

# Technical claims brief

Monthly update – February 2013



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## News

### Ministry of Justice Claims Portal Extension put back

Following pressure from the Association of Personal Injury Lawyers and recognising that the development of the hardware and legal rules is not sufficiently advanced, the Ministry of Justice (MOJ) appears to have accepted that the 1 April 2013 implementation date for extending the portal system must be put back. The planned extension would have seen the scheme for road traffic accident (RTA) cases extended from a maximum claim value of £10,000 to £25,000 and for the first time included other classes such as Employers' and Public Liability cases up to £25,000.

The position is unclear with no official public announcement and no alternative date put forward. There is some hope that a portal extension for liability claims from £1,000 to £10,000 might yet take place in April but it now more seems more likely that portal extension will be deferred until at least July 2013 and many commentators say that a more realistic date would be October 2013 or later.

This would give insurers and other compensators more time to prepare for the very tight deadlines for claims handling that the portal scheme will introduce for an extended range of claims but they will also have longer to wait for the fixed costs and new liability predictive costs regimes that promise significant costs savings.

The delay in the implementation of the portal extension is not expected to affect Lord Justice Jackson's package of reforms. Compensators will benefit from the ending of recoverability of success fees and After the Event (ATE) insurance



premiums from defendants and from a possible reduction in claims numbers from the banning of referral fees. These measures are set out in the **Legal Aid Sentencing and Punishment of Offenders Act**, still due to come into force on 1 April 2013.

Measures that will assist claimants: Qualified One Way Costs shifting, harsher Part 36 penalties and a 10% increase in general damages are also likely to be unaffected, the Civil Procedure Rules Committee and the Court of Appeal respectively having already prepared for them.

Costs budgeting for claims worth over £25,000 is also still due to be extended on 1 April. This is intended to ensure that costs are proportionate to the work required on a case and will allow the courts to look at the parties' costs at an early stage and set appropriate limits. Claimant solicitors are likely to want to set

the bar as high as they can and arguments over costs are likely to arise much earlier than previously.

*Comment: the delay in implementing the portal extension does not come as much of a surprise. The MOJ has been widely criticised for trying to change too much too quickly and even Lord Justice Jackson and the Government's costs advisor Professor Paul Fenn have called for a delay in implementation.*

## Solicitors Regulatory Authority stands by April 1 2013 implementation of referral fee ban

The Solicitors Regulatory Authority (SRA) is reported in the Law Gazette as saying that it will not seek any extension of time for the introduction of the referral fee ban for personal injury claims due to come into force on 1 April 2013, despite accepting that the deadline was a tight one.

The SRA is quoted as saying that whilst the Law Society and the Ministry of Justice had been in talks about a possible delay, the SRA had not participated. The SRA also rejected suggestions that they would turn a 'blind eye' to breaches of the ban for the first few months but were reported as planning some flexibility for those firms who were changing their business model.

The SRA admitted that it would be difficult to decide what constituted a breach of the ban in circumstances where advertisement payments were linked to results.

*Comment: The SRA has been criticised by the Law Society and others for failing to give adequate guidance as to what constituted a breach of the ban. Critics of the ban say that it is too easily avoided. How effective the ban will be in practice remains to be seen.*



## Actuaries' report reveals areas of Claims Inflation

The Institute of Actuaries have released a report showing areas of UK claims inflation.

- Personal injury claims from Road Traffic Accidents (RTAs) rose by 60% in the last six years despite a corresponding drop in the number of accidents by 20%
- The number of Employers' Liability claims (excluding deafness claims) has remained fairly static but Public Liability

claims numbers have increased by 7% a year for the last four years

- The cost of personal injury claims generally is increasing in value by an average of 6% a year overall but with more severe claims increasing faster.

*Comment: The 10% increase in general damages and 10% damages penalties for defendants who do not beat Part 36 offers which are being introduced as part of the Jackson reforms on 1 April 2013 will add to claims inflation though this should be offset by a reduced costs burden for defendants. Any reduction in the discount rate could have a very significant inflationary effect.*

*We are grateful to Berrymans Lace Mawer Solicitors for their helpful analysis of the report.*





## Ministry of Justice crack down on “Rogue Claims Firms”

The Ministry of Justice (MOJ) has shut down more than 900 claims management companies in the last five years with 209 shut down between April and November of 2012. Three other companies were suspended and 140 warned about improper practices.

In a statement to the BBC, the Head of the MOJ’s Claims Management Regulation Unit said that it was currently looking closely at the use of improper cold calling by telephone or text to get new business.

*Comment: The activities of some claims management companies have been blamed for encouraging more claims to be made, sometimes where there is no proper cause of action. They have also been criticised for persuading consumers to pay them to pursue claims for the miss selling of payment protection insurance when individuals could pursue these themselves with relative ease. They have also of course been responsible for many irritating “cold calls”.*



## Irish Government makes new commitment to periodical payments

The Irish Government has announced cabinet approval for legislation to introduce periodical payments to Ireland. The Irish **Department of Justice and Equality** will begin drafting a **Civil Liability (Amendment) Bill** setting out the new rules.

The Irish Justice Minister spoke of the risks of over and under compensation where lump sum settlements were calculated on the basis of uncertain longevity and recommended the introduction of periodical payments as a means of avoiding these pit falls.

He also said that a new financial system would be needed to ensure security of payments where non-state compensators were involved but which would not expose the state to any financial risk.

*Comment: The Irish Government has been receptive to the idea of introducing periodical payments for*

*some years but it faces serious practical difficulties in introducing them. The main problem appears to be one of ensuring security of payments without which periodical payments are unlikely to be accepted as an appropriate basis of compensation. The Irish Government quite understandably does not want to expose itself to financial risk in the current difficult economic climate but may struggle to produce a credible guarantee scheme unless it does.*

## Scottish Government consults on major reform of personal injury damages

The **Civil Law of Damages: Issues in Personal Injury Consultation** is wide ranging and seeks responses on what would be major reforms to Scottish law if adopted. Measures suggested in the paper include:

- A new statutory regime governing psychiatric injury to replace the current common law rules
- A review of damages for wrongful death

- Amendments to limitation including an extension of the current period for injury from 3 to 5 years, new measures for victims of child abuse and for assessing date of knowledge of injury
- Giving Scottish Courts the power to impose Periodical Payment Orders
- A statutory framework for interest entitlement.

The Consultation paper can be viewed in full at:

<http://www.scotland.gov.uk/publications/2012/12/59801/1>

The consultation began on 19 December 2012 and will close on 15 March 2013.

*Comment: Many of the proposals contained within the consultation would have a significant financial impact if implemented making this consultation potentially one of the most important issued by the Scottish Government for some time.*



*Comment: When looking at accidents between vehicles and pedestrians the courts consider 'causative potency'. Put simply a vehicle can do far more damage to a pedestrian than the other way around. Since the motorist was in no danger from the pedestrian, all he had to do was to wait for him to move out of the way. The motorist however decided to try to drive around the pedestrian and misjudged this manoeuvre. He was therefore, found to bear the greater proportion of responsibility.*

## Liability

### **Drunken pedestrian 20% negligent: Robert Ian Ayres (By his mother...) v Odedra – High Court (2013)**

The claimant pedestrian suffered a serious brain injury and an injury to his right knee after allegedly being struck by the defendant's car. The accident occurred in a one-way street in a city-centre pedestrian zone with restricted access for traffic. It was late at night and the claimant had been out drinking heavily with friends.

The claimant had been exposing himself to passers-by and was standing blocking the path of the defendant's car with his trousers around his ankles. The defendant initially stopped but later moved on again at which point the claimant fell striking his head on the kerb. His leg was then run over by the defendant's car. The claimant alleged that the defendant had knocked him over but the defendant maintained that the claimant had fallen over before he attempted to drive around him.

The court accepted that the defendant had not intentionally run the claimant over but his suggestion that the claimant had fallen over before he moved off was inherently implausible. The claimant was not actively interfering with the defendant's car and the Court did not accept that the defendant had any immediate need to extricate himself from the situation. His priority should have been to wait until the claimant had safely moved out of his way before setting off. The defendant was held to be primarily liable.

With regard to contributory negligence, the claimant had been obstructing a quiet, one-way street. This was not as dangerous as a busy two-way flow of traffic but his behaviour was nonetheless very foolish. His drunken state and dropped trousers had hampered his ability to move freely out of the path of the defendant's car. In the circumstances, he was 20% liable.

**Completed 28 January 2013 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).**

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