Survival strategy

Kerry Underwood on how to keep small claims profitable in PI

As you may have heard, the chancellor of the exchequer has announced that the small claims limit in personal injury cases is to rise from £1,000 to £5,000. I understand that although this does not need primary legislation, it will be included in the bill required to remove the right to claim general damages in 'low-value' soft tissue injury cases. Such changes are generally only introduced in October or April. The parliamentary timetable means that April 2017 is effectively the earliest day for implementation.

On all previous occasions, the key date has been when proceedings are issued. Thus two passengers are injured in the same accident and both have claims worth £4,000. One claim is issued in March 2017, and so is cost bearing, and the other is issued in April 2017, and is not cost bearing.

The non-personal injury small claims limit was increased from £5,000 to £10,000 in April 2013, and that was how it was implemented. Likewise, under section 57 of the Criminal Justice and Courts Act 2015, the relevant date is when proceedings were issued and not the date of the cause of action. Any claim issued on or after 13 April 2015, whenever the accident occurred, is caught by the fundamental dishonesty provisions.

'Proceedings' under that act means issued at court – and so being in the portal process does not count. It is likely to be the same with a small claims limit; that is, court proceedings must be issued by the end of March 2017 to avoid a sub £5,000 claim being allocated to the small claims track. There is no precedent as the small claims limit for personal injury matters has not risen since 1991, long before the portals existed.

Given the 21 days plus three months' time frame for a defendant to consider a claim, you should aim to have everything in the portal by 30 November 2016 – and ensure that you are ready to issue proceedings the moment the time limit is up.

Following the abolition of recoverability of additional liabilities, and the more than halving of portal fees in April 2013, virtually all solicitors switched overnight from charging the clients nothing to charging 25% of damages. That was easy.

So what now? I suggest 40%, including VAT. There is no recoverability in employment tribunals, and clients happily pay the statutory maximum of 35% – and used to pay 40% before that maximum was introduced. Clients will pay. As with April 2013, the question is whether solicitors will charge a sensible amount. The answer then was yes, and it will be again.

Most clients have no interest in how much, or whether, you recover costs from the other side, unless it has an impact on their bill. If the market will bear 40% then let us start charging that now. Note that the 25% maximum is in relation to the success fee; it does not apply to unrecovered solicitor and own client costs. Careful drafting is necessary.

Given that the vast majority of personal injury claims will not be cost bearing, it is apparent that a higher figure – 40% is suggested by me – will become the norm. There is no reason to restrict that level of charge to non-cost bearing cases. Make it 40% across the board in all personal injury cases, whether or not costs are recoverable from the other side.

In any event, it will be much harder to judge at the beginning whether a claim will trip over the £5,000 barrier. True, we have that problem with the £1,000 small claims limit – but anything under £1,000 is a more trivial injury, and so easier to call. Quite simply, most personal injury claims are over £1,000 but under £5,000. It is estimated that 90% fall within that band.

If clients do not want to pay 40% then they can pay an hourly rate, win or lose, or take their chance and deal with an insurance company direct. We all know where that leads.

Clients are not entitled to no win, no fee arrangements. It is a concession by personal injury solicitors and it has to work for solicitors as well as for clients.

NUTS AND BOLTS

The funding method is a pre-issue contingency fee agreement, combined with a conditional fee agreement both from day one, and a bridging agreement. You cannot have a contingency fee agreement post-issue. The Damages-Based Agreements Regulations 2013 specifically allow the continuance of contingency fee agreements in pre-issue work save in employment matters. Again, careful drafting is necessary. My firm has been working on this basis for over 20 years.

Advocacy must all be moved in-house. You cannot afford to pay counsel's advocacy fees out of your contingency percentage. Solicitors should be able to advise on all matters in such claims. Counsel's fees may be modest for advising on quantum, but it is about time as well as money. The winners in contingency fees are the best lawyers who can judge a matter quickly and surely. If you need to instruct counsel on quantum in modest cases, then forget about doing low-value personal injury work.

CHILDREN

Obviously there are very talented paralegals, but generally contingency fees economically require qualified lawyers and those closely supervised by qualified lawyers.

As the courts have set themselves against any deductions from children's damages, you cannot act for children unless you are sure that the damages will be well clear of £5,000, or you are prepared to act for no fee at all.

PART 36

Part 36 does not exist in small claims track work, and so after-the-event insurance is unnecessary, and a major defence weapon is removed.

PORTALS

Portals cannot be used for small claims. No indication has been given as to whether that will change, but the portal organisation has suspended its proposed changes to the portals. If they cannot be used for claims under £5,000, then it is unlikely that the portal system will continue.

MEDICAL EVIDENCE

No indication has been given as to whether medical evidence will be allowed in small claims, but assume that they will be rare.

COURT FEES

Court fees are recoverable in small claims cases, as are very low fixed costs – currently £90 for a £5,000 non-personal injury claim, with a £205 court fee.

WORK

The number of accidents will not fall. The number of people needing solicitors will not fall. The key is whether solicitors can make it worthwhile for themselves and for their clients.

When similar policies were introduced in Ireland, 90% of injured people still instructed lawyers. I believe it will be the same here. Given that factory firms are going under anyway, and that can only be accelerated by an increase in the small claims limit, most firms of solicitors will have more, not less, personal injury work.

Turning that work into an acceptable profit is the trick - and that is what this article is aimed at.

Kerry Underwood is a senior partner at Underwoods; kerry.underwood@lawabroad.co.uk; Twitter: @kerry_underwood

● **Kerry's book *Qualified One-Way Costs Shifting, Section 57 and Set-Off* is published this month. Details of Kerry's new series of costs books, and the dates of his costs courses throughout England can be found at https://kerryunderwood.wordpress.com/.**