

Claims compromise

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Kerry Underwood says it is time for compromise agreements to be considered as the standard way of resolving all personal injury claims worth £5,000 or less

The Law Society has begun a campaign to stop the personal injury small claims limit being increased from the current level of £1,000. In all other civil cases, except claims against the police and housing disrepair cases, the limit is already £5,000 and has been for years without any apparent adverse effect on access to, or the administration of, justice.

Rather than defend the indefensible, it is time for compromise agreements to be considered as the standard way of resolving all personal injury claims worth £5,000 or less.

In employment cases, where costs are not recoverable from the other side and where there is no legal aid in England and Wales (there is in Scotland), parties are free not to be legally represented and indeed most are not represented at tribunal. They are not free to agree a binding settlement without the claimant receiving advice from a qualified lawyer or certain qualified trade union advisers.

If the parties agree such a settlement without the claimant receiving such advice, it is not binding and the claimant can take the settlement money and still issue or continue with employment tribunal proceedings.

Because of this, a custom has developed whereby employers wishing to compromise claims agree to pay for the employee to receive advice in relation to the compromise agreement. The sums vary from around £250 to several thousand pounds in more complex cases.

If the requirement of a compromise agreement was introduced into all personal injury work, there would be considerable benefits to the public and to lawyers.

Most settlements are reached without the intervention of lawyers and this is especially so in road traffic accidents. If all settlements had to receive the sanction of a compromise agreement, paid for by the liability insurers, there could never be any under-settlement of cases by clients representing themselves. If the solicitor wrongly advised the lay client in relation to a settlement, the client would have a remedy against the solicitor. The introduction of compromise agreements would represent a huge advance in consumer protection. Indeed it would be the most vulnerable, that is those not in trade unions and not aware of legal expenses insurance, who would benefit most.

The new Motor Insurers Bureau Scheme in relation to compensation of victims of untraced drivers provides a model for such a scheme. Under that scheme, the Motor Insurers Bureau pays a fee to the claimant/applicant's solicitor of £500

plus VAT or 15 per cent of the award, whichever is greater, and with a cap of £3,000 on awards of between £20,000 and £150,000. VAT is added to the costs figures.

This could provide the basis for compromise agreements in road traffic accident cases and indeed one could use exactly the same tariff, but with no cap, so that the fixed fee would be the greater of £500 plus VAT or 15 per cent of the damages, payable by the liability insurer.

Example

Dennis Damaged is dealing with his claim himself and the insurers have offered £10,000. The solicitor's fee will be £1,500 (15 per cent of £10,000). So the solicitor has considerable scope to investigate – about nine hours' work at today's rates for a Grade 1 solicitor.

By comparison, the fee under the fixed costs scheme for such a case would be £2,550, but of course much more work will have been done for that higher fee.

At the lower end of the scale, the minimum fee of £500 provides for around three hours' work on even the simplest of cases and settlements.

The minimum fee under the fixed costs scheme is £1,000, but to earn that, the solicitor will have done far more work.

The fixed costs scheme only kicks in once the claim is cost-bearing – when damages are over £1,000 in personal injury cases and over £5,000 in damage-only cases.

The compromise agreement scheme should apply to all cases, whatever their value, as it does in employment tribunals, and thus far more cases would be covered. Arguably it is the lay client accepting a very low sum who is in most need of qualified legal advice to ensure that he or she is not undersettling. These costs would be payable by the liability insurers.

The MIB scheme is based on the assumption that the solicitor will do relatively little work as the MIB is obliged to undertake most of the work: "MIB shall, at its own costs, take all reasonable steps to investigate the claim." clause 7(1)

In a compromise agreement it will be the lay client who has done most of the work but the principle is the same – the solicitor is paid for checking the agreement and the client has the security of that advice and of the solicitor's professional indemnity insurance.

In more complex cases, such as workplace accidents, the minimum figure could be increased to allow a greater amount of time to be justified in checking the settlement, say £750 or 20 per cent of the award, whichever is greater. Clients would still be free to instruct solicitors to conduct the whole case, but with a fixed costs regime in place.

One option is to increase the small claims track limit to £5,000 in all cases, in other words to bring personal injury in line with other types of action, and to allow only a compromise agreement fee for small claims track work.

There are powerful arguments in favour of compromise agreements in all personal injury cases, primarily because a lay client is almost always up against a rich and powerful insurance company. It would also help protect the legal profession in the face of supermarket law, as the adviser has to be a qualified solicitor, not just a representative from the firm. Supermarkets will not be keen on employing lots of solicitors as opposed to unqualified cheap labour.

Lawyers who are seriously concerned about the public should look more closely at compromise agreements and not just at their own bank balances.

Kerry Underwood is senior partner in Underwoods