Civil Litigation

Personal Injury Claim Process (Hypothetical Scenario)

With regard to the potential personal injury claim being brought by a shop worker as a result of a road traffic accident[1] there are numerous criteria that must be satisfied before any pre-action protocols can apply. This commences with the initial interview, conductible either in person, on paper, or by telephone.

The most fundamental element required is the exact nature of the problem and what outcome the client is seeking. In this instance the cause was a road traffic accident whereby the client has suffered physical (and possibly psychological) injury, both of which will need proper identification and assessment for the purposes of the claim[2]. This investigation would fall within the scope of the plan of action drawn up by both parties, along with the need to provide written and signed witness statements. Given the need for examination by various professional staff[3] it would also be prudent to ensure written expert witness statements are also sought.

Secondary to this will be the need to collate and preserve all relevant documentation associated with the accident, ranging from insurance policies, vehicle documentation, drawings, driver details and photographs of the accident scene that illustrate physical harm was caused where possible. Where there has been proven loss of earnings then any medical, treatment, travel or prescription costs will also need to be submitted and copies kept for future reference.

Once these areas are explored the funding for the claim will need agreeing. There are several options available to the client yet if by implication the shop worker was part of a trade union or eligible for employer monetary assistance[4] then it might be wise to first pursue that avenue of research. Should that option fail then there may be a legal expenses insurance policy[5] contained within the clients home or motor insurance which could be used to provide funding for the claim. If that approach is ruled out then either a CFA[6] or DBA[7] could prove valid; whichever route is agreed, the full details of the cost implications will be drawn up in a client care letter[8].

Low-value whiplash claims[9] that permit a return to work within a three week period suggest that para. 4.1(3) of RTA[10] protocol would apply with regards track allocation and procedure[11] while before issuing proceedings the steps contained within the RTA protocol would need to be observed.

While acting on behalf of the client it is required under RTA 6.1(1) that a CNF[12] form is completed prior to visiting the askCUPI website[13] as per 6.3A(1), at which point specific client details are entered in exchange for a unique CNF reference number. This number must then be added to the CNF after which it is sent to the defendants insurers and a copy of the 'defendant only' CNF sent by 1st class post to the defendants

[1] Subject to s.11(4) The Limitation Act 1980

[2] Pending investigation of the defendants financial standing.

[3] Doctors, psychologists and therapists being typical examples.

[4] Litigation Funding Agreement (LFA)

[5] BTE Insurance (Before the Event Insurance)

[6] Conditional Fee Agreement

[7] Damages Based Agreement

[8] SRA Code of Conduct 2011, Outcomes 1.6 and 1.13

[9] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013

[10] Road Traffic Accidents

[11] Unless shown to depart under para 1.2

[12] Claims Notification Form

[13] www.askCUE.co.uk

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themselves[14]. Although not mandatory The Rehabilitation Code 2007 also requires that a solicitor must provide full and adequate details of the injuries sustained by their client[15] to the compensator in order to facilitate any intervention, rehabilitation or treatment that might restore the claimants quality of life to that enjoyed before the accident.[16] Following on from this is the requirement by law for all legal representatives to register and pursue their claim on the claims portal.[17]

For the purposes of evidence there are three main types that need provision for a successful claim: a prepared client statement, pecuniary losses (disbursements) and a medical report.[18] In accordance with para.7.8A[19] a soft tissue injury such as whiplash[20] requires submission of a fixed cost medical report. This document is sourced from an accredited expert or MRO[21] via the MedCo[22] portal and is solely relied upon except where more complex injuries demand greater representation. The need to account for pecuniary loss (presently adjusted for three weeks) along with disbursements shown though MRO costs[23] require evidence which in this instance is provided by Ogden Tables[24] designed to calculate an exact figure under s.10 of the Civil Evidence Act 1995. Subject to CPR r32.4(1) and PD32.8 a signed witness statement supported by a statement of truth will accompany the other evidence in order to expedite the claim process and avoid full litigation.

Before management directions can be agreed upon it is vital to determine which claims track will be allocated. R26.6 (1)(a)(ii)[25] provides that any personal injury claim that includes damages no greater than £1000 will be allocated to the small claims track (SCT) while minor whiplash injuries that provide recovery within a few days to a few months allow for compensation claim values of between a few hundred pounds through to £1705[26]. Under r26.6(5)(a) it is explained that the fast track (FT) is the normal track for any claim for which the SCT is not the normal track and that has a claim value of less than £25000 as per r26.6 (5)(b)(i). Once track allocation is confirmed, r28.2(1)[27] allows the court to give the appropriate case management directions while setting a timetable for such undertaking prior to establishment of a hearing date as per r28.2(1)(a). Where immediate agreement of track cannot be found, a pre-trial questionnaire (N181) is issued to both claimant and defendant in order to facilitate a cost-effective allocation by the judge under r28.5.

Under standard case management directions r28.3 requires the disclosure of relevant documents, signed witness statements and written expert evidence by both parties.[28] This process is subject to certain exemptions and privileges[29] to withhold, based upon criteria that may weaken or compromise a claimants position pre-trial; however disclosure of documentation relied upon is typically required no later than 28

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[14] RTA 6.1(2)

[15] Precluding the need for a full medical report.

[16] *Restitutio In Integrum.*

[17] www.claimsportal.org.uk

[18] PD 8B para.6.1(a)

[19] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013

[20] Hyperextension and hyperflexion micro-trauma of the neck and lower back muscles as per 1.1(16)(a)

[21] Medical Reporting Organisation

[22] www.medco.org.uk

[23] Recoverable through claim success as per *Woolard v Fowler* [2006] (unreported).

[24] Actuarial Tables with Explanatory Notes for use in Personal Injury and Fatal Accident Cases

[25] CPR Part 26 - Case Management - Preliminary Stage

[26] Figure includes 10% uplift as per *Simmons v Castle* [2012] EWCA Civ 1039.

[27] CPR Part 28 - The Fast Track

[28] Further detail of this can be found in r31.6 of Part 31 - Disclosure and Inspection of Documents

[29] Public interest immunity, legal professional privilege and privilege against self-incrimination

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days[30] after the date of track allocation has been served,[31] except in circumstances where the court feels either specific disclosure or non-disclosure is required. Used as evidence-in-chief during trial, signed witness statements are also served under CPR r32.4(2) within a discretionary timeframe set by the court and subject to sanctions if served late. Written expert evidence is typically served around 14 weeks after receipt of direction orders and is subject to optional presentation where applicable, although it must also be noted that expert evidence can be waived where mutually acceptable and does not typically require the presence of an expert during trial unless where r35.5(2) expressly intends.

Due to the nature of the claim brought for (minor) whiplash it is unlikely that there would need to be any deviation from standard direction unless the defendants were to be found subject to a striking out under PD3A r3.4. A typical reason for such an action would be where the defendants were unable to disclose any reasonable grounds for defence of a claim or through a failure to comply with a rule, procedure or court order under r3.4(2). In the event that evidence helpful to the clients claim is found to be held in possession of a third-party, CPR r31.17(2)(a)(b)[32] provides the court with power to request standard disclosure from those outside the case,[33] subject to numerous criteria laid down in *Three Rivers DC v HM Treasury*[34]*;* while in other more complex cases the ruling in *Norwich Pharmacal v Customs and Excise Commissioners*[35] could apply. Under certain circumstances it may be proven necessary for the claimant to request a pre-trial *Anton Piller*[36] search order, although it would command serious foresight as the risks associated with such an action could prove financially damaging and pervert the overriding objective to the detriment of the claimant. Described as the 'nuclear weapon of the law'[37] this order confers obligation without notice upon defendants or those served, to provide or allow inspection of certain documents that may be destroyed before proceedings commence. It needs further noting that due to the exacerbating nature of this ancillary order it is typically found in copyright, patent, fraud and trademark cases.

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[30] S. Sime, *A Practical Approach to Civil Procedure* (18th edn, OUP) 308

[31] PD28.3.12

[32] While (4)(i)(ii)(ii) also apply.

[33] Granted under s.34 of the Supreme Court Act 1981 (c.54) and s.53 of the County Court Act 1984 (c.28)

[34] [2002] 4 All ER 881: (1) The rule gives no power for disclosure of documents failing to meet CPR r31.17(2)(a)(b) or those which circumvent that rule through inclusion within applicable documentation. (2) The threshold test distinguishes 'may well' from 'more probable than not.' (3) Upon application of the test it must be accepted that some documents that may at first appear to support the claimants case or adversely affect the defendants case may in the event not do so. (4) When applying the test, individual documents that may seem singularly weak, bear relevant context when read as a whole.(5) The court will not object to an order for disclosure where the conditions set down in (4) satisfy the overall needs of the test.

[35] [1974] AC 133: Where it is found that a third-party unwittingly possesses information (*R (on the application of Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048) or even the identity of a wrongdoer associated with a claim, the court can obtain such evidence upon consideration of applicant resources, urgency of information and public interest.

[36] [1976] Ch 55.

[37] J. Leslie, J. Kingston, *Practical Guide to Litigation* (2nd edn, Travers Smith Braithwaite 1998) 81

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"Part 36 is the supreme achievement of the Civil Procedure Rules in assisting out of court resolution of civil disputes, and thus best illustrates the presiding philosophy of those rules, that restricting legal costs promotes better access to justice"

CPR[38] Part 36 while designed to expedite civil disputes to an equitable conclusion, appears to permit more than conversation between parties. Given the almost pre-requisite nature of early settlement offers, the avoidance of full litigation on the basis that spiralling costs might warrant a claim void, paradoxically heightens the risks[39] inherent to legal action.

To explain, it would seem only reasonable that a client has been fully briefed before electing to pursue a claim, therefore it might also follow that an agreeable settlement figure had been provisionally agreed or discussed. Penalisation of parties that refuse such an offer[40] within the parameters of Part 36 suggests a 'who dares wins' philosophy rather than a substantive support of the mediation or ADR[41] process. That said it also suggests that the most organised and perhaps commercially aware lawyers gain clear advantage in personal injury/RTA claims when the first blow landed is theirs. Furthermore where the theme of access to justice rests upon survival of the *fastest*, the courts are inevitably faced with a conflict of interests and a predictable symptom of post-modern justice.

This sentiment while perhaps representative of twenty-first century culture, grants purpose to a future that not only undermines if not altogether erases the adage 'not only must justice be done; it must also be seen to be done'[42] but instead provides undeserved refuge for the wealthy and exploitation of the poor. By this it is meant that where a civil dispute arises between an individual and a powerful commercial entity[43], ADR and mediation along with the onus of a strategically placed Part 36 offer precludes the subject matter from the public domain, thus enabling continued legal abuses by discourse where (upon advisement or even coercion) the claimant tentatively accepts an undisclosed sum and perhaps even signs an NDA[44] as part of that settlement. All this while being impliedly denied the right to a fair trial under Art.6(1) of the ECHR;[45] where then is the weight of the law truly felt?

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In fact when taken in its greater context, the coined phrase 'access to justice'[46] seems so much more about access to *money;* and as if to further reinforce such an unnerving motive, the clearly defined cost implications included within Part 36 demonstrate that refusal of an early offer to settle carries greater risks of financial hardship on the part of the claimant over that of the defendant[47] as expressed within the Jackson Final Report in 2009:

> The risks imposed by Part 36 offers are currently tilted in favour of the defendants because claimants risk paying all future costs in cases where offers are pitched well and not accepted. The risks are significant and, in our experience weigh heavily on claimants…even when indemnity costs come

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[38] Civil Procedure Rules

[39] By this it is implied that emotional, ethical, moral and financial risks are all conversely affected.

[40] See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288.

[41] Alternative Dispute Resolution as per CPR r1(4)(2)(e)

[42] *R v Sussex Justices Ex parte McCarthy* [1924] 1 KB 256 (Hewart CJ)

[43] *Impact of the Woolf Reforms One Year On* (2007), a survey by the City Research Group revealed that 90% of the FTSE Top 100 companies in-house lawyers supported early settlement of disputes.

[44] Non-Disclosure Agreement

[45] European Convention on Human Rights

[46] H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (HMSO 1996)

[47] Particularly where proceedings may become protracted: see *Barclays Bank plc v Competition Commission* [2009] CAT 31 where the claimants finals costs wound up at £790,000 versus £225,000 for the respondents.

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into play, they know that the burden of increased costs will be limited and it is often in their interests to fight on in the hope that they can drag damages down.[48]

It is therefore very hard to accept that fairness and equitability are at the heart of any civil claim, especially when considering that most cases are first evaluated by experienced solicitors rather than accountants; though when taking such a line it cannot be reasonably held without looking at both the history and mechanics of domestic civil litigation as a whole.[49]

It goes without saying however that before the Woolf reforms found structure, the processes followed by private and commercial entities were just as at risk of spiralling out of all proportion as they are still today; yet a degree of governance by the courts managed at least to find a way forward. However when holding the virtues of civil law in both hands now, it is contradictory to presume that a restriction of legal costs will provide better access to justice when Part 36 allows for the *injustices* described in paragraph three. The reason for this is simply because when justice is sought for perceived and factual wrongs, it is done so with so many more reasons than mere profit.[50] In fact by its own construction Part 36 is a principle that serves to operate only as a means of expedience and evidently not jurisprudence; yet no matter how complex the civil procedure rules appear their overriding purpose is to help remedy those same wrongs, regardless of interference or procrastination from lawyers and professionals alike.

In fact numerous legal and academic writers appear to profess deep frustration with Part 36 and the CPR as a whole, not least because in order to avoid litigation a meticulous set of protocols demand timely completion by those ironically trained to work in a detail-oriented industry. Yet when considering the transparent relationship encouraged by such rules it must also be agreed that if carried out effectively they *can* achieve purposeful mitigation, so it would seem the only traceable cause of spiralling legals costs stems from the client representatives themselves; an example being *Wong v Vizards*[51] where after drafting and sending a client letter that outlined a provision of profit costs not exceeding £9,955 the same solicitors later delivered a final bill of more than £45,000, despite the trial ending two days earlier than anticipated and with no unforeseen complications relied upon for such a massive increase.[52]

When calculating the current number of civil claims in the United Kingdom it is only reasonable to contemplate that the figures collectively obtainable[53] are unlikely to decrease any time soon. Therefore if the CPR are deemed as practicable and chronologically efficient as they can be, something needs to give. Furthermore, why remove the bloodline between civic freedoms and the rule of law by eroding legal aid into insignificance[54], when in this age of advocation barristers could either significantly lower their fees[55] to justify their embellishment of an argument, or be removed from the civil process altogether; because after all, the truth can and always has been able to speak for itself perfectly well. However for the purposes of this writing and in order to achieve clarity through the limitations of the word count, it is best to focus attention on three key areas of contentious solicitor costs, those being success fees, ATE insurance premiums and proportionality.

Success fees are commonly used within CFA claims and were originally retrievable from client awards (without limit) but not recoverable from the opponent. In guidelines laid down by the Law Society it was

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[48] R. Jackson, *Review of Civil Litigation Costs: Final Report* (Judiciary of England and Wales, London, May 2009) 424 para 3.5

[49] Something which requires more than the permitted word count.

[50] " Money is not the sole governing criterion" *Carver v BAA Plc* [2008] EWCA Civ 412 [31] (Knight LJ)

[51] [1997] 2 Costs LR 46.

[52] S. Middleton, J. Rowley *Cook on Costs 2015* (LexisNexis 2015) para 1.13

[53] 1,581,200 claims made between January - December 2014 as collected from Ministry of Justice 'Civil Justice Statistics Quarterly England and Wales and the Appellate Court Statistics' online articles available via <http://www.gov.uk/government/collections/judicial-and-court-statistics> accessed 21 December 2015

[54] Public eligibility for legal aid has dropped from 80% to 36% since its inception.

[55] " What is a reasonable income for a barrister? £20,000 per annum, £100,000 per annum, £500,000 per annum?" *Callery v Gray* [2002] UKHL 28 [33] (Hoffman LJ)

agreed that no more than twenty-five percent should be taken, but an absence of legislation left it open to abuse; however when recoverability of success fees from opponents was granted in April 2000[56] those issues lessened. With changes brought into effect by LASPO 2012[57], the opportunity for a solicitor to seek recovery of success fees re-emerged. Based upon guidelines contained in s.58 (4)(b) it has been expressed that the maximum percentage of recoverability from a successful clients damages varies from twenty-five percent to one hundred percent upon appeal.[58] When considering access to justice it must be noted that where a small (or even medium) claim is ultimately successful, there is once again a risk that the party compensated is left either with a minimal award or worse still, a debt owed to the solicitor assigned to help achieve it. The underlying reason for this inequitable scenario is because *unless* victory can be established within a budgeted timeframe[59] it is clear that further proceedings will undoubtedly increase the cost of litigation.

ATE[60] insurance is a safeguard policy designed to protect the claimant (or defendant) from facing court-ordered costs should their argument fail. Although in essence this option seems like a 'common sense' approach to cases risking high costs or even little chance of success, when insurers are willing to charge ninety-five percent[61] of the costs faced by the losing party, or even worse, create premiums grossly disproportionate to the value of the award,[62] there emerges an issue of fiduciary abuse and an obstruction of access to justice.

When considering scope it is noted that in early civil cases it was typical to rely upon tests of reasonability[63] when deciding recoverable costs, but the problem with this polarised summation is that it failed to address proportionality. Now as expressed in CPR r.44.3 it is readily accepted that costs are proportionate when they reflect the reasonableness of the litigation and the overall amount awarded upon its conclusion. This measure has been necessary in order to allow judges to first consider the reasonable necessity of a party's costs before assessing their proportionate relevance to the work involved; as only then can it be defendable when permission is granted to recover.

CPR r.44.3(5)(c)and (d) are however problematic because the former contemplates case complexity while the latter attempts to justify reputation and public concerns as mitigating factors for higher costs, yet still subject to grounds of proportionality. This expansion of the rule may be digestible for those with deep pockets, but for most of the general populace, access to justice inevitably remains something of a fairy tale.

As has been already discussed, there are obviously more areas of concern extending beyond Part 36 itself, but no dilution of the possible outcomes should occur. Furthermore history shows that trial and error are critical evolutionary factors, and so it is only right that they must apply to this issue because if *access to justice* is to remain the mantra of civil process, then it surely follows that continuing refinement will inevitably determine if this caveat of the CPR will determine its own shelf life. It is also important to remember that what was once the privilege of the few, can and will eventually, become a right of the many; but only on the proviso that intellect, education and simplification of laws continue to strive toward that

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[56] Amendment of s.58(a)(6) of Courts and Legal Services 1990 via s.27 of the Access to Justice Act 1999

[57] Legal Aid, Sentencing and Punishment of Offenders Act 2012

[58] Art.5(1)(a)(b) CFA Order 2013

[59] An outcome largely dependant on the effectiveness of the solicitors involved.

[60] After-the-event

[61] R. Jackson, *Review of Civil Litigation Costs: Final Report* (Judiciary of England and Wales, London, May 2009) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-14110.pdf> 83 para 2.11 Accessed 17 December 2015

[62] See *Jonathan Luke Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 where an over inflated ATE premium used for a claim valued at around £3000 wound up in the region of £4800; after which the presiding judge noted that research suggested a fee of £900 was more reasonable, thus lowering the recoverable sum accordingly; see also *Kris Motor Spares Ltd v Fox Williams* [2010] EWHC 1008.

[63] " It is of great importance to litigants who are unsuccessful that they should not be oppressed into having to pay an excessive amount of costs. I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them" *Smith v Buller* [1875] LR 19 Eq 473, 473 (Malins VC)

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common goal. On a final note and in order to remove possible confusion it is written with confidence that any support for the notion that Part 36 is the supreme achievement of anything, remains purely subjective and one hopefully destined for reform when the long-term effects are properly addressed.

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