
<tr>
<td>16-18 months</td>
<td>£3,850</td>
<td>£1,705 to £6,380</td>
<td>£2,500</td>
<td>£50</td>
<td>£2,575</td>
</tr>
<tr>
<td>19-24 months</td>
<td>£4,400</td>
<td>£1,705 to £6,380</td>
<td>£3,500</td>
<td>£100</td>
<td>£3,600</td>
</tr>
</tbody>
</table>

**Table/Chart 1 – RTA related soft tissue injury claims without psychological injury:**

<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>0-6 months</td>
<td>£1,750</td>
<td>£200 to £3,520</td>
<td>£400</td>
</tr>
<tr>
<td>7-9 months</td>
<td>£2,400</td>
<td>£1,705 to £3,520</td>
<td>£700</td>
</tr>
<tr>
<td>10-12 months</td>
<td>£2,950</td>
<td>£1,705 to £3,520</td>
<td>£1,100</td>
</tr>
<tr>
<td>13-15 months</td>
<td>£3,300</td>
<td>£1,705 to £6,380</td>
<td>£1,700</td>
</tr>
<tr>
<td>16-18 months</td>
<td>£3,750</td>
<td>£1,705 to £6,380</td>
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</tr>
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<td>£4,350</td>
<td>£1,705 to £6,380</td>
<td>£3,500</td>
</tr>
</tbody>
</table>

The amount of compensation available under the new system increases in a series of fixed increments – although for minor injuries i.e. those with a duration of 0-6 months, the amount of compensation may be £0 if the option to remove PSLA from minor claims is pursued.

The MoJ says it is also considering an exceptionality provision, which would provide the judiciary with the ability, upon application, to apply an uplift to the amount payable to a claimant by up to 20% in exceptional cases where the injury duration is more than six months.
In addition to this, other measures have been added, such as banning offers to settle RTA related soft tissue injury claims without medical evidence – with all claims having to obtain a report from a MedCo-accredited medical expert to receive compensation.

Although EL/PL claims were identified as a category of claim which may also benefit from such a ban:

'This, however, is with the possible exception of some EL/PL claims where anecdotal evidence indicates that claimants following a slip or trip incident can be subject to such offers from supermarkets or local authorities. The reason they do this is again related to cost: it is currently often cheaper to settle a claim than investigate it and many major retailers have budgets set aside to settle claims speedily. The arguments set out above relating to settlement driving claims could also be made here, although the numbers involved are significantly lower'.

The government say that this would address the concern that the use of pre-medical offers by insurers is encouraging minor, or even fraudulent claims to be made, especially if an insurer gets a proportionate high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action'.

Other Provisions

Claimant Community Response

The introduction of a fixed tariff system for more serious injuries is expected to net defendant insurers at least £52m a year, while they can expect a net saving of £63m from the increase in the small claims limit.

Law Society president Robert Bourns has been reported as saying that ‘the government’s proposals will completely undermine the right of ordinary people to receive full and proper compensation from those that have injured them – often seriously – through negligence. This five-fold increase will stop people getting the legal advice they need in order to bring claims for the compensation they are entitled to in law. People may be tempted to try to bring claims themselves without expert advice. This will clog up the court system creating a David and Goliath situation where people recovering from their injuries act as litigants in person without legal advice…’,

The MoJ address some of the criticisms by stating:

'Raising the small claims limit to cover PSLA claims of at least £5,000 will not preclude claimants from engaging legal representation, but would mean that they would in future be responsible for paying for their own legal costs if they choose to seek legal representation. The government is of the view that there is increasingly more information available to claimants to take forward claims without necessarily needing to seek legal representation'.

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The claimant campaign group A2J has said that these reforms could lead to redundancies of up to 60,000 people due to clients being frightened off bringing claims and case volumes plummeting as a result. 2

This consultation will run until 6 January 2017 and a response will be published by Friday 7 April 2017.

The full publication can be accessed here.

Lord Justice Jackson To Report On Fixed Costs

Lord Justice Jackson has been commissioned to undertake a review of fixed recoverable costs, to be completed by 31 July 2017. As we reported in edition 157 of BC Disease News, the Government confirmed in the consultation paper ‘Transforming Our Courts and Tribunals’ that:

'We will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action'.

It would seem that this review is a step towards this goal and an extension of LJ Jackson’s wider review of civil litigation procedures which led to the ‘Jackson Reforms’, in which he first recommended the application of fixed recoverable costs.

The terms of reference for the review are:

1. To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.
2. To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

The review will start in January 2017 and will contain several recommendations which will then be considered by the Government in its public consultation on the proposed reforms which is due to take place after the review is published in July 2017.
LJ Jackson has been reported as saying:

‘Although the momentum is heavily for reform, the review will provide ample opportunity for comments and submissions on the form and scope that reform should take. I am inviting the views of practitioners, users of the civil courts and any other interested parties on these points. Seminars will be held in London and elsewhere to discuss the issues. There is a great deal to be done on the detail of the review, which will inform the Government as it prepares proposals for formal consultation in due course’.

The full announcement can be found here on the Judiciary website.

### Duo Court of Appeal Decisions on EL/PL Protocol Drop Out Claims

The Court of Appeal has this week handed down two rulings on costs and protocols in *Bird v Acorn Group Ltd* [2016] EWCA Civ 1096 and *Qader & Ors v Esure Services Ltd & Ors* [2016] EWCA Civ 1109.

The first of these decisions, *Bird*, concerned a public liability claim which was withdrawn from the portal due to the defendant’s failure to respond. Liability was then admitted by the defendant’s insurer shortly afterwards. The claimant then submitted medical evidence and details of his special damages with a view to settlement. However, nothing was agreed and proceedings were issued. The defendant failed to acknowledge judgment and the claimant obtained default judgment at which point the claim was transferred from the Money Claims Centre to Birkenhead for assessment of damages where it was listed for a disposal hearing but subsequently settled.

However, costs were not agreed, there was a dispute as to which column within the table 6D part B (below) applied:

### TABLE 6D

<table>
<thead>
<tr>
<th>Fixed costs where a claim no longer continues under the EL/PL Protocol – public liability claims</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7</strong></td>
</tr>
<tr>
<td>Agreed damages</td>
</tr>
<tr>
<td>Fixed costs</td>
</tr>
</tbody>
</table>

| **B. If proceedings are issued under Part 7, but the case settles before trial** |
| Stage at which the case is settled | On or after the date of issue, but prior to the date of allocation under Part 26 | On or after the date of allocation under Part 26, but prior to the date of listing | On or after the date of listing but prior to the date of trial |
| Fixed costs | Damages | The total of— (a) £2,450; and (b) 17.5% of the damages | The total of— (a) £3,065; and (b) 22.5% of the damages | The total of— (a) £3,790; and (b) 27.5% of the damages |

| **C. If the claim is disposed of at trial** |
| Fixed costs | The total of— (a) £3,790; (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee |

| **D. Trial advocacy fees** |
| Damages agreed or awarded | Not more than £3,000 | More than £3,000, but not more than £10,000 | More than £10,000, but not more than £15,000 | More than £15,000 |
| Trial advocacy fee | £500 | £710 | £1,070 | £1,705 |

The defendant submitted that column 1 should apply but this was rejected by Lord Justice Briggs who found that the listing for a disposal hearing was a listing for trial and therefore column 3 applied. In coming to this conclusion he noted that listing a case for disposal has the intention of disposing of the case at first instance and as such triggers the claimant to prepare and serve evidence. He stated:

‘It seems most unlikely that the rule committee can have intended to leave the claimant to the much lower column 1 level of recovery after such a settlement, having done all of the work necessary to achieve finality at the disposal hearing, and being entitled to fixed costs equivalent to column 3, plus the trial advocacy fee, if the matter proceeded all the way to a disposal hearing’.
It was put to LJ Briggs that such an approach would remove the incentive for insurers to settle. However, this was also rejected as LJ Briggs said that settlement would still save insurers their own costs of preparing for a hearing and the advocacy fee.

He also rejected the argument that the columns were intended to be moved through in succession and therefore it was not right that column two would be skipped over. He said:

‘The fact that column 2 is jumped over because there is no intermediate allocation to the fast-track seems to me to be just one of those events which means that the three columns will not always be triggered in succession. But that by no means undermines the good sense of a conclusion that, once there has been a listing for a disposal hearing, column 3 is triggered’.

It has been suggested that defendants can ward against this route if they make better offers at stage 2 under the EL/PL protocol, or make better post-exit, pre-issue part 36 offers which will encourage settlement or give the defendant better protection.5

In another claimant friendly decision LJ Briggs, in Qader, considered whether cases that exit the RTA and EL/PL protocols and then proceed on the multi-track are subject to the fixed recoverable costs in Part 45.4

The case concerned two conjoined appeals where RTA claims had left the protocol and been assigned to the multi-track due to allegations of dishonesty.

Part 45 r.45.29B applies the fixed costs regime to all cases which start within the relevant protocols but no longer continue under them and does not distinguish between those that proceed onto the fast-track and those that proceed onto the multi-track.

LJ Briggs noted:

‘The claimants in each case, and their solicitors, face the unattractive prospect of pursuing their claims and resisting serious allegations of dishonesty, at trials likely to last well over one day but upon the basis of a fixed costs regime which, as will appear, was plainly designed to be suitable only for fast-track cases’.

He concluded:

‘[… I have come to the conclusion that section III A of part 45 should be read as if the fixed costs regime which it prescribes for cases which start within the RTA protocol but then no longer continue under it is automatically disapplied in any case allocated the multi-track, without the requirement for the claimant to have recourse to Part 45.29J, by demonstrating exceptional circumstances’.

Briggs relied upon a Ministry of Justice response to consultation in February 2013 that said: ‘It has always been the government’s intention that these proposals apply only to cases in the fast track and if a case falling out of the protocols is judicially determined to be suitable for multi-track, normal multi-track costs rules will apply’.

As such he determined that there was no evidence that the government altered its policy in relation to multi-track cases falling outside the fixed costs regime and no evidence that the CPR committee purposely decided to adopt the opposite approach. Although he did say that the drafting of r.45.29J was an anomaly and should be addressed by the committee as soon as possible.

These decisions have been much awaited and will allow for the resolution of thousands of cases that have been stayed until the ambiguity in the provisions regarding fixed recoverable fees for portal drop out claims had been resolved.

The judgment in Bird can be accessed here.

The judgment in Qader can be accessed here.

**Limitation in Contribution Claims:**

**Spire Healthcare Ltd v Nicholas Brooke [2016] EWHC 2828**

In this case the court considered whether or not an interim payment triggered the start of the two-year period for commencing contribution proceedings based on s.10(4) of the Limitation Act 1980.

The original claim was for negligence brought by a patient against a hospital and the surgeon, Mr Brooke, who had operated upon him. On 18 November 2011, the hospital offered to settle the claim together with costs on the understanding that it would seek a 50% contribution from the surgeon. It also offered, pending assessment of damages, to make an interim payment. A consent order to that effect was then signed by all three parties on 25 November 2011. Quantum was then agreed on 24 June 2013.

The hospital then issued contribution proceedings against Mr Brooke on 5 March 2015.

s.10(1) of the Limitation Act 1980 states:

‘Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued’.

The date on which a right to recover contribution accrued is ascertained either by the date a judgment is given in any civil proceedings or an award is made on any arbitration which holds the person in question liable for the damage.
S.10(4) of the Limitation Act 1980 states:

‘If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made’.

The preliminary issue in relation to limitation in this case was:

(1) whether a voluntary interim payment amounted to ‘mak[ing] or agreeing to make, [of] any payment...in compensation for the damage’ within s.10(4) of the 1980 Act so as to trigger the start of the two-year limitation period under that section;

The surgeon submitted that the date of the interim payment offer was when the right to recover contribution had accrued i.e 18 November 2011 and as such time had run out for the hospital to bring this contribution claim on 18 November 2013. He based this on the language of section 10(4) which he said was clear in saying that the trigger date is the date on which ‘the amount to be paid by him is agreed’. That phrase, in turn, he said, refers back to the amount of ‘any payment...in compensation for that damage’. The key word is ‘any’ in ‘any payment’. An agreed interim payment, as made in the present case, is such a payment ‘in compensation for that damage’. That it is intended to be covered by section 10(4) is confirmed by the use of the word ‘any’. If section 10(4) had been intended to cover only final quantification of damages, there would have been no need for the word ‘any’.

Spire submitted that under both s.10(3) and s.10(4) it was important to distinguish between a) the circumstances in which a person becomes entitled to a right to contribution and b) the date on which that right accrues. It claimed that the first part of s.10(4), the words ‘makes or agrees to make any payment to one or more persons in compensation for that damage’, defines the circumstances, but it is the second part, the words ‘the earliest date on which the amount to be paid by him is agreed’, which is the trigger date for the commencement of limitation. The ‘amount to be paid by him’ must mean, it said, to be paid ‘in compensation for the damage’ and that must be the full amount to be paid in full compensation for the damage. As such, it was Spire’s case that, limitation ran from the date of agreement of final quantum i.e. 24 June 2013 and so limitation did not expire until June 2015 and as the claim was brought on 5 March 2015, the claim was in time.

Mr Justice Morris, sitting in the High Court agreed with Spire’s interpretation of the legislation and rejected Mr Brooke’s submission that s.10(4) covered an agreed interim payment. He stated that the provision was concerned with the date of agreement of ‘the’ settlement sum, which meant the final overall figure, rather than agreement of sums towards a final figure. There should be a parity of approach to the meaning of ‘the relevant date’ for limitation purposes as between s.10(3) and s.10(4) of the 1980 Act. Under the predecessor to s.10(4), namely the Limitation Act 1963 s.4(2)(b), an interim payment would not have been covered. Section 10 substantially reproduced s.4 of the 1963 Act even though the wording was materially changed; there was no suggestion that the change in wording had been intended to change the trigger date. Not even a court order for an interim payment would start time running under s.10. Furthermore, the word ‘any’ in the first part of s.10(4) did not mean that a consensual interim payment was the trigger date under s.10 in circumstances where a court-ordered interim payment was not. Where limitation legislation was intended to cover the effect of a part payment, it would say so expressly. The ‘relevant date’ for the purposes of s.10(4) was therefore 24 June 2013 and proceedings had been issued within the two-year limitation period.

Dependent’s Loss Of Earnings Cannot Be Claimed: Rupasinghe v West Hertfordshire Hospitals NHS Trust [2016] EWHC 2848 (QB)

Mr Rupasinghe ‘the deceased’ was killed as a result of the defendant’s (admitted) negligence. Consequently his wife, Dr Rupasinghe claimed for damages under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976.

The deceased died on 9th November 2010 at the age of 33. Subsequently, faced with what Mr Justice Jay termed ‘a range of unpalatable options’, the claimant decided to return with her two young children to Sri Lanka to be closer to her family.

Proceedings were issued shortly after and claims were advanced under the 1934 Act and the 1976 Act. All bar three of the claims were agreed which were as follows:

(i) Item 2.6 is a claim for “Past Earnings Dependency (the Claimant’s loss of earnings)”. It is pleaded that “as a result of his death, the Claimant has had to make substantial changes to her career and has suffered a loss of earnings and pension as a result”. Instead of being able to pursue a relatively remunerative career as a doctor in the UK, leading to a consultant position in the fullness of time, the Claimant has had to accept much less valuable employment in Sri Lanka. Under item 2.6 of the Schedule, the claim is for the difference. The Schedule pleads a loss of £118,503.19.

(ii) Item 2.7 is a claim for “Future Earnings Dependency (the Claimant’s loss of earnings)”. Analytically, this case proceeds on the same basis as item 2.6, and takes the position from
date of trial to the date of the Claimant's notional retirement as a doctor in the UK. The Schedule pleads a loss of £1,257,678.73.

(iiI) Item 2.8 is a claim for “Future Pension Dependency (the Claimant's loss of pension)”. The claim under this rubric is in respect of pension loss from the date of notional retirement over the balance of the Claimant's life expectancy. The Schedule pleads a loss of £437,260.59.

As such, the claimant was arguing that her loss of income (which would not be recoverable under normal fatal accident principles), had arisen due to her need to move to Sri Lanka to get support from her family which would not have been the case had the deceased not have died.

The judge rejected this claim and stated at para 47:

'It is axiomatic, and in any event well established by cases such as Malvyn v Plummer (see paragraph 25 above), that a free-standing claim for loss of earnings falls outside the scope of section 3 of the Fatal Accidents Act 1976. This is because such a claim does not relate to the loss of a benefit which would have accrued to the Claimant had the Deceased survived. The Act is only concerned with losses which flow from what the Deceased did when alive: either by the making of a financial contribution to the household, or by providing childcare and similar services (capable, under the common law, of being accorded a financial value)'.

He went on to say:

'The key issue, in my judgment, is whether on the particular facts of this case the disputed items do form part of the services dependency claim'.

In doing so he pointed out that that:

'Ordinarily, the court approaches the quantification of a services dependency claim by considering the cost of replacing the services formerly provided by the Deceased. In some situations, it is appropriate to approach this exercise by looking to the cost of furnishing commercial care in the form of nannies, au pairs, child-minders or the like. In other situations, the claim is in essence one for gratuitous care, and the authorities make clear that commercial rates fall to be discounted to reflect that. In the instant case, the Claimant is claiming for commercial care and for gratuitous care, albeit the latter is not being provided by herself. It is being provided by other family members, in particular by her parents'.

However, Justice J concluded that the items claimed for were not an attempt to value the loss of the deceased's services but rather a broader endeavour predicated on the fact that the claimant had lost her career because of her husband's death. Whilst he conceded that this was 'correct as a matter of fact' he did not accept that it benefitted her as a matter of law. As such, the items claimed for were found to be for loss of earnings and not attributable to any need to replace a service that the deceased had formerly been providing.

The disputed items were found to irrecoverable due to the fact that the claimant had already advanced a comprehensive services dependency claim which left no room for supplementation and the items of loss claimed for, therefore constituted an independent claim for loss of earnings.

Interestingly, Justice J did point out that he was not ruling out the possibility of bringing simultaneous direct and proxy claims but was deciding this case on the facts before him.

The full judgment can be accessed here.
References


Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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