

Success Fees in Employers' Liability Disease claims

On the 1st July 2005 the Civil Justice Council announced that agreement has been reached on fixed recoverable success fees for industrial disease claims funded by Conditional Fee Agreements (CFA). This follows the agreements already implemented in relation to road traffic accident claims after 6th October 2003 and accidents at work after 1st October 2004.

The agreement will be implemented by rules of court and whilst these have not yet been published, they are expected to come into force in October 2005.

Solicitors' Costs

Unlike the equivalent rules for employer's liability claims, the success fee recoverable on solicitors' profit costs varies according to the type of disease claim being brought. Where the case settles before trial the recoverable success fees are set out below:

Table 1: Cases settled before trial where funded by CFA

Type of Case	Fixed Success Fee
Asbestos related claims	27.5%
Vibration White Finger	62.5%
Noise induced hearing loss	62.5%
Stress/RSI Claims	100%
Any other type of claim	62.5%

In addition, a higher success fee will be payable where a membership organisation, most commonly a trade union, has undertaken to meet the claimant's liability for legal costs in accordance with section 30 of the Access to Justice Act 1999. This is to account for the fact that the trade union will not be providing disbursement cover to the Claimant solicitor. In these circumstances, the success fee payable will be:

Table 2: Cases settled before trial where funded by trade union

Type of Case	Fixed Success Fee
Asbestos related claims	30%
Vibration White Finger	70%
Noise induced hearing loss	70%
Stress/RSI Claims	100%
Any other type of claim	70%

For all types of cases, if the matter proceeds to a trial, as with the road traffic accident and employer's liability schemes, the case is deemed worthy of the highest success fee:

Table 3: Cases concluded at trial

Type of Case	Fixed Success Fee
All types of claim	100%

Counsels' Fees

Where counsel is instructed under a CFA, the recoverable success fee on Counsel's fee is also fixed by the scheme and is identical to the success fee recoverable on the solicitor's costs (see tables 1 and 3). However, whereas a solicitor's success fee is fixed at the same level unless the case actually goes to trial, Counsel is entitled to an enhanced success fee for cases that settle in the period just before trial. For fast track cases, this period is 14 days and for multi track cases it is 21 days. Therefore, where a case settles within 14 days of a fast track trial or within 21 days of a multi track trial, the solicitor is entitled to the standard success fee (as per table 1 or 2 above) and Counsel is entitled to the higher success fees set out below:

**Table 4: Counsel's success fee for cases settled up to:
14 days before fast track trial or
21 days before multi track trial**

Type of Case	Fast Track	Multi Track
Asbestos related claims	50%	75%
Vibration White Finger	62.5%	75%
Noise induced hearing loss	62.5%	75%
Stress/RSI Claims	100%	100%
Any other type of claim	62.5%	75%

Exceptional Cases

For claims settled in excess of £250,000, there will be provision to seek an alternative success fee in the same manner as for accidents at work in CPR 45.18(2). The alternative success fees to be allowed in these cases is yet to be determined.

There is also expected to be a further exceptionality clause to deal with test case litigation, but this has not yet been agreed and is not expected to come into force until April 2006.

Other Issues

The fixed success fee schemes for road traffic accident and employer's liability claims depend on the index accident occurring after a specified date. In a disease claim, where there is rarely a specific accident date as such, it is not clear how this will be implemented. It may follow the rules for calculating limitation periods and depend upon the date of knowledge, or it may simply apply to all claims commenced, however defined, after the commencement date. This issue is important as it has been held by the Court of Appeal, at least in relation to fixed success fees in road traffic accident claims, that fixed success fees do not operate retrospectively, *Atack v Lee (2004)*. When the rules are implemented, it will be vital to be able to ascertain

whether ongoing cases fall under the new scheme or whether the success fee will need to be determined in accordance with the standard test of reasonableness.

The other major unresolved issue with all fixed success fee schemes is how it fits in with the indemnity principle. It is a fundamental principle of costs law that a party may not recover as costs more than they are liable to pay their own solicitor. What therefore is the position where a CFA specifies a lower success fee than that allowed as a fixed recoverable success fee? Will a party recover the full amount of the fixed success fee even though this exceeds their own costs liability in clear breach of the indemnity principle?

One solution that is put forward by commentators is that the rules of court overrule the indemnity principle and therefore even if the fixed success fee exceeds a party's own costs liability, it will still be payable. However, the Lord Chancellor's Departments (as it was then) when invited to bring an end to the indemnity principle to avoid some of the issues that arose in the so called 'costs war', stated that the indemnity principle could only be overturned by primary legislation. It would therefore seem strange that the indemnity principle could be so simply avoided merely by using rules of court. Finally, even if this is the position, what is clear is that where the amount recovered under the fixed scheme exceeds the party's own liability to their solicitor, the balance belongs to the party and not to the solicitor.

Summary

Since the Access to Justice Act 1999 allowed success fees to be recovered as part of a winning party's reasonable costs, there has been almost ceaseless conflict over the recoverability of costs in cases funded by conditional fee agreements. This scheme, following on from the similar schemes in road traffic accident claim and employer's liability claims, will hopefully bring stability to at least one area of conflict.

Nick Starling of the Association of British Insurers, in their press release announcing the agreement, said that it brought "certainty for all parties" and the Master of the Rolls, Lord Phillips, commenting in the Civil Justice Council's press notice, called the proposed scheme one of a number of "workable solutions to the problems that have occurred in the past due to costs".

Work also continues in relation to the other main area of success fee disputes, public liability claims, although the broad range of claims that come under this head means that an agreement which is satisfactory to all involved parties may be more difficult to achieve.

Cases:

Atack v Lee [2004] EWCA Civ 1712

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