QUEST
LEGAL ADVOCATES

Advocacy & Litigation Updates

It's approaching 2 years since Quest began receiving instructions to attend both OIC Liability and Quantum hearings. Operations Manager Molly Ellis provides some analysis of advocates' experiences and results.

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Change is certainly not new to legal practitioners operating in the Motor and PI markets. The introduction of the pre-action protocols in 2010 and multiple subsequent updates has meant adaptability in operations has been key to any successful firm.

Those who have taken the leap in running OIC files likely find themselves handling an even higher volume of cases, albeit with apparent reduced complexity. This shift has also required Quest advocates to adapt their practices to ensure our high level of service remains consistent despite the changing landscape.

Designed to streamline the process of making personal injury claims, the introduction of the OIC portal has certainly given practitioners plenty of new rules to get to grips with. This includes the new RTA SC Protocol (its 12.1 paragraphs practically vaulting the 2013 RTA Protocol's 7.1 in terms of content), the Civil Liability Act 2018 and of course the Whiplash Regulations 2021. It is difficult to imagine the lay person, with our increasingly busy lifestyles, having the time, knowledge or inclination to attempt to navigate these many sources to bring their own claim, despite the overarching intention of the portal in the first place. Indeed, OIC data shows that in over 90% of claims brought through the portal, Claimants have been represented.

Even with the plethora of authorities, and as usual with new legal developments, Judicial clarification has been sorely needed in a number of areas. The most notable is the Court of Appeal's judgement in Rabot v Hassam that has formed a large part of Advocates' submissions regarding PSLA over the past 12 months or so. The imminent opinion of the Supreme Court following the appeal heard of 20th February is much anticipated to inform a solid basis to submissions, able to be tailored to each specific case, going forward.

One of the most novel changes has been the listing of two separate hearings, one to deal solely with liability and then, if the Claimant is successful, a second to deal with quantum, which on the face of it seems somewhat contrary to the Overriding Objective. However, to date, instances of Quest having been successful for Claimants in a liability hearing and then re-instructed for a quantum hearing have been minimal, suggesting a high number of quantum settlements post-liability findings. Perhaps the threatened cost of a further hearing gives impetus to both parties to reach an agreement.

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Further adding to the listing backlog, it appears Courts had not necessarily been briefed on the requirements of the new hearing types. We have seen a significant amount of liability hearings listed for 30 minutes or less, meaning no time for live evidence is allocated, resulting in late adjournments, and many quantum hearings listed for 90 minutes, when they are often concluded in 30. Fortunately, these instances are becoming fewer and fewer.

Whilst those concerned have been finding their feet, at Quest we find ourselves in a somewhat unique position to be able to offer some insight into how our advocates are finding Courts' approaches to procedural issues, evidence, matters of quantum and costs.

Procedure

- There was some initial confusion caused by the wording of the Protocol and PD 27B that informed Claimants "DO NOT include details of any offers made by the compensator or the claimant that have not been accepted". Thankfully the OIC clarified* in March 2023 that offers should not be redacted from Court Valuation Forms (CVFs).

- Whilst some Judges have made awards higher than Claimant's offers within the CVF, others have thought themselves bound by the amounts sought, treating the CVF as pleadings. Clarification on the matter would be of benefit going forward. In a similar vein, there appears to be some issues with Claimants being able to populate any offers at all within the CVF if the Defendant does not respond to a claim in its entirety. Judges, we have found, have so far been understanding of the situation Claimants have been placed in but this technical glitch is one that we hope is being investigated.

- For whatever reason, in a fairly large proportion of cases, Defendants have failed to file acknowledgements of service (RTAASL or RTAASQ forms) within the required 14 days. They have therefore been disbarred from relying on any evidence or taking part in hearings. Advocates have both robustly put forward and opposed applications for relief from sanctions, with their submissions addressing the Denton test and the facts of each case.

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Evidence

- Parties need to ensure that all evidence they want to rely on is uploaded to the portal. File handlers used to MOJ portal will be no stranger to this, but if the client provides further evidence/documentation advocates are prepared to make an application for this to be relied upon as a preliminary issue and manage expectations accordingly.

- In liability matters it is obviously expected drivers to be in attendance. We have seen more Defendants' non-attendance than traditional RTA small claims. It seems the format of providing evidence on the portal does not encourage the inclusion of detail, and the Court has found on occasion that witness statements have been lacking and some adjournments necessitated for more detailed statements to be provided – with costs orders made accordingly.

- In quantum matters, there is no requirement for Claimants to attend. They may give oral evidence if they wish – although to do so Courts have provided a strong indication that a witness statement must have been uploaded to the portal. Frequently, Defendants have sought clarification on causation of non-tariff injuries, raising issues with medical reports not containing requisite detail as to the mechanism of injury. Whilst Quest have seen an instance of a matter being reallocated to the fast track due to causation being raised, most often the Court has determined that the medical evidence contains sufficient information to make an award, and lacklustre opinions or discrepancies in evidence tend to be resolved in favour of Defendants. Indeed, whilst Claimants have personally attended 23% of quantum hearings Quest have attended, no live evidence has been given in any quantum hearings attended in the past 10 months. This suggests oral evidence is not often necessary to determine the claim (PD 27B 3.17(1)(e)) but may well be in certain situations, for example in matters including credit hire. Quest advocates are alive to these issues and the arguments to be made whether acting for Claimants or Defendants.

Quantum

- The OIC data* indicates that 67% of claims made include mixed tariff and non-tariff injuries. The Association of Consumer Support Organisations (ACSO) claim* that despite insurers suggesting the number of mixed injury claims has risen since the inception of the OIC, the proportion of mixed-injury claims was around the same in 2019 as in 2023.

- Unsurprisingly, the most common dispute our Advocates deal with at trial is the valuation of PSLA in mixed injury cases. Quest's MI indicates that on average, Defendant's final offers for non-tariff injur(ies) have been 24% of the Claimant's final offer. Court awards generally lean more in Claimants' favour, with awards made being on average 74% of the amount claimed for non-tariff injur(ies). It is expected that awards will increase following the publication of the 17th edition of the Judicial College Guidelines in April.

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Costs

- Allocated to the small claims track, the lack of FRC will add to the strain on file handlers within Claimant firms. It is of no surprise that applications for additional costs for the other party's unreasonable behaviour have been much more common than in traditional RTA Small Claims.

- Following **Liability** matters, if Claimants are successful, we have found that only Court fees paid have been awarded in 70% of cases due to Judicial interpretation of PD 27B 2.16(2)(b). It is difficult to believe that there was an intention to no longer allow the recovery of witness expenses usually recoverable in small claims matters under CPR 27, and this is perhaps a point that will be addressed in a future update to the CPR. Our Advocates have made unreasonable behaviour applications in 35% of cases and these applications have been successful 86% of the time.

- In **Quantum** hearings, our advocates have made applications for additional costs under 27.14(2)(g) in 39% of cases, acting on behalf of both Claimants and Defendants. These applications have been successful 23% of the time.

- Whilst the commentary to CPR 27 makes clear that rejection of an offer does not constitute unreasonable behaviour in itself, it will be taken into account. To support applications, advocates have drawn the Court's attention to paragraph 8.1(4) of the Protocol in which it is stated that parties are expected to negotiate, and issuing is a last resort.

- Whilst of course no specific costs consequences are outlined in PD 27B, we have had some success in persuading a Judge to award additional costs where a party has effectively beaten their own offer, through making parallels with the MOJ process.

- If offers have been outlandishly low or high, particularly following the CA judgment in Rabot v Hassam, this has been brought to Court's attention however many Judges have been of the view the high threshold for unreasonable behaviour is not met in these instances, this still being a relatively new area. It will be interesting to see if judicial approaches change in the coming months and whether parties' offers are deemed sensible after the SC decision is handed down.

- Submissions on behalf of Claimants have also been bolstered where a Defendant's representative does not attend a hearing, despite the Defendant having disagreed that the matter is suitable to be dealt with on papers in their RTAASQ.

Quest attend OIC hearings in all Court centres across England and Wales for a fixed fee of £225 + VAT. Please send any enquiries through to our team at instructions@questlegaladvocates.com or call 0161 234 6507 to discuss further.

*If you would like copies of any of the materials referenced in this article then we would be happy to provide them on request.

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