



FOIL UPDATE

October 2009

RTA Process Reform – FAQs

Following the publication of the MOJ procedure document and the FOIL Updates on the new process members have forwarded a number of questions on how the new process will work. Anthony Hughes attended a further meeting with the MOJ on 15 October and some of the issues can now be clarified:

1. **Although I thought cross border claims were to be excluded from the process there is no mention of this in the MOJ procedure document?**

Cross border claims are excluded.

2. **Despite the new process isn't it still possible to run a PD claim outside the process and recover more costs if the claim is over £5k?**

Yes, this is a risk as it is now under the CPR. Insurers will need to review their strategy on dealing with such issues.

3. **Seatbelt Contributory Negligence**

- **At para 2.3 it states "the value of the claim will also include any deduction for seatbelt contributory negligence.". This seems to mean that where a claim is worth, say £12k but 25% contrib. brings that down to £9k it will stay in the scheme. However, without expert evidence it is impossible to say what the level of contrib. will be?**

This is correct in theory but it is expected that cases like this, where the level of contrib. cannot be agreed, will exit the process due to the need for expert evidence.

- **Under the procedure the issue of seatbelt contrib. must be raised at Stage 1. There appears to be no procedure to enable it to be raised later if, for example, the medical evidence showed that a belt had not be worn or that the claimant had hit the windscreen.**

This is an issue of causation and can be raised when medical evidence is produced at Stage 2 but the claim would then exit the process.

4. **Value of claim**

- **It appears that if a claim exits for low value under para 2.4, Stage 1 costs are still payable and are not recoverable?**

This is a current area of dispute. The MOJ's view is that there is no cause of action to recover the money but insurers are arguing, quite rightly, that the wrong behaviours will flow from this if it is not corrected. One option would be to deduct the fee from the damages or pull the case out of the process at Stage 2 and then seek recovery as part of the small claims action.

- **Under para 2.4 there does not appear to be any mechanism to determine if there are “reasonable prospects” of the claim exceeding £1k.**

That is correct.

5. Claim Notification Form (CNF)

In para 3.1.3 it says that all fields in the CNF are mandatory and that "if a mandatory field on the CNF is not completed so as to enable the insurer to make a decision on liability...where the court subsequently considers that the claimant solicitor could have obtained the information and that the claim should have remained in the process [recoverable costs will be limited]:

- **Is the claimant at risk of penalty wherever a field is incomplete or only if this affects the defendant’s ability to make a decision on liability?**

The claimant is at risk only where the lack of a completed field prevents the defendant from making a decision on liability. If the defendant is still able to make a decision on liability despite the omission there is nothing to stop an admission of liability being made to keep the case within the process, although it is unclear in those circumstances how the missing information will then be obtained.

- **Is there any need for the court to determine whether the solicitors could have obtained information - realistically all the information should either be available or not relevant?**

This is a potential weakness that could lead to satellite litigation on this point, it will be difficult to prove one way or the other.

- **From the defendant’s point of view it would seem most favourable to keep the claim in the process - should there not be provision for a defendant to ask the claimant to complete any blank fields before a claim exits?**

There was a provision in a previous draft of the procedure which would have allowed a 5 day period to do just that but the MOJ has changed it without explanation.

6. Electronic exchange

Under para 2.10 is the electronic exchange compulsory?

Yes, the only optional issue is the way it is done. Use of the ISDL portal is optional but as that is being built to avoid DPA problems it is likely to be the usual option.

7. Stage 1 costs

Under para 3.5 Stage 1 costs are payable if the claim leaves the process due to contributory negligence. Will Stage 1 costs then be deducted from the final costs paid?

FOIL is seeking clarification on this: it was agreed during negotiations that any costs paid would be set off

8. Disbursements

Although disbursements are mentioned in the MOJ document several times and receipts for disbursements are required to be sent to the defendant during Stage 2, there is no provision in the procedure document for the payment of disbursements at the end of Stages 2 and 3?

This omission will be remedied.

9. There is no mention in the procedure of payment of an ATE premium?

Our understanding is that ATE will form part of the additional liabilities recoverable under the scheme

10. Expert reports

- **Under para 3.2.3 why is the claimant required to notify the defendant of the delay in obtaining amendments to the medical report? As there is no time limit for obtaining a medical report the defendant would not have been aware of any delay.**

Correct, this is an anomaly

- **Under para 3.2.1. a third and a fourth medical report may be obtained. How does this affect the timetable?**

The further reports will be obtained before the Stage 2 Settlement Pack is prepared: at that stage there is no applicable time limit.

- **Presumably the same approach to checking reports etc will apply to addendum reports, as to the original reports under para 3.2.3?**

Correct

11. Recoverable disbursements

- **Will there be a fixed list of recoverable disbursements? Otherwise there must be a risk that claimant solicitors will simply outsource work wherever they can and claim it as a disbursement.**

This is currently being considered but the MOJ is reluctant to fix disbursements

- **Will the recoverable disbursements include counsels' fees?**

That is not the intention, the understanding is that the Stage 3 costs cover advocacy. Hopefully this will be clarified.

12. Stage 2/Stage 3

I'm confused on where Stage 2 ends and Stage 3 begins. It appears from the MOJ document that Stage 2 includes preparation of the

Settlement Pack, and finalising it with the defendant. Stage 3 will begin with the application for a hearing (para 3.3.1). Is that right?

That is certainly the point at which the Stage 2 fee becomes payable. The claimant can proceed to Stage 3 as soon as the 20 day negotiation period ends.

13. 100% success fee for Stage 3

- **In para 3.3.11 and para 7.14 where the 100% success fee is mentioned there seems to be a conscious change from the word 'hearing' to describe the paper and oral hearings under the new process, and the word 'trial', (...a 100% success fee will apply where the claim concludes at trial....) Is there any significance in this or are 'hearing'/'trial' interchangeable?**

There doesn't appear to be any significance in the change of terminology.

- **I struggle to understand the reasoning behind the 100% Stage 3 success fee - when deciding whether to proceed to Stage 3 the claimant will have all the information needed to determine prospects of success and, realistically, only the best cases will be pursued beyond Stage 2.**

The 100% success fee only applies to Stage 3 costs and is applicable because of the rules on success fees at a hearing: if the case settles in Stage 3 with no hearing then the uplift is only 12.5%

- **It appears that under the new process the effect of Lamont v Burton has been circumvented. Is that correct?**

That's correct. Obviously under the old system there was an incentive to go to a hearing as even if the claimant lost on Part 36 the 100% success fee would apply on all the claimant's costs to the date of the offer, usually resulting in greater costs than if the case had been settled at the offer stage with a 12.5% success fee. Under the new process the 100% success fee will only apply to the Stage 3 costs. If the claimant is unsuccessful at the hearing there will be no Stage 3 costs award and therefore no 100% success fee. A 12.5% success fee will apply to the Stage 1 and 2 costs.

14. Interim payments

- **Para 4.8 indicates that a claimant must give reasons why a payment greater than £1k is required (if one is sought). Obviously claimants generally do not need to justify an interim payment on the basis of need - is the test different within the process?**

The intention is that the test will be the same but the current terminology used does say it is "needs" based.

- **Under para 3.2.13 at the end of Stage 2, an interim payment will be made of the full amount of the defendant's offer, subject to CRU. Under para 4.6 where an additional medical report is required the process will be stayed and an automatic interim payment will be made - will CRU deductions be made from that payment?**

Yes

- **It appears that Part 21 CPR will not allow a voluntary interim payment to a child so if an interim payment is requested the claim will leave the process. Is this a loophole?**

Yes, the problem is that any payments require court approval in theory but there is no reason the parties could not agree this between themselves for, say, treatment fees

15. Payment of costs/success fee

- **In para 3.2.16 Stage 2 costs will "attract" a 12.5% success fee. Is the success fee also payable at this stage where the case settles?**

Yes

- **Under para 3.3.13 presumably, in line with all other time limits, that should read 10 *business days*.**

Yes

16. Child settlement

- **Under para 7.10, where the judge does not approve the settlement for a child at the approval hearing the claim will exit the process. Is it correct that the fee for the hearing is still payable?**

That's correct, the rationale being that the hearing is not contested.

- **In contrast, under para 7.15 if, in a contested quantum case, the judge does not award damages and requests further evidence the claim will again exit the process and the hearing fee of £500 will not be payable. Why the difference?**

Because this is a contested hearing so costs are at large

17. Section 5 – vehicle damage

In para 5.2, if the invoices for vehicle damage/hire charges are not sent with the CNF do the Stage 2 time limits apply?

Yes, this is only a problem if those items are claimed in the CNF

If you have any further questions about the operation of the new procedure please contact Shirley Denyer at shirley.denyer@foil.org.uk

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