STAYING ON TRACK

Dominic Bright outlines ten key points that PI lawyers should know about the small claims track

As things stand at the time of writing*, the small claims limit for personal injury claims is due to increase in April: to £5,000 for road traffic collision-related claims; and £2,000 for all others.

What distinguishes the small claims track from the other tracks that personal injury practitioners need to know? There are ten key points, as outlined below.

1. Unrepresented litigants do not benefit from a lower standard of compliance

Rules, practice directions and court orders apply to all litigants. There is no distinction between a litigant who has legal representation and another who does not.

The overriding objective to deal with a case justly and at proportionate cost includes two factors. First, enforcing compliance with rules, practice directions and court orders. Secondly, ensuring that the parties are on an equal footing.

The civil procedure rules and practice directions strike a balance between the interests of both sides. The fact that one side is in person does not mean that she is entitled to any greater indulgence in complying with rules, practice directions and court orders.

This balance - ensuring that parties are on an equal footing - is inevitably disturbed if an unrepresented litigant is entitled to greater latitude than a represented litigant.

2. Judges may adopt any method of proceeding considered to be fair

Judges hearing claims that are allocated to the small claims track have a number of unique powers.

First, asking questions of all, or any, of the witnesses, before allowing any other person to do so.

Second, refusing to allow cross-examination of any witness until every witness has given their evidence in chief.

Third, limiting cross-examination of a witness to a fixed time frame, issue, or both.

Accordingly, personal injury lawyers will be alive to the distinction that, although a judge hearing a claim that has been allocated to the small claims track has a wide discretion as to the method of proceeding, the civil procedure rules, practice directions and case law do not permit judges to 'enter the arena'.

3. 'Behaved unreasonably' is wider than 'fundamental dishonesty'

Cases involving disputed allegations of dishonesty will not usually be suitable for (or allocated to) the small claims track. The express provision that evidence does not have to be taken on oath should be understood in this context.

The concept of 'fundamental dishonesty' with which personal injury practitioners are familiar is very different to the small claims track concept of 'behaved unreasonably'.

While both operate to disapply the general rule regarding costs, 'behaved unreasonably' is a wider concept. It is not defined in the civil procedure rules, practice directions or case law.

The leading authority merely provides that the test is 'whether the conduct permits of a reasonable explanation'.

4. Standard directions do not order trial bundles to be compiled, filed or served

Lord Justice Sedley's Laws of Documents may be the rule for personal injury cases that are allocated to the small claims track, rather than the exception in personal injury cases allocated to another track.

This is because directions for trial of a claim allocated to the fast track or the multi-track order a party to compile, file and serve a trial bundle.

5. Strict rules of evidence do not apply

In principle, the rules and practice directions prescribing the form of a witness statement are expressly disapplied.

In practice, standard directions provide that witness statements must be filed and served at least 14 days before a hearing and comply with the usual matters of form.

The rule requiring witness statements to be verified by a statement of truth, however, does apply.

The form of the statement of truth is also prescribed.

Where a witness statement does not have a valid statement of truth, the court may direct that it shall not be admissible as evidence.

The practice direction prescribing the necessary formalities where a witness is unable to read or sign a statement of truth also apply.

6. Rules and practice directions relating to statements of case apply

Rules and practice directions apply to personal injury cases allocated to

the small claims track, unless they are expressly disapplied. They are not expressly disapplied for statements of case.

In principle, this means that a statement of case in material breach of the rules and practice directions is unacceptable.

One argument against raising the limit of the small claims track is that there could be an inequality of arms

An application to amend should be made, sanctions should take effect, and an application for relief from sanctions should be made where a sanction has taken effect.

In practice, and in want of authority, there is often greater latitude for defective statements of case that are part of a claim that has been allocated to the small claims track.

7. Applications for relief from sanctions are unusual

Before an application for relief from sanctions is necessary, a sanction must have taken effect.

Standard directions in a claim that has been allocated to the small claims track usually include that a judge 'may refuse to hear' evidence that has not been prepared, filed and served in accordance with the directions on the notice of allocation.

This provides the judge with a discretion as to whether or not to impose a sanction.

It is different from, say, an unless order, specifying a sanction. For example: 'Unless a fully particularised defence and counterclaim is filed and served before 25 February 2020, the defence and counterclaim shall stand automatically struck out.'

8. Greater potential for represented defendants to assist unrepresented claimants

Legal representatives are under a duty to cite authority that undermines their case where it has not been cited by the other side.

One argument against raising the limit of the small claims track is that there could be an inequality of arms.

In the vast majority of claims, defendants are insured, and insurance companies instruct legal representation. Claimants cannot afford to do likewise. To the extent that this is correct, there is greater potential in the small claims track for defence advocates to undermine the case that they are instructed to present, thereby assisting the claim that they are instructed to challenge.

This is because it is foreseeable that unrepresented litigants would not have access to professional legal resources, including quantum law reports, that represented litigants have at their fingertips.

9. Transcripts are not required to appeal

In principle, there is no requirement to obtain, file or serve a transcript of the judgment (or other record of reasons) in a claim that has been allocated to the small claims track.

In practice, however, depending on the grounds of appeal, it may assist the appeal court (and the party who is appealing). Personal injury practitioners may form their view having considered the costs that are recoverable on successfully appealing.

10. Costs regime applies to appeals

The rules and practice directions relating to costs of a final hearing of a claim that has been allocated to the small claims track apply to the costs of an appeal. In principle, a circuit judge may give judgment at first instance. If so, the appeal court is a High Court judge. In any event, the costs of a skeleton argument, for example, are not recoverable, unless the general rule is disapplied because a party has behaved unreasonably.

Personal injury practitioners should be informed and prepared to uphold the rule of law.

Having considered the ten key points that personal injury practitioners need to know about the small claims track, it is possible to understand why HHJ Karen Walden Smith (Senior Circuit Judge, Designated Judge for the County Court in East Anglia) concluded the foreword to *A Practical Guide to the Small Claims Track* in these terms:

'Undoubtedly, the better informed and prepared the representatives are, the better it is for the judges who hear such claims to enable them to concentrate on reaching the correct legal and factual conclusions in furtherance of upholding the rule of law.'

* A ministerial statement on a possible delay to the increase in the small claims limit is expected on or after 6 March.

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