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FOIL UPDATE

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The Quirks of the MOJ Portal

With draft protocols under consultation to extend the protocol/portal process to higher value RTA, EL and PL cases, Sarah Robson, counsel at Alpha Court Chambers, looks at some of the issues arising under the current regime.

The MOJ Portal is an odd creature. Promising to save costs, streamline cases and get both damages and costs paid more quickly, the reality is rather different. The MOJ Portal can trip up even the most wary. The Portal rules are both prescriptive and strict. Fail to comply with just one of them by even just a day, and you risk the matter dropping out and facing a claimant's costs bill of several thousand pounds.

Claimant solicitors can try and remove a case from the Portal and issue Part 7 just to get the much higher costs. I've heard of cases removed for failing to agree Care or a Collision Damage Waiver, not making a second Stage 2 offer, and even for making a pre-med offer. The latter was defeated in *Monteith v Carroll Liverpool County Court* 17 October 2012, with the claimant being restricted to Portal costs and D getting their additional costs of defending Part 7 proceedings. Some firms are more inclined to take the risk and push up the stakes as they test the boundaries of insurers' resolve, with substantial costs benefits to be had if they can get a favourable ruling applicable across entire case loads.

Read the Rules!

Parties often mis-read or mis-understand the Portal rules, so please study them carefully. For example, there are different time limits to pay Stage 2 damages; 10 days where the damages are agreed, 15 days where they are not. I've also seen cases where parties believe that time starts to run from when agreement is *reached*, not from the *end* of Stage 2.

The 31-page reserved judgment of *Patel v Fortis*, Recorder Morgan, Leicester County Court 5 December 2011, makes some interesting observations. Aware that both counsel had instructions to appeal if they lost, and accepting my invitation to take the opportunity to make some helpful obiter comments on the Portal, the judge did not disappoint. C sought leave to appeal, but was refused.

And there's more afoot, so keep your ear to the ground. For example, there's an appeal due to be heard on 12 November in Liverpool concerning the status of Portal offers once a claim has left Stage 2; *Purcell v McGarry* 2BI00320. It is hoped the appellate judge will similarly take the opportunity to provide further general advice about the Portal in his obiter comments. I've found Linked In and Twitter can be fertile ground for hearing about updates and changes.

Counting Calamities

Counting time has proved another interesting 'gotcha', especially around Easter. Only business days are counted in the Portal, however long the period of time is – quite unlike under the CPRs. Add a Royal Wedding or a Golden Jubilee to the flurry of bank holidays from Easter, and you have the proverbial cocktail for disaster in mis-counting – partly the cause of the claimant's solicitor losing over £20K in costs in *Uppal v Daudia*, 14 May 2012 DDJ Matthews, Leicester County Court.

Patel v Fortis established that the CPRs do not generally apply to the Portal, certainly not for counting days, so principles such as clear days and deemed service do not apply. That said that you do start to count days from the day after something is sent, so be careful.

Where to pitch an offer where there is a range of prognosis on the medical report

The Portal intentionally does not allow witness statements. In *Dominic v Martin* at first instance the judge held that as C had to prove their case, in the absence of any evidence to say when in a range the claimant reached a full recovery he awarded damages on the basis of the shortest period. On appeal HHJ Stewart QC reversed that, and with one eye on the proposed vertical extension to the Portal he said as you could not wait for a full recovery in a case worth up to £25K, you should take the mid-point - as in future loss cases.

Unreasonable Fall-out

Experience shows one should be as reasonable and congenial as possible where C unreasonably leaves the Portal. In the unreported case of a CNF being sent by fax, *Boyd v Clark*, 11 April 2011, DJ Levinson Chichester CC upheld it as being correctly sent. He held the defendant had been *"quite excessively and inappropriately pedantic"*. I'm sure if D had not taken such an intransigent stance the outcome could have been very different. (The draft protocol from April 2013 specifically requires use of the Portal, finally clearing up the fax/electronic method dispute.)

I've had a judge tell me D should have warned C not to continue with their intention to leave the Portal in order to get their costs, although we went part-heard and he appeared to have changed his mind by the time we came back. The clear implication was that if D had not warned C, despite *Patel* finding it could no longer stay in the Portal, we could have established unreasonable fall-out but still not restricted C to Portal costs. Acting reasonably may require gritted teeth, but doing so can pay back dividends when it comes to costs.

What costs can D get when a case unreasonably leaves the Portal?

The judge in *Patel v Fortis* took the view that it was punishment enough for C to be restricted to Portal costs and D was awarded very little for their costs, although as a reserved judgment, there was no oral argument on costs. The 2012 White Book was

published just a few months after *Patel*, which made it clear at C13A-007 that D's costs are indeed 'up for grabs', confirming the position set out in the PD on Pre-Action Conduct 4.6(2) and (3). *Uppal v Daudia* even held that as the claimant left the Portal unreasonably, it followed that such unreasonable behaviour entitled D to its Part 7 costs on an indemnity basis, though I remain unconvinced this should follow in *every* case.

Do remember if you settle a case which has left the Portal, you are not tied to paying C's standard basis Part 7 costs if you consent to pay C's reasonable costs. There are plenty of cases you can use, e.g. *Javed v British Telecommunications PLC* [2011] EWHC 90212 (Costs) (25 August 2011) – the phrase 'reasonable' costs does not rule out costs of a particular regime.

If you have a contested fall-out case, do try to agree quantum and leave the matter of costs to the court. In my experience a judge is far more open to consider costs argument on principle/regime if such an argument is expected.

Don't Push!

Don't make a case fall out of the Portal! Your worst-case scenario costs consequence from losing a case in the Portal is £1,000 + VAT. If a judge orders a claim out of the Portal under 8BPD.7 para 7.2, there's no room to argue unreasonable fall-out and for C to only get Portal costs, so you could easily be looking at costs of *ten times* as much. If you have a genuine dispute on a low level head of loss it can cost you more to fight it out of the Portal than to pay it. Wage slips, letters from employers and accounts can be provided for loss of earnings claims, invoices can be provided for rehabilitation treatment, breakdowns can be provided for care claims for example. Ensure you flag up the sort of evidence required before Stage 2 commences, so that C knows this before they send you the Stage 2 pack, which should contain all their evidence. A claimant should not be allowed to leave the Portal because they have failed to provide evidence they could have provided, so robust advocacy may be required.

So there's a feast of satellite litigation afoot from a system designed to simplify things. To quote Robin Torr, Head of Personal Injury Department, Abacus Solicitors LLP, "*The Portal has only shifted a problem to a new arena. It has not eradicated it*."