Enter the new era

Kerry Underwood on why he believes portals should be extended throughout civil litigation

Lord Justice Jackson is now preparing his report in relation to both the horizontal extension of fixed recoverable costs (FRC) – that is to all types of civil litigation – and the vertical extension, that is increasing the damages level at which they apply.

Currently, FRC apply to personal injury claims only, and not all of those, and with a maximum damages figure of £25,000 on a full liability basis.

The brief for the new report is to include all fast track claims in the FRC scheme, and also to introduce FRC in some multitrack claims. There is no immediate plan to increase the scope of the fast track. The maximum damages figure currently being considered for FRC is £250,000.

The report will be published by 31 July 2017. The concept has government support, and no significant political opposition. Personally, I fully support the extension of FRC, and indeed would introduce FRC for all cases of all types, whatever their value.

This article looks at the idea of extending the portal system to all civil work without exception. Here, I look at some structural and general practical issues, rather than specific figures. If readers think that that is the play without Hamlet, I assure you that I have drafted figures for absolutely everything, both in the fast track and the multi-track, and both for personal injury matters and all other types of work. Those details must await another article.

PORTALS

The portals work exceptionally well and should be introduced for all civil work, with broadly the same system of exclusions and reasons for exiting the portal, including complexity.

As the portal system only operates if liability and causation are admitted almost immediately, then the only issue can be quantum. If the matter is simple enough to remain within the portal system, with quantum to be decided at a stage 3 hearing if necessary, the simple existing costs structure that applies to road traffic accident matters and employer's liability/public liability matters can be used for clinical negligence work and other civil litigation generally.

Essentially, clinical negligence is the only personal injury work not currently covered by the portals. Industrial disease cases are covered by the portals, but not by fixed costs outside the portal.

As with the existing portal costs structure, there should be a stage 1 fee, a stage 2 fee and a stage 3 fee, with an extra fee for advocacy and with these fixed fees being related to the amount of damages agreed or ordered.

Given that a non-admission of liability, or complexity, causes a matter to exit the portal, there is no reason why the online portal system should not be introduced for all civil cases of all kinds, without a limit on value.

The existing pre-issue regime in general litigation is a form of one-way costs shifting, a fact which is generally not realised, or rather lawyers do not see the scheme in those terms. A claimant who succeeds pre-issue outside the portal and FRC scheme is not entitled to any costs, which is why settlement needs to include a contractual term that the defendant must pay costs to be agreed or assessed.

A defendant is never entitled to costs in an unissued matter. Thus the claimant obtains a contractual entitlement to costs if successful, but a defendant has no right to costs. A losing defendant will virtually always agree that costs should in principle be paid in a case settled pre-issue. Otherwise the claimant will simply issue and so incur more costs, and once proceedings are issued then the pre-issue costs are also recoverable anyway.

A claimant who abandons a case pre-issue will never agree to pay the defendant's costs, as the defendant has no remedy. A prospective defendant can never issue proceedings. Hence my description of the current system as one-way costs shifting.

So there will be no need to make provision for a defendant's costs in the portal system, any more than there is provision for a defendant's costs now in a matter that is never issued.

Stage 3 does involve the issue of proceedings and the payment of an issue fee, and the existing system provides for the defendant to get

costs of stage 3 if the claimant fails to beat the defendant's Part 36 offer. That provision should apply to all civil work in the portal process.

Thus by extending the portal system to all civil work, all that is happening is that pre-issue costs are being quantified, rather than having to be negotiated between the parties or be the subject of assessment by the court.

The Claim Notification Form submitted on the portal stands as the Letter of Claim, which is a requirement of every civil litigation protocol, and so no extra initial work needs to be done. The benefit for claimants is an opportunity to have a speedy and cheap resolution of a dispute, and the benefit for the defendant is the same.

So there are mutual benefits. Outside the field of personal injury, any individual or business in the country has just as much chance of being a true defendant as of being a claimant. So a system that introduces certainty into costs has benefits for claimants and defendants, individuals and small businesses.

There is an argument that the only beneficiaries of unfixed costs are lawyers, but fees must be sufficiently attractive so that lawyers of appropriate skill will do the work - and if this is not the case, then individuals and businesses do lose out by not having sufficiently skilled practitioners to act for them.

The system of portals and FRC does not of itself affect the arrangements between clients and their lawyers. But in practice, the introduction of a portal system and FRC for all cases will influence the relationship. If a client knows for certain that even if wholly successful they will recover, say, £40,000 in costs, then they are likely to want a retainer with their lawyers that is not open-ended.

Clients will want their additional liability to their own lawyers capped, and for claimants this will be by reference to a percentage of damages recovered, which is the almost universal situation in personal injury work where we already have FRC.

For defendants, it may be by reference to a percentage of damages saved, either because nothing is paid and the claim is won, or a reduction is achieved, or a successful Part 36 offer is made.

Personal injury work is atypical for two reasons:

(i) In reality individuals are virtually never defendants in personal injury work; the true defendant is almost always an insurance company.

Thus for individuals, and indeed businesses, which will be covered by compulsory employers' liability insurance, the system of portals and FRC has no benefits.

The benefits or disadvantages are with insurance companies, and lawyers acting for claimants.

(ii) Qualified one-way costs shifting: the starting point in personal injury work is that a successful defendant does not recover costs, and so a system of fixed costs does not protect a claimant against open-ended costs, as generally they will not have to pay them even if they lose.

These matters are interrelated – qualified one-way costs shifting was introduced to reflect the fact that the true defendant in a personal injury matter is almost always an insurance company.

COURT FEES

In the current portal process, no court fees are paid until stage 3 is initiated. Thus resolution within stage 2 avoids the claimant having to find a court fee, and avoids a losing defendant having to pay such a fee.

Most lawyers think that their own work is the most difficult, complex, demanding and unusual work ever done, and therefore unsuitable for FRC. 'No one size fits all' is the cry of these dinosaurs.

My firm does pretty much all civil litigation, and without question the most emotionally demanding work is family work, and the most intellectually demanding work is employment.

Neither type of work attracts any recoverable costs at all, so I have no sympathy for those civil litigators who are not prepared to embrace fixed recoverable costs. The realistic alternative is the abolition of costs following the event, as is already the case in most countries, and here in employment and family work.

NO COSTS RECOVERED

I propose that the categories of work where costs cannot be recovered from the other side be extended to include defamation work and neighbourhood disputes.

There may be problems of definition in relation to neighbourhood disputes, but in both of these types of work, costs are wholly disproportionate.

Neighbourhood disputes can be complex. Defamation cases never are.

PART 36

The only Part 36 risk in the portal relates to stage 3 costs. Thus a claimant who fails to beat a defendant's offer pays stage 3 costs, so the formula is (stage 1 and 2) minus stage 3.

Exit the portal and the whole of the successful claimant's damages can be lost in post Part 36 costs, and the defendant is at risk of paying indemnity costs. This is a powerful argument for both parties to resolve a quantum dispute within the portal process. The only beneficiaries of portal exiting are lawyers.

COMPLEXITY

Those who argue that their particular type of work is so complex that it is not suitable for the portal process have nothing to fear, as a claimant's solicitor has the unfettered right to exit the portal on grounds of complexity at any stage.

Complexity was raised by claimant personal injury lawyers dealing with employers' liability work and public liability work, where the portals were extended to cover that work on 31 July 2013.

Figures for the first 37 months of the EL and PL portal process, that is up to 31 August 2016, show that:

- in the EL portal, out of 142, 984 portal claims, just 243 exited the process as too complex, that is one in every 588 claims or 0.17%;
- for public liability claims, out of 203,383 portal claims, just 295 exited the portal as too complex, that is one in every 689 or 0.145%.
- for road traffic matters of 5,073,532 portal claims, 9,937 exited due to complexity, that is one in every 510 claims, or 0.19%.

The more complex the case, the more there is to be gained by quick and cheap resolution in the portal, as demonstrated by these figures.

Over a vast number of claims there is no significant difference between the percentages exiting for complexity in what are considered to be very simple cases, that is RTA matters, and much more complex cases, that is employer's liability and public liability.

Indeed the very simple category - RTA - has the highest level of exits due to complexity!

It seems to me that the argument for the immediate introduction of a portal process for all civil litigation - without limitation on type of work or value of claim - is unanswerable.

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