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BC LEGAL
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BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

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Welcome

Welcome to this week's edition of BC Disease News. In the last week there has been a rush of new claims seeking to avoid the now in force enhanced court fees. Elsewhere, claimant firms have reported reduced financial performance.

This week we present a feature exploring whether disease claims could be resolved by means of online dispute resolution (ODR).

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

As always, warmest regards to all.

SUBJECTS

Court Fee Reforms – Claimant Firm Financial Performance – Hearing Locations – Online Dispute Resolution

Claims rush as enhanced court fees close in

Civil courts have this week introduced enhanced court fees to a chorus of condemnation from across the profession.[1]

From 9 March the court fee for all claims valued at more than £10,000 will be 5% of the value of the claim, with the maximum fee capped at £10,000.

The changes have come into force just seven weeks after they were announced by the Government, and despite an ongoing legal challenge by the Law Society and other groups. Opposition has also hailed from the senior judiciary and representative groups for both claimant and defendant lawyers.

Practitioners last week reported a surge in claims as lawyers scrambled to capitalise on the then existing fees. Some had feared that failure to do so would leave them in professional negligence waters.

The Ministry of Justice insisted that the courts would be prepared for this week's new fees, which are claimed to be expected to raise £120 million a year to help fund the courts service. The Ministry of Justice said: 'Changes have been made to HM Courts & Tribunals Service's computer systems and relevant public-facing leaflets in readiness…We have also briefed court staff on the new fees'.

The Law Society has issued a pre-action protocol letter on the court increases, which amount to more than a seven-fold rise for claims valued at £200,000. The president of the Society, Andrew Caplen, said: 'The Government appears to be on a mission to turn the courts into a profit centre, amounting to a flat tax on those seeking justice'.

While the legal challenge continues, claimant practitioners will have to either rely on litigation funders or after-the-event insurers or dip into their own reserves to fund claims. The Law Society council member for civil litigation, Keith Etherington, said: 'The problem is firms are already working in overdraft – how can they fund cases up to £10,000? The MoJ says it is making savings but they will fall on to the NHS and local authorities when costs are recovered'.

PI leviathan reports post-Jackson revenue fall

One of the largest personal injury firms in the UK lost tens of millions of pounds in turnover in the first full year following the implementation of the Jackson reforms.[2]

Accounts filed with Companies House show that Minster Law – based in York – recorded revenue of £55 million for the year ending 30 June 2014.

The previous year's results, which accounted for a 14 month period ending on 30 June 2013, saw revenue of £102 million. The fall therefore amounts to £32 million of an annualised basis.

The results reflect the difficulties faced by firms managing the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which banned the recoverability of success fees and insurance premiums in April 2013.

In 2012-13 the firm recorded pre-tax losses of approximately £600,000. These increased to £2.5 million in 2013-14.

The reporting period was extended last year to include BGL Group's acquisition of Minster in May 2013. It emerged that BGL made a loan of £73 million to the company last year, to be repaid by 31 May 2017.

In its strategic report, the board said the results were considered 'satisfactory' in view of the significant changes in the sector. It said that the 2012 Act had reduced legal fees that solicitors could recover in PI claims and that the sector remained 'highly competitive'. It also noted that the firm has invested in people and technology to distinguish its services and to ensure compliance with the 2012 Act. The company has also diversified by introducing capability to handle serious injury cases and employers' liability and public liability work.

The report added: 'There has been a significant amount of regulatory and legislative changes which have impacted trading and the business has had to adapt to incorporate those changes. It has done so through investment in people and technology…There remains uncertainty as to the extent of future changes which could impact upon the business and further changes are anticipated'.

Litigants must show London hearings are necessary

In edition 81 of Disease News we explored the upcoming changes to the Civil Procedure Rules. Practice Direction 29 is to be amended to require parties to explain why a hearing in London is necessary when regional specialist courts are available.[3]

Further details have now emerged from the meeting of the Civil Procedure Rule Committee. In a report last July, Mr Justice Coulson acknowledged that specialist judges in Manchester and Leeds were concerned at the number of cases being diverted to London. He concluded that the diversion of work was not a 'crucial issue' and urged the Committee not to take the most extreme option of insisting that parties must start their claims in the centre to which the claimant has the closest connection. He instead proposed amending the existing rules to require parties to say why London is a more suitable venue.

Practice Direction 29 will now state that parties must explain in their directions questionnaire why the case is not suitable for a hearing in the appropriate specialist regional court. The additional section states: 'Those regional specialist court centre have been set up to deal with appropriate cases out of London, so the parties will need to state in detail why, despite the availability of a regional specialist court, they wish the case to be heard in London'.

According to the minutes of the

Committee's meeting, Coulson said that both parties in two cases had told him since his report that they preferred London because more judges were available resulting in cases being heard more quickly. Coulson said he had found this to be a commonly held view.

Elsewhere, the Committee said it had considered amendments to the rules in relation to recoverable rates for legal representatives, with Coulson noting that rates were better for hearings in London.

However, the Committee said it refrained for making any amendments following a written response from the Senior Costs Judge, Master Gordon-Saker, who gave an 'absolute assurance' that no costs judge or officer would allow a higher hourly rate simply because the case was heard in London. 'The only relevant geographical factor is the location where the work was done…The guideline hourly rates are based only on the location of the solicitor, not the location of the hearing'.

Claimant firm profits drop

Pre-tax profits at national claimant firm Irwin Mitchell fell 10.3% to £21.7 million 2014 on a fall in turnover partly caused by the Jackson reforms to civil litigation.[4]

The expanding alternative business structure (ABS) said that profit before tax had 'reduced due to a combination of law reform and continued investment in developing the business through recruitment, acquisition and from the opening of a new office'.

Accounts filed with Companies House for the year ending 30 April 2014 show turnover slipping 2.4%, to £186.7 million, from 191.4 million in 2013.

'Overall revenues fell following the transfer of part of the recoveries department to a subsidiary of Irwin Mitchell Holdings Limited', the firm said. It noted that: 'Law reform has impacted significantly on some areas of the business, particularly the motor operations, but this has been offset by organic growth in other areas such as the expanding business legal services division'.

Feature: A brave new world? Online resolution of disease claims?

Introduction

With the seemingly perennial changes to disease litigation, it is all too easy to overlook reforms beyond those that are legal in nature. But those reforms may nevertheless have the potential to profoundly impact on disease claims and their handling. In this week's edition we consider just such a reform: online resolution of claims. The future is now one where disease claims may be resolved online, after a major report said it is time for a 'radical and fundamental change' in the way the courts deal with low-value claims and called for the introduction of state-backed online dispute resolution (ODR) across England and Wales in 2017.[5]

In this article we consider the proposals, the reception they have received, and ask whether online resolution of disputes is something that realistically might be suitable for disease claims.

Online Dispute Resolution – The Proposals

In its report, 'Online Dispute Resolution for Low Value Civil Claims', the Civil Justice Council's (CJC) Online Dispute Resolution Advisory Group – chaired by legal futurologist Professor Richard Susskind – said ODR would increase access to justice through delivering a more affordable and user-friendly service, and would streamline the court process.

The Group's terms of reference were limited to investigating the suitability of ODR for civil claims under the value of £25,000. It said these claims could come under the jurisdiction of a new HM Online Court (HMOC), which would be part of HM Courts and Tribunals Service (HMCTS).

While the Group emphasised that ODR would not be appropriate for all types of case, the report said HMOC would extend the courts' scope to encompass dispute containment and avoidance, and formally bring alternative dispute resolution into the system, through a three tier process.

Tier 1 would concern dispute avoidance, involving online evaluation of the problem with the support of interactive aids and information services. This would help people diagnose their issues and identify the best way of resolving them.

Tier 2 would concern dispute containment, which would see the introduction of online facilitation, in which trained, experienced facilitators 'bring an objective eye to the problem and try to help the parties reach agreement on resolving the issue'. There would also be some 'automated negotiation', or blind bidding.

Tier 3 would be concerned with dispute resolution, where professional judges would decide suitable cases online if the first two stages failed, largely on the basis of papers received electronically, but with an option of telephone hearings. The decisions would be as binding, enforceable and appealable as any other court rulings.

The report called for the system to be piloted in 2015-16, ahead of national roll-out in 2017. It suggested, but did not recommend, that the pilot should focus on the small claims track of claims up to £10,000, and personal injury and housing disrepair claims of up to £1,000.

As to funding of the system, the report said a 'modest fraction' of the £75 million being pumped into the civil courts in each of the next five years to renew the system should be allocated to ODR. Fees would be lower than for users of physical courts, but the advisory group said they should be set at a level that deterred litigants attracted by the ease of online claims to pursue many cases with no realistic prospect of success.

The Group envisaged that the second

generation of HMOC would embrace video technology and an online reputation system, while the third generation would involve artificial intelligence as a facilitator at tiers 1 and 2, and as an 'intelligent assistant' for judges, rather than replacing humans.

Professor Susskind said: 'ODR is not science-fiction. There are examples from around the world that clearly demonstrate its current value and future potential, not least to litigants in person'.

A Warm Reception?

Lord Dyson, Master of the Rolls and chairman of the CJC, said the chief executive of HMCTS was an 'enthusiastic' supporter of the report, while he had little doubt that the government would support it also. But he did concede 2017 was 'very optimistic' for the roll-out. He also added that ODR would not be the end of lawyers in litigation, noting that they are rarely involved in small claims anyway.

He said: 'This is an important and timely report. There is no doubt that ODR has enormous potential for meeting the needs (and preferences) of the system and its users in the 21st century. It aim is to broaden access to justice and resolve disputes more easily, quickly and cheaply. The challenges lies in delivering a system that fulfils that objective'.

A HMCTS spokesperson said: 'We welcome the publication of this important and thought-provoking report. We agree that ODR is an important area and one that we are actively exploring in more detail in the context of the reform of court and tribunal services. We are keen to continue to engage with the ODR advisory group on its report and any future work that the Civil Justice Council may commission it to do.

David Greene, partner at Edwin Coe, said: 'Having worked as an online mediator for eBay I know that the system does work. It's the way to go. Taking a step further into adjudication is more adventurous because it is likely to press the judge into a much more inquisitorial role. Probably it can only really work in certain types of cases…The judicial process is often dependent on seeing the parties and witnesses give evidence. Taking that evidence over the phone would miss that element. It would make more sense to develop video/skype conferencing for the scheme.[6]

However, the report was not roundly welcomed in all quarters. A spokesperson for the Bar Council urged caution, saying: 'We must be wary of creating a system which is over-simplified and does not do justice to the circumstances of particular cases'.[7]

Online Disease Claims?

Given that ODR is anticipated to apply to claims up to £25,000 in value, there is the prospect that a significant proportion of disease claims could be captured. Having said that, the report did concede ODR will not be appropriate for all cases. So is ODR 'appropriate' for disease claims? While it is never wise to dismiss novel concepts before they have been explored fully – particularly if they may herald lower costs – it is suggested at first blush that, as candidates for inappropriate uses of full ODR go, disease claims could be expected to feature highly on that list. That is for the following reasons:

- Disease claims are complex cases that very often require substantial expert evidence, both of an engineering and medical nature. These are matters which will need to be thoroughly tested by the courts in the traditional manner under cross examination.
- Many disease claims turn on the evidence of individual witnesses, particularly in relation to events that took place many years ago. The veracity, credibility and weight to be attached to that evidence is best judged by testing it in the traditional manner under cross examination. Receiving that evidence on paper or by telephone alone would deprive the court of its ability to best judge the evidence.
- The complexity of disease claims makes it desirable to have specialised practitioners present to explore the issues with rationally and in detail. Paper based consideration alone removes that possibility.
- Disease claims are complex and any process which aims to simplify and hasten their resolution – such as ODR – may risk elevating the precedence of those objectives at the expense of doing justice in the circumstances of the case.

Those considerations do not, however, mean that technology cannot have a greater role in the resolution of disease claims. It will have been noted above that we suggested disease claims are not necessarily suitable for 'full' ODR. That does not means that certain elements of the proposals, and tier 2 in particular, cannot have a role to play. Moreover, and more generally, the greater use of video conferencing may permit the courts to retain the traditional advantages of the trial format, but in a more cost effective way. That is to be applauded.

Conclusion

ODR represents a significant change to the resolution of claims in England and Wales. For that reason it should be implemented cautiously. A roll out of 2017 is certainly optimistic, to say the least. Cautious implementation also dictates that the new regime should be visited on the simplest of cases first, so that the necessary experimentation and evaluation can be conducted efficiently and effectively. That should necessarily exclude applying the new regime to disease claims, which, by their very nature, are typically complex. More generally, it would be surprising if disease claims are ever regarded as suitable for full ODR. But that does not mean that technology should not be utilised to improve the speed and cost of disease claims where that can be achieved without compromising on achieving justice in individual cases.

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[2] John Hyde, 'PI Giant Reports Huge Revenue Drop Post-Jackson' (Law Society Gazette, 9 February 2015) <http://www.lawgazette.co.uk/practice/pi-giant-reports-huge-revenue-drop-post-jackson/5046612.article> accessed 9 March 2015.

[3] John Hyde, 'Want a London Hearing? Prove it is Needed, Litigants Told' (Law Society Gazette, 10 February 2015) <http://www.lawgazette.co.uk/news/want-a-london-hearing-prove-it-is-needed-litigants-told/5046684.article> accessed 10 March 2015.

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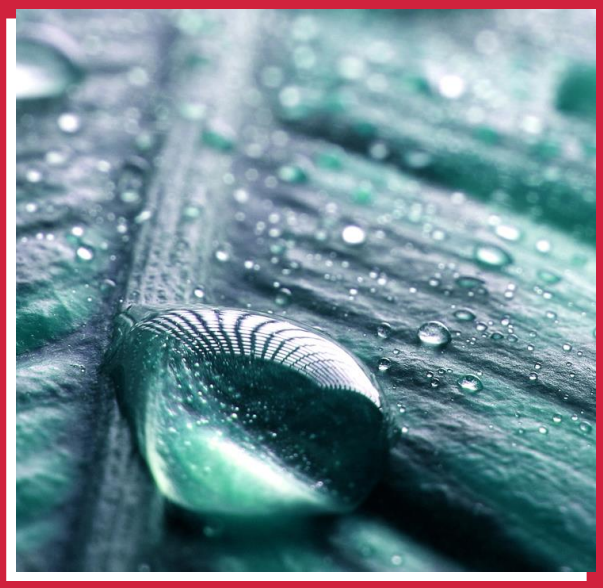

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