THE FUTURE OF PERSONAL INJURY LAW

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1. HISTORICAL BACKGROUND

We are currently part way through a tide of change that started with

- "Access to Justice" (the Woolf Report) in 1996
- Introduction of the CPR 1998 – introducing new method of managing claims and formalising pre action protocols by which pre litigation preparation and resolution of claims could be achieved;
- Introduction of Periodical Payments Orders in 2005;

The aim of the changes is to simplify, speed up and cheapen the claims process so that claims are dealt with more speedily, with less cost and more fairly.

That process is far from complete and some more changes are just around the corner. The general perception is that the system is failing in that it is thought to be too slow and too expensive.

"The personal injury compensation system is failing. It takes too long to get compensation to claimants, the legal costs are too high and it undermines rehabilitation"

"Adding Insult To Injury" – ABI March 2008

The ABI paper indicated that

- The average RTA claim took 2 years to settle

- The average EL claim took 3 years to settle

- The level of costs in all cases was high but disproportionately so in low value cases (cases valued at £1,000-£4,999 attracted costs of 88% for RTA cases and 93% for EL cases). Examples of costs bills of £7,000+ in claims worth only £2,000 were cited.

2. THE IMMEDIATE FUTURE

In April 2007 the government issued a consultation paper entitled "Case Track Limits and the Claims Process for Personal Injury Claims". This paper recommended that:

- The limit for small claims track cases should remain at £1,000

- The limit for fast track claims should be raised to £25,000 subject to a discretion to allocate claims to the multi track

- The claims process for personal injury cases should be overhauled "***to provide fair compensation in a more efficient and cost effective way"***

The proposals for claims management applied only to cases falling below the proposed fast track limit (ie claims below £25,000). The proposals included

- Early disclosure and notification of a claim to insurers (5 days)

- An early assessment and decision on liability by insurers (aimed at avoiding duplication of work investigating liability and "frontloading" of costs by a claimant) Draft claim forms setting out the basic information that insurers might require to reach a decision on liability

- Time limits for responses by insurers as to liability (15 days in RTA claims, 30 days for EL claims)

- Admissions of liability to be binding except in cases of fraud

- Provision for early rehabilitation

- Provision of a "settlement pack" where liability is conceded (containing the medical report, material on special damages and an offer to settle) – a response will be required within a set time either by way of acceptance of the offer or by a counter offer

- Provision for a simple quantum assessment at a hearing before a district judge without the need for formal, full scale proceedings

- The setting of fixed costs for the various stages of the process

- The removal ATE insurance in all but a small number cases within the process and fixed recoverable costs for each stage of the claim

- If liability is denied then the claim proceeds in the "usual" way and the claim falls out of the scheme

After the consultation process (which included a submission by the Association of British Insurers in March 2008 welcoming the proposals) a

Response was published in July 2008. The key conclusions reached were that

- The small claims limit would remain at £1,000 for PI claims
- The fast track limit would rise to £25,000
- The proposals relating to ATE were abandoned
- The new claims process would apply to cases valued at up to £10,000 (excluding clinical negligence, disease claims EL claims and PL claims – i.e. only RTA claims)
- The time limits for notification of claims to insurers would be greater than 5 days and would be subject to further consultation
- But insurers would have 15 days to respond to a notification of claim with their decision on liability (and without any provision for an extension of time)
- Admissions are to be taken as admissions of breach of duty (leaving issues of causation open) but are to be binding (save for cases of fraud)
- Allegations of contributory negligence will take the claim out of the process

- If causation becomes an issue the claim will drop out of the process

- The fixed costs regime would be implemented but the levels of any such costs would need to be considered by the Advisory Committee on Civil Costs

- Referral fees would not form part of the fixed costs regime

- If the claim did not settle then the value would be determined by a district judge at a hearing (unless the parties agreed to a determination on paper)

The Civil Procedure Rules Committee have been asked to consider draft rules, practice directions and protocols to implement the new claims process.

In summary:

- Claims for PI under £1,000 – small claims track

- Claims under £25,000 – fast track – of which

- Claims arising out of RTA under £10,000 – new procedure

    - Early notification of claim to insurers by solicitors

    - Early (and binding) decision by insurers on liability

- If liability conceded – proceed to medical evidence and settlement pack

- Insurers accept claimant's offer or make counter offer

- If no settlement go to hearing before district judge for resolution

- Fixed costs apply – rates to be determined

- ATE allowed

At present this is a novel but limited regime of dealing with quantum claims quickly and cheaply. Its impact will be limited to begin with as it will apply only to road traffic cases worth less than £10,000 (of which there are many) but, if the scheme succeeds, it is very likely to be extended. In the medium term we can expect to see the scheme apply to all cases within the fast track, increasing the value of the cases to which the scheme applies and the range of cases to which it could apply.

3. THE MEDIUM TERM

a. The impetus to **drive down costs** will continue – note the presence of the Advisory Committee on Civil Costs created in 2007 on the recommendation of the Civil Justice Council. Their remit will not be limited to fast track costs – the unease as to the level of costs of personal injury litigation goes wider than that

"The very high costs of civil litigation in England & Wales is a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole.... One element of the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on their work"

Willis v Nicolson [2007] EWCA Civ 199 Buxton LJ

Whilst a fixed costs regime may not be feasible for multi track and high value cases the courts are keen to look at other ways to control spiralling costs.

One solution might be costs capping whereby "costs budgets" for each stage of the case (or for the whole case) are set at the outset of the case (or at a very early stage of the case). **Willis** (quoted above) was a costs capping case.

At present there is a difference in the way that costs capping measures are applied to different types of cases. In group litigation cases costs capping is positively encouraged and adopted, the courts being keen to step in and exercise control over the proceedings and the costs incurred – see **King v Telegraph Group [2005] 1 WLR 2282**.

But, in individual cases, the courts have been less willing to interfere and impose a costs cap. In such cases the court's approach is that a costs cap should only be imposed in limited circumstances – see **Smart v East Cheshire NHS Trust [2003] EWHC 2806 QB**. In effect, in individual cases the courts apply a 3 stage test:

- That there is a real and substantial risk that costs will be disproportionately and unreasonably incurred

- That that risk could not be managed by "conventional" case management powers (especially the power to disallow costs at a detailed assessment)

- That it would be just to make such an order

In **Willis** the Court of Appeal were invited to confront this inconsistency and to hand down guidance as to the correct approach to costs capping in personal injury cases. Having heard the arguments the Court of Appeal drafted a set of principles to be applied in personal injury cases but, after discussion with members of the court (including the Master of the Rolls and the Deputy Head of Civil Justice), decided that it would be inappropriate to give such guidance. Instead it was held that any such guidance, if it was to be given at all, should emanate from the Civil Procedure Rules Committee after extensive consultation.

Willis was decided in March 2007. The Advisory Committee on Civil Costs was established in September 2007.

Some move might be made to cut the rates that are applied to various cases, overriding market rates and imposing the court's own rates, as determined by the Advisory Committee. This is likely to encounter significant and hostile opposition (especially at a time when many claimant solicitors are suffering reduced incomes) and is unlikely to succeed.

b. **Rehabilitation** is also likely to feature strongly in the future. We have already seen the introduction and gradual acceptance of the Rehabilitation Code. Rehabilitation featured in the April 2007 Consultation Paper

"It is recognised that to have best effect, rehabilitation needs to be provided as early as possible, usually before a claim is made... In these circumstances we do not believe that rehabilitation should be dependent on the claims process or await a claim being made"

The need for and benefit of rehabilitation was acknowledged by the ABI response

"The (Rehabilitation) Code is a step towards improving the provision of rehabilitation to injured people. If the benefit of rehabilitation is to be maximised, it needs to be provided early."

But no positive recommendations appear to have been made in the Government's response to the Consultation Paper, probably because, with RTA cases at £10,000 or less, there is less scope for rehabilitation to play a part.

Nevertheless the likelihood is that this will become an increasingly prominent feature. Eventually a system will evolve whereby rehabilitation at an early stage will be a key process of all cases where liability (or even primary liability) is not in dispute. In effect the new claims procedure currently being introduced will be expanded to include a "rehabilitation phase". The parties are likely to be required to consider and provide rehabilitation – in effect the Rehabilitation Code will become compulsory.

Just as with the new claims procedure, some dispute resolution mechanism will be required without the need to issue and conduct formal (expensive) proceedings. Some form of application to the court for specific dispute resolution may be required.

This regime will extend not only to rehabilitation in the form of therapies or vocational rehabilitation but is likely to include the acquisition of accommodation by the claimant and the establishment of a care regime (funded by interim payments from the insurer). All before formal proceedings have been commenced.

c. The "post code lottery" introduced by the decision in **Sowden** may not last much longer. At present the provision of care and accommodation to seriously injured victims of a tort by the local authority or PCT varies enormously. Some provide a full or nearly full package of care. Others, aware that there is an insurer in the background, are more reluctant to step forward. Many claimant solicitors are keen to avoid any form of section 47 assessment. The result is that it is often in insurers interests to keep liability open so that the claimant is compelled to seek local authority provision for which credit can be claimed.

This situation is unlikely to continue and, eventually, legislation will be passed that, in one way or another, prevents an insurer from taking credit for local authority provision. Either the damages will fall within

any means testing or insurers will be obliged to repay the local authority or PCT.

d. **Periodical Payment Orders** will become the norm in high value cases with a care component. Eventually claimants and their advisors will become accustomed to dealing with these claims and insurers will need to adjust (for example offers to settle will need to be pitched on two bases – lump sum and lump sum plus PPO).

   In certain claims PPOs will apply to the future loss of earnings claims as well – this is likely in claims for young claimants who are just at the outset of their working careers.

e. **Ogden 6** is going to cause confusion when considering the question fo future loss of earnings for a claimant with a permanent injury who is not prevented from pursuing his pre accident work by that injury.

   At present, if the claimant is deemed "disabled" within the meaning of the Disability Discrimination Act 1995 then a different (much lower) multiplier applies to his future, post accident earnings than that which would apply to his pre accident earning capacity – see **Conner v Bradman [2007] EWHC 2789 QB**

   The test laid down by the 1995 Act is whether the person has a ***"physical or mental impairment which has a substantial and long term adverse affect on his ability to carry out normal day to day***

activities". On this approach most claimants with a permanent injury given continuing symptoms could claim to be "disabled" even though the particular disability did not affect their capacity to perform their work.

The problem is that this approach is inflexible so that a paraplegic manual labourer is treated in the same way as a an office worker who has suffered a back injury restricting their capacity to perform heavy lifting. In practice one is obviously more severely limited at work than the other but, applying Ogden 6 rigidly, both would have the same multipliers (assuming that they were the same age).

The solution in **Conner** was to adopt an Ogden 6 approach and then "adjust" the multiplier to take account of the extent of the "disability". That approach is likely to generate further dispute and litigation.

4. THE LONG TERM

This is mainly guesswork.

a. The move will be away from adversarial, court based procedure to a more co operative mediation based approach. This is already happening – how many cases find their way to a contested trial and judgment? The trend will continue and develop so that disputes along the way do not require the claimant to issue proceedings to resolve that one isolated argument. This is already starting to happen with the new claims procedure.

b. Smaller claims will eventually fall out of the court system as we know it and will be dealt with in a satellite, fast track system. The aim will be to remove the lawyers from the process as much as possible.

c. Larger claims will still require the involvement of the courts but on far fewer occasions than is currently the case.

d. The trend will be for litigation and, in particular, the assessment of damages, to move from a lawyer based adversarial system towards a more mechanical system whereby the answer can be reached by using a table or set of tables. We are seeing this already with Ogden 6 (although it is creating problems) and it was suggested for general damages in the 2007 Consultation Paper (although not pursued).

e. All of this has applied, mainly, to cases where liability is not contested. What about cases where there is a dispute on liability? There rehabilitation and speedy assessment of damages is not possible so, eventually, the focus will be on speeding up the resolution of liability disputes and making that process less expensive. How might that be achieved?

- One option is the rigid formula approach – for example set brackets for contributory negligence (again a recommendation in 2007 but not currently pursued);

- Another option is the resolution of liability arguments at a very early stage by mediation or pseudo arbitration. Bear in mind that, in the new procedure, insurers will need to have formulated their views on liability within a very short time of notification of the claim. If liability is contested that should be capable of resolution within a short space of time thereafter. Such resolution need not, necessarily, involve the full court process.

- The final option is the adoption of a "no fault" system. This rears its head from time to time, about every 15 years or so, and will not go away. The advantage is that it means that all cases are quantum only – that makes them cheaper to deal with and quicker to resolve. My feeling is that we are, in the very long term, heading in that direction. The argument will be

that insurers will offset any losses in paying out on "no liability" claims by savings in not fighting liability and quantum in contested actions. For example, If all claims are quantum only then the need for ATE insurance will fall away significantly.

f. **Rehabilitation** will feature strongly. One area that might usefully be considered by insurers is a more pro active role in the provision of a claimant's care needs so that the insurer is not merely responding to (and trying to cut back on) whatever scheme the claimant's solicitor and experts are seeking to construct. It would be an advantage for insurers to be able to offer their own "packages" in any individual case.

One obvious areas where this can be done is in the provision of care and case management. To an extent we are already moving in this direction with the joint appointment of case managers outside the litigation system. Why not go further and create a pool of case manager, care providers and therapists whose services can be used and whose engagement is agreed by both sides?

Similarly insurers might explore the possibility of acquiring a stock of disabled friendly housing in areas around the country. In any catastrophic injury claim one significant component of the damages award is the cost of accommodation – both purchasing suitable accommodation and adapting it (adaptations which often produce a further claim for removing after the claimant has left the property. This

is all money lost to insurers. If insurers could offer suitable accommodation to inured claimants they could avoid this significant outlay and retain the asset. Even if the accommodation was used only as a temporary measure for the claimant after discharge it would serve a valuable purpose. If one particular insurer was not using any particular accommodation it could be made available to other insurers (or perhaps, even, the local authority).

Whilst this would not work in all cases and insurers could only hold so much housing stock there are significant benefits to the idea which, at the very least, make it worth exploring:

- Retaining the asset
- Avoiding outlay on buying and then adapting expensive accommodation
- Avoiding the argument that an early significant interim payment is required to establish a home and a care regime
- It enables an early regime to be setablished in suitable accommodation providing early and thorough rehabilitation at low stress to a claimant thereby improving the likely outcome.

g. **Other areas** to consider:

- Causation – are we moving away from the conventional but for test to a more risk based approach to establishing causation – see for example **Bailey v MoD [29-7-08] CA**

- Consumer Protection Act 1987 – will its use grow – especially in cases where equipment provided to an employee has failed or in public liability cases. At present it is underused.

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