



FOIL UPDATE

January 2010

RTA Process Reform – Concerns regarding fraud Urgent input sought from members

As the detail surrounding the operation of the new process becomes clearer concerns are being expressed that the new process, and the implications arising from the rules on admissions, will make it much more difficult for defendants to deal with claims which they believe have a fraudulent element.

The liability wording

Whilst the final wording remains outstanding FOIL's understanding is that:

- Any admission made will remain valid even if the case falls out of the process;
- An admission within the regime has the same effect as now.

Concerns around Fraud

Taking on board the comments above regarding admissions, there are significant implications bearing in mind the proposed amendments to the CPR and the PAP.

- It appears that the draft rules on admissions set out above will apply in any case to which the MOJ process "applies". This suggests that the rule will apply to any case which falls under the scope of the process, not merely cases in which the process is being engaged, for example time for admission expired.
- The exclusion of vehicle damage and hire charges from the valuation means that this rule will apply to virtually every potentially fraudulent motor PI claim where an admission of liability has been made.
- It appears that the draft rules will state that the court may **only** give permission for an admission to be withdrawn by a party if that party makes an allegation of fraud.
- The above represents a potentially huge change. In the majority of fraud cases fraud will not be pleaded. Defences will commonly set out the reasons why insurers have concerns and accordingly put the claimant to proof on those reasons.
- Even if an insurer is able to be joined into the proceedings and file a defence before judgment, the claimant would be in a position to apply for judgment based on the admission.
- The defendant would not be able to cross apply to withdraw the admission unless the defence pleads fraud.
- The entry of judgment will trigger the disposal process and this would not allow a defendant to take issue with the circumstances of the alleged accident.

- If the claimant has obtained a default judgment by the time the insurer is joined into the action the position will be even worse with the case quickly proceeding to disposal.

Unintended Consequences

Under the proposed regime an early admission, made in circumstances where there will inevitably be limited time for investigation, could completely deny insurers any prospect of successfully defending many fraudulent claims.

At present the Rules Committee does not consider that the above points are an issue. It may be that whilst the rules are still in draft form these points can be raised further with the Rules Committee and a satisfactory solution found. If not, the implications are potentially significant.

Views are therefore sought from members on the fraud issue as a matter of urgency, by Friday 15 January please, in preparation for a meeting of the ABI Group on Monday 18 January. Please contact Shirley Denyer on shirley.denyer@foil.org.uk or Anthony Hughes on anthony.hughes@horwichfarrelly.co.uk

On a couple of further points:

Advice from counsel on quantum

The rules are likely to provide that Counsel's fees for advice on quantum will be allowed, as now, at the discretion of the court, where the:

- Claim is issued and is resolved at a hearing;
- Court considers that it was reasonable for such advice to have been sought; and
- The claimant solicitor is entitled to costs, having successfully beaten the defendant's offer in accordance with Part 36.

Where the claim is issued and settles before the hearing then as now the payment of Counsel's advice will be at the discretion and agreement of the paying party.

Where payment is not made the claimant will be able to seek a remedy by issuing costs only proceedings (under Civil Procedure Rule 44.12A) and it will be at the discretion of the judge whether Counsel's advice is payable.

Physiotherapists

The MOJ has decided to extend the definition of medical expert to include physiotherapists.

End of Stage 2 payment

The MOJ will monitor the effect of non-issue by claimants to see if there is any evidence to support that there is a problem with claimants failing to issue after receiving an interim payment at the end of Stage 2. At the moment the MOJ are not satisfied that there is firm evidence to suggest this will occur.

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