



# FOIL UPDATE

September 2009

## RTA Process Reform – issues arising from the MOJ procedure document

The Ministry of Justice has now published the full version of the new RTA procedure. The document is available on the FOIL website [www.foil.org.uk](http://www.foil.org.uk) together with the draft forms (although it should be noted that some of these are still subject to amendment and further drafting). Attached as Appendix 1 to this Update is an updated summary of the process. Some of the detail has changed and this amends the summary provided in the previous FOIL Update called 'RTA Process Reform – MOJ signs off the agreement and publishes the rates', which should be discarded.

It was anticipated that the publication of the new procedure for RTA claims up to £10k would mark the successful conclusion of an initiative involving much hard work and negotiation over the past 18 months. The publication, however, of the Ministry of Justice document, called "Low Value Personal Injury Claims in Road Traffic Accidents" has raised a number of questions and uncertainties. It had been hoped that the new procedure would introduce a quicker, cheaper process based on greater certainty but there are now some doubts as to the extent to which that has been achieved, and what action, if any, can be taken at this stage to address the issues. Some of the issues are set out below: the paragraph numbers below refer to the MOJ document.

### Part 36

This issue was one of the last outstanding matters on the table before the new process was finalised. Throughout the process the defendant lobby had sought the inclusion of a formula which would provide an incentive to claimant lawyers to make sensible offers of settlement, and provide certainty, to avoid the need to make judgments on reasonableness as required by the approach in *Carver v BAA*.

Disappointingly, confirmation has now been received from the MOJ confirming that, instead of a codified approach based on Part 36, which would have given certainty whilst preserving the common-sense approach of *Carver*, the current Part 36 provisions should apply. The announcement from the MOJ confirms that the Secretary of State takes the view that the new system will significantly reduce costs through the industry fixed costs agreement, which he has endorsed, and that the increased certainty these bring will assist the Part 36 procedure. There is little comfort however for thinking that this will encourage a sensible first offer from a claimant as a high offer can now be made without risk of penalty.

### Seatbelt contributory negligence

Under the procedure the defendant must raise seatbelt contrib. in Stage 1. There appears to be no mechanism for raising the issue at a later stage if, for example, it becomes evident through the medical evidence.

### **Cross Border claims (paras 2.1 and 2.2)**

Obviously, accidents involving foreign parties and insurance companies can raise very complex issues. It had been anticipated that cross border claims would be excluded from the new procedure but the only provision included is that the process covers accidents which occur in England and Wales.

### **Reasonable prospects of success (paras 2.4 and 2.5)**

The new process will apply to all RTA claims where the value of the claim is between £1,000 and £10,000 (excluding vehicle damage and hire costs) and the pain, suffering and loss of amenity (PSLA) element is at least £1,000. In practice the claim will be assessed at the outset, and if there are reasonable prospects of the PSLA claim exceeding £1,000 the fixed costs for Stage 1 will be paid. Where it becomes clear in Stage 2 that the value of the PSLA claim was less than £1,000 the claim will exit the process. There is no longer any mechanism within the process to determine 'reasonable prospects'.

### **The effect of contributory negligence (para 3.5)**

Where the defendant's insurer admits liability within 15 business days but this is subject to contributory negligence (other than failure to wear a seatbelt), the claim will leave the process. The defendant's insurer will set out the reasons for alleging contrib. in the response section of the CNF and send this electronically to the claimant solicitor. The MOJ confirms that Stage 1 fixed costs will be payable and that costs for work done after Stage 1 will follow the usual current costs regimes, but it is not clear if Stage 1 costs will then be deducted from the final costs paid.

### **Disbursements (paras 3.2.16 and 3.3.11-13)**

At the end of Stage 2 fixed recoverable costs of £800 will apply, together with a success fee of 12.5% where the case settles. At the end of Stage 3 fixed costs of £250 (for a paper hearing) or £500 (for an oral hearing) will be payable together with a success fee of 100% if the claimant has won. The fixed recoverable costs are to be paid within 10 business days. Although disbursements are mentioned several times in the MOJ document 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 Stage 2 or Stage 3. It appears that, as the procedure is outlined at the moment, there is no requirement for defendants to pay disbursements.

### **ATE premium**

Although details of the success fee uplift are included in the procedure there is no mention at all of payment of an ATE premium.

### **Payment of costs and damages before Stage 3 trial commences (para 3.3.13)**

Where an offer is made and settlement is reached between the issue of the claim in Stage 3 and the trial, the procedure states that the costs and damages should be paid within 10 days. Presumably, in line with all other time periods in the process that should read 10 *business* days.

### **Interim payment (para 4.6)**

Under para 3.2.13, at the end of Stage 2, where the parties have not reached agreement an interim payment will be made of the full amount of the defendant's

offer, subject to deductions of any sums payable to CRU. Under para 4.6, where an additional medical report is required at final prognosis the parties will stay the process and at that stage an automatic interim payment will be paid. The procedure document does not indicate whether CRU or other deductions should be made from that interim payment.

### **Interim payment for a child (paras 7.3 and 7.4)**

Under Part 21 of the CPR, no payment, including any voluntary interim payment, so far as it relates to a claim on behalf of a child, will be valid without the approval of the court. There is therefore no provision within the new procedure for interim payments in child cases: if an interim payment is required the claim will leave the process.

## **APPENDIX 1 A SUMMARY OF THE PROCESS AS SET OUT IN THE MOJ DOCUMENT**

The new process will apply to all RTA claims where:

- There is an element of personal injury
- The PSLA (pain, suffering and loss of amenity) element is at least £1,000
- The value of the claim is between £1k and £10k for each claimant (excluding vehicle damage and hire costs, and taking into account any contributory negligence for no seat belt use)
- The accident occurred in England and Wales
- The accident occurred after 6 April 2010

Claims excluded from the process are:

- claims where the value of the PSLA has no reasonable prospects of exceeding £1,000;
- claims involving employers' liability and/or public liability;
- MIB untraceable cases;
- claims where the claimant or defendant is deceased;
- claims where the claimant or defendant is bankrupt; and
- claims where the claimant or defendant is a protected party.

### **The Process**

#### **STAGE 1**

##### **Providing early notification of claims to defendants and insurers**

- There will be a standard Claims Notification Form (CNF).
- All fields will be mandatory save for the referral source
- As soon as the claimant's solicitor has all the information required to complete the CNF, it MUST be emailed to the defendant's insurer.
- There will be a central portal for notification of all claims by secure electronic exchange, which will send an automatic email, acknowledging receipt of the CNF. The MIB will have a dedicated e-mail address.
- Modified version of the CNF will be sent to the defendant by first class post.
- The CNF must be fully completed for time to run.
- If a mandatory field is not completed "so as to enable the insurer to make a decision on liability within the 15 days the claim will exit the process and fixed costs will not apply. (Costs may then be limited in the ensuing proceedings).
- Insurers have 15 business days to respond on liability with no extensions. The MIB has 30 days to respond.

## Response options

- Liability is admitted, and it is not alleged that the claimant shares fault for the accident happening. However, the cause and extent of the alleged loss is not admitted. **The claim proceeds to Stage 2. Stage 1 costs payable.**
- Liability is admitted. However, because of issues of contributory negligence other than in relation to failure to wear a seatbelt, the RTA PI claim is not suitable for this claim. **The claim leaves the process. Stage 1 costs payable.**
- Liability is not admitted or there is no response. **The claim leaves the process. Stage 1 costs not payable.**
- Where fraud is alleged at any stage. **The claim leaves the process. Fixed recoverable costs not payable.**

Where Stage 1 fixed recoverable costs of £400 are payable this must be done **within 10 business days** from the end of the 15 day period allowed for a response. A success fee of 12.5% will apply on this fee if the case settles, payable at the end of Stage 2.

All cases that fall out of the process will drop into the Pre-action Protocol and the current CPR regime.

## STAGE 2

### Medical evidence, offers to settle and negotiation

- Following an admission of liability, the claimant's solicitor will obtain a medical report from a GMC registered expert (no fixed time period). It must be checked by the claimant for factual accuracy.
- Where it is clear from the outset that a second medical report from a different discipline will be required that should also be obtained.
- Within **15 business days** of the report being confirmed as factually accurate the claimant solicitor will complete the Settlement Pack Form. This will be emailed to the insurer together with the medical report and any receipts/evidence of special damages claimed. Receipts for disbursements should also be sent.
- The insurer has **15 business days** from the day following dispatch of the Settlement Pack to consider and either accept or reject the claimant's offer.
- During this period, if the defendant's insurer wishes to question or deny causation or allege fraud, the claim will leave the process and drop into the Pre-action Protocol. Fixed recoverable costs will not apply.
- The defendant's insurer must make a counter offer within the 15 days if the claimant's offer is rejected, in which case there will be a **further 20 business days** (35 in all) for the claimant to respond. This period can be varied by agreement.
- Where the case is settled damages will be paid within **10 business days**.
- Where agreement on quantum is not reached the claimant will prepare a Stage 3 version of the Settlement Pack including details of offers and comments.
- The defendant will have **5 business days** from receipt of the Stage 3 Settlement Pack to provide brief comments.
- An interim payment to the full value of the insurer's offer, subject to CRU deductions, must be made on all cases where agreement cannot be reached.

- Fixed recoverable costs of £800 will apply to all cases taken through Stage 2, payable within **10 business days** of the stage being completed. This fee will attract a success fee of 12.5% where the case settles.
- Where the claim has settled and fixed recoverable costs or disbursements have not been paid the claimant can apply for payment to be enforced through the procedure in CPR rule 44.12A. Unpaid damages will also be dealt with through an application to the court. Where the claim has not settled, unpaid costs, disbursements and interim payments will be dealt with at the Stage 3 hearing.

Where it becomes clear in Stage 2 that the value of the PSLA claim was less than £1,000 the claim will exit the process.

Where it becomes clear that the claim is worth more than £10,000 the claim will exit the process, and the claimant will notify the defendant. If unreasonably removed from the process the court may limit costs to the maximum recoverable under the new process.

### **STAGE 3**

#### **Where quantum cannot be agreed**

- After **10 business days** from the date the claimant sent the Stage 3 Settlement Pack to the insurer the claimant may make an application to the court.
- Where the claimant has not sent the Stage 3 Settlement Pack to the insurer within **15 business days** of the end of the 20 day negotiation period the insurer may prepare the pack and commence proceedings.
- The court papers will include a claim form, medical report and the Stage 3 Settlement Pack together with receipts supporting the special damages and disbursements. The offers will be lodged in a sealed envelope.
- No new documents or evidence to be provided except where ordered by the judge.
- There will be a **presumption** of a paper hearing unless the judge directs otherwise or either party requests an oral hearing.
- The court makes its decision and notifies the parties
- Subject to the usual Part 36 rules, damages and costs become payable - £250 for a paper hearing and £500 for an oral hearing.
- There will be a fixed success fee of 100% where the case concludes at trial and the claimant has won.
- Defendant's costs are fixed at Stage 3 - £250 for a paper hearing and £500 for an oral hearing.
- Damages and costs should be paid in accordance with the usual CPR provisions.
- Where payment is not received the claimant's solicitor will be able to issue proceedings for the enforcement of the court's order.
- Where an offer is made and settlement is reached before trial, fixed costs of £250 will apply and there will be a fixed success fee of 12.5%. The agreed damages and fixed costs should be paid within **10 days** of settlement being reached (*should that read 10 business days?*)

#### **London Weighting**

PD 45 para 26A6 will apply. Claims that meet those criteria will be allowed, in addition to the fixed recoverable costs, an amount equal to 12.5% of the fixed recoverable costs.

### Subsequent medical reports/interim payments

A third or fourth medical report should only be obtained on the recommendation of either of the two medical experts of different disciplines already consulted

A subsequent report may be obtained after a period of time, where treatment is ongoing or a final prognosis is awaited. The parties should then agree to stay the process for the required period of time. An automatic interim payment of £1,000 will be made. Fixed recoverable costs will not be payable at this interim stage. The claimant may seek an interim payment of more than £1,000, stating the reasons. Where the additional interim payment is not agreed the claim will exit the process. If the court concludes that the request for a higher interim payment was not reasonable costs will be limited to those under the new process.

### Vehicle damage and hire charges

Vehicle damage and hire costs will be included on the CNF where the solicitor is instructed on these issues, and invoices sent. Where details cannot be sent with the CNF they should be sent as soon as possible and on the defendant's admission of liability.

To avoid the claimant losing the right to make a claim for personal injuries any claims for vehicle damage and hire charges being handled by a third party need to be brought together with the PI process if they remain unsettled at Stage 3.

### Seatbelt contributory negligence

Information on the wearing of a seatbelt will be included in the CNF. Once an admission of liability has been made with an allegation of seatbelt contributory negligence the medical report will allow the deduction to be calculated on normal case law principles. The Settlement Pack should include a suggested percentage reduction. If the percentage deduction is not resolved the judge will consider it at Stage 3. Where there is a dispute of fact requiring evidence from the defendant and possibly medical evidence, the claim should exit the process.

### Claims involving children

Children's claims will be included in the process. There is an assumption that they will all require Stage 3 approval at an oral hearing. The claimant's solicitor will arrange for the appointment of a litigation friend. The same costs rules under the procedure will apply. In addition the insurer will pay any expenses incurred by the litigation friend in accordance with CPR rule 21.12.

If the settlement is not approved and the judge requests further evidence the claim will exit the process. The £500 for the hearing and the £800 for Stage 2 will still be payable.

Where quantum cannot be agreed the Stage 3 hearing will also act as an investment hearing and the claimant's solicitor will file and serve any additional documents required under the CPR. The fixed recoverable costs for the oral hearing will be £500. In addition, £500 will be payable for preparing for the approval hearing, which will form part of the quantum hearing. A 100% success fee will apply if the claimant wins. If the judge does not award damages and requests further evidence the claim will exit the process and the £500 for the oral hearing and the £500 for preparation will not be payable.

If an interim payment is required the claim will leave the process, as this cannot be made without the approval of the court.

### Claimants in person

There will be an overarching principle that claimants in person will be encouraged to seek independent legal advice. Claimants in person will, as now, be able to deal direct with the defendant/insurer without using the process.

Where an offer is made to a claimant in person through the new process he or she will be informed of the set time period in which they can accept and reminded that if they accept there can be no further claim. They should be informed of their right to seek independent legal advice.

### Limitation

Where a claim is submitted close to the limitation date it is expected that the claimant's solicitor will issue proceedings in the usual way and seek permission from the court for a stay. In the event that the claim does not settle it is proposed that the proceedings will be reactivated for completion of Stage 3.

### Issues to note

- The process applies only to solicitors (to ensure that those advising the claimant are suitably qualified to advise on a suitable initial offer)
- Any cases not captured by the process could attract current levels of costs and so lead to leakage.
- Missing any trigger points could allow claims to exit the process or increase costs, for example;
  - Failure by the insurer to respond to the CNF within 15 days – exit
  - Mistaken denial of liability – exit
  - Failure to pay Stage 1 costs – exit
  - Failure to pay Stage 2 costs in time could result in a court application and additional costs
  - Failure to agree or pay an interim payment could result in a court application and additional costs
- Unless there are arguments as to validity credit hire cases will be caught by the process.
- The possibility of a trial fee at usual fast track rates being added to the costs has been raised by the MOJ but defendants object to the proposal.

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