FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

FOIL UPDATE 28 December 2020

Update – Civil Justice Council Low Value Personal Injury Working Group Report

This long-awaited report has now been published. The group has put forward a series of agreed recommendations, particularly relating to the Official Injury Claims Portal (OICP).

The group was tasked with looking at further reforms that could be introduced to lower value (below £25,000) PI claims.

The group reported under five headings: resolving meritorious claims more quickly; preventing unmeritorious claims (particularly those that are fraudulent); claimant support; regulation; and qualified one-way costs shifting (QOCS).

The principal recommendations made and concerns expressed are:

1. The OICP will require a comprehensive pre-action protocol (PAP) and rules and directions comprehensible to litigants in person (Lips) and clear guidance on how to value claims.

2. The group has concerns regarding the lack of detail around the extension of fixed recoverable costs (FRC) and accepts that some

IN BRIEF

This CJC working party looked in detail at all aspects of low value personal injury claims processing (sub-£25,000).

It has made a series of recommendations as to how the current and proposed processes might be improved.

The report also details a number of areas on which members of the group disagreed.

cases are not suitable for FRC, such as abuse cases or multi party actions.

3. The government should establish a single, consistent and reliable database to facilitate the identification of insurance fraud, its frequency and its sources.

4. There needs to be a government led publicity campaign with interested parties to educate the public as to the true nature of insurance fraud.

5. There should be a consultation on how best to combat fraudulent and unmeritorious claims in the future.

6. There should be a government led identity check system for all claimants and all types of low value claims at the start of the process.

7. There should stricter and more robust regulation by the Financial Conduct Authority (FCA) on claims management companies (CMCs) to ensure vulnerable claimants are protected in both existing and new markets and the need to ensure the Lips in OICP are aware of methods of funding that may be available to them such as legal expenses insurance.

8. A blanket ban on cold calling.

9. A SRA/FCA coordinated approach to ensure referral fee ban not being breached.

10. The Group was supportive of MedCo and acknowledged the steps that had been taken on greater independence, quality and governance but could not reach agreement on MedCo extension beyond soft tissue injuries.

11. There were differing views on QOCS, which are looked at in more detail below.

12. There were concerns that ADR has been removed from the OICP and about the burden this may place on the court system.

13. The group were supportive of ADR but the introduction of mandatory ADR was not supported.

Under the first heading of **resolving meritorious claims more quickly**, there was agreement that with the increase in the Small Claims Track (SCT) limit, there must be a pre-action protocol (PAP) which is comprehensible to litigants in person (Lips). There should also be appropriate directions to permit the efficient management of the cases that would previously have been dealt with on the Fast Track.

It was also agreed that the current portal process is working well and so the new OICP should mirror it as far as possible, with full integration between the two systems to be implemented as soon as is practicable, particularly at Stage 3. Within the revised SCT and the OICP, a high volume of cases will be processed in a non-cost bearing environment, and where, in any event, QOCS would often apply. The group agreed that there needs to be a review of the SCT regime when data is available from the MoJ (post-implementation of the whiplash reforms). If from that data it becomes apparent that the revised SCT is being abused, for example by claims management companies encouraging small but nevertheless

speculative claims or by representatives or compensators taking advantage of the claimant being unrepresented and unfamiliar with the process, steps should be considered to control such behaviour.

There was agreement that FRC are likely to be extended but there was concern about some of the detail of the FRC proposals that have yet to be clarified. It was agreed that child abuse cases should not be caught within the reforms. It was also accepted that it may be appropriate for some multi-party claims to be outside of the proposed FRC regime.

The group discussed the benefits generally of ADR but the need for it specifically within the OICP. The group was supportive of the increased use of technology in dispute resolution. The imperatives here are for the MOJ to use the best available systems and ensure that they are fully integrated and 'joined-up'. These systems must also be accessible to Lips, who are likely to increase in number. In the meantime, the courts must be adequately resourced to cope with an increased influx of cases on the SCT.

The second topic considered by the group was **preventing unmeritorious claims (particularly those that are fraudulent)**. This involved a debate among members as to the true level of fraud within insurance claims. The result was consensus that it would be of considerable assistance for the government to take steps to capture and collate data about suspected fraud from all available sources, so that a more accurate assessment may be made. In the light of that a more informed view could be taken as to what preventative steps might be necessary. This assessment should also consider whether or not it should be mandatory to identify the source of claims brought within the portals. In the meantime, there should be a coordinated campaign to educate the public as to the true nature of insurance fraud; its cost to the general population; and the criminal and civil penalties for making or supporting a fraudulent claim.

There was also broad agreement on an extension of the existing askCUE PI service to other types of claim, to facilitate confirming the identity of claimants. This would be beneficial as there continue to be new types of claim arising, that the market has not seen before. Linked to this was consensus that claimants need to understand fully the consequences of signing a statement of truth, when the information provided is not accurate.

A more sophisticated and comprehensive database capturing evidence of fraudulent behaviour would also facilitate better policing of the claims market and the taking of robust action by the regulators. In this regard, the group welcomed the review of the CPR on contempt. It is recognised that the CPRC are able to deal with procedure, but cannot alter the substantive law of contempt, which may therefore require separate consideration.

There was discussion about how QOCS is working and consensus that judicial consistency is required here, to avoid appeals and satellite litigation about costs (but see further below).

The third topic, **claimant support**, produced concern about the activities of claims management companies, particularly as solicitors withdraw from handling these lower value claims. It is accepted that CMCs will remain part of the process but it is hoped that the FCA will monitor CMCs operating in this area and will impose high standards of conduct. In particular, the FCA should ensure that CMCs are not permitted to charge claimants unreasonable fees.

Similarly, the use of McKenzie Friends should be subject to strict rules and they should not be permitted to charge.

For its next topic the group considered the issue of **regulation**. There was agreement that there should be a blanket ban on cold-calling by those wishing to capture insurance claims. It was noted that supervision of CMCs now lies with the FCA, a welcome development, and the legal profession with the SRA. There must be liaison and coordination between the two, particularly to prevent unlawful referrals.

A major topic for consideration was MedCo. The group was supportive of the principles of MedCo and believes that its aims of greater independence and improved quality and governance have moved the process of medical evidence in the right direction. The on-going work on accreditation and MI is to be welcomed. MedCo is also taking steps to manage unacceptable behaviour.

There was agreement that randomisation of medical experts restricts freedom of choice and limits best service for the claimant. However, the group recognised that randomisation is currently a part of the MOJ policy to reinforce the independence surrounding the instruction process.

As to the further extension of MedCo, the full report sets out the divergent views of the group but most members considered that as MedCo had brought improvements to the provision of medical reports in RTA claims there is the potential in the future for its remit to be extended to a wider range of claims and potentially for reports other than medical. The principles of independence, accreditation, data collection to monitor performance, audit, and sanction are all sound.

Possible extensions would be:

- Extending MedCo's remit to all claims below £25,000
- Second medical reports (as MedCo currently only has control over the initial medical report)
- Backed by extending fixed costs to such reports
- Holiday sickness claims
- Rehabilitation in low value claims (RTA and EL/PL) where there are currently suggestions of abuses to the system.

The final topic of **QOCS** was then considered in more detail and agreement reached that as a consequence of QOCS more cases are being brought that would not have been run under the old rules, with a number only discontinuing when the listing fee becomes payable. There was unanimity, however, that it would not improve matters if the court was required to approve a notice of discontinuance within 28 days of trial in injury claims. It was not felt that this would be an effective solution but rather that it would add extra complexity, additional cost and take up court resource. It was also felt that it would be difficult for litigants in person to comprehend and follow the procedure. It is also pointed out that there would be a risk of satellite litigation if a procedure was be introduced that was different from all other claims.

Any extension of QOCS should await the system bedding down further in its current context, although claimant representatives propose an extension to a wide range of other cases.

A major area of debate was fundamental dishonesty. Some members felt that further guidance was needed on fundamental dishonesty, particularly in light of the likely increase in LiPs resulting from the impending reforms. There must be clear guidance on the circumstances in which fundamental dishonesty can be alleged, and litigants in person must be able to access legal advice if such allegations are made against them. For these members of the group, the lack of clarity is reflected in the number of decisions on the point that have already been reported. Others within the group strongly opposed any change. They argued that the statutory provision provides a disincentive and a remedy for fraudulent behaviour which cannot be addressed by other means, and noted that no call for greater clarification had come from the judiciary. It would be inappropriate to tamper with a statutory principle which was a considerable time in the making and subject to full parliamentary scrutiny prior to introduction, without strong evidence indicating it is not working as intended.

Some members of the group considered that there should be a corresponding provision applicable to defendants who are fundamentally dishonest in the defence of claims.

Similarly, some members of the group considered that guidance was required on the term "substantial injustice" included within S57Criminal Justice and Courts Act, while others felt that guidance would be provided through decisions in the courts, similar to what has been achieved via fundamental dishonesty decisions.

Comment

Consideration of the full report is recommended. It illustrates how the opposing sides inevitably have different perspectives, but nevertheless were able to reach agreement on a number of important issues.

The full report may be found at: 20201218-FINAL-CJC-Low-Value-PI-Working-Group-Report.pdf (judiciary.uk)