NEW PRACTICE DIRECTION ON NON-INJURY MOTOR ACCIDENT CLAIMS

From 1 January 2002, all non-injury motor accident claims must comply with the Practice Direction 2 of 2001.

The new Practice Direction applies to non-injury cases only. Injury cases should continue to observe the requirements of pre-action notices to the defendant's insurers under the Motor Vehicles (Third Party Risk and Compensation) Act, Cap 189.

The Practice Direction is introduced to improve efficiency and cost-effectiveness of non-injury motor accident cases. It promotes pre-action settlement, simplifies the litigation process and allows certainty, consistency and transparency of the litigation costs.

Promoting Pre-Action Settlement

Prior to commencement of the proceedings, the claimant (or his lawyer) is required to send a letter of claim each to the potential defendant by way of certificate of posting and his insurer by way of AR Registered mail or by hand. The letter of claim must set out the full particulars of his claim together with the following supporting documents (if available):-

- GIA reports and type-written transcripts of all persons involved in the accident, including a sketch plan;
- repairer's bill and evidence of payment;
- surveyor's report;
- excess bill/receipt;
- vehicle registration card;
- COE/PARF certificates;
- names and addresses of witnesses;
- original or coloured copies of scanned photographs of damage to all vehicles;
- original or coloured copies of scanned photographs of accident scene;
- rental agreement, invoice and receipt for rental of alternative vehicle;
- supporting documents for all other expenses claimed.

After delivery of the letter, the claimant or his lawyer must withhold his action in the next 14 days for the potential defendant or his insurer to consider the claim.

Within these 14 days, the potential defendant or his insurer must reply to the claimant in order to stop the litigation clock ticking again. Otherwise, the claimant is entitled to commence legal proceedings without any sanction by the court.

In the reply to the claimant, the potential defendant or his insurer should consider the following matters:-

He should assess the claim. If he is ready to take a position on the claim, he should state so in his reply (e.g. making a without prejudice offer on liability or quantum or both; or denying the claim with reasons and supporting documents).

If he is not ready to take a position, he still needs to reply with an acknowledgement of the claim. Having done so, he will be entitled to a further period free from proceedings of at least 6 weeks (see below) to carry out further investigation and/or make proposal to the claimant.

In whichever way, the potential defendant or his insurer should consider whether to inspect the claimant's vehicle and state so in his reply.

In the event that there is a counterclaim, the reply must contain the particulars of the counterclaim together with the supporting documents. If his insurer is not pursuing the counterclaim, the potential defendant should send a separate letter of claim to the claimant within 8 weeks of receipt of the claimant's letter of claim.

The potential defendant should also inform the claimant if he wishes to bring in a third party. He should also send a letter (copied to the claimant) setting out full particulars of his claim against the third party together with the claimant's letter of claim and all relevant supporting documents to the third party as well as the third party's insurer within the same 14 days.

COE/PARF certificates;

names and addresses of witnesses;

original or coloured copies of scanned photographs of damage to all vehicles;

original or coloured copies of scanned photographs of accident scene;

rental agreement, invoice and receipt for rental of alternative vehicle;

supporting documents for all other expenses claimed.

If the potential defendant or his insurer has made an offer in his reply, the claimant should consider the offer. No legal proceedings shall be commenced prematurely if there is a reasonable prospect for a settlement. In the event that there is no prospect of settlement, the claimant must give a 10 clear days' notice by letter to the potential defendant and his insurer of his intention to issuing the Writ of Summons.

If the potential defendant or his insurer merely acknowledges the claim in his reply, he must state his position on the claim (e.g. whether the claim is admitted or denied or making an offer of settlement on liability or quantum or both) within 8 weeks from the date of receipt of the claimant's letter of claim; or 6 weeks from the date of his acknowledgement of the claimant's letter of claim; or 14 days after inspecting the vehicle, whichever is later. Again, the claimant should not commence legal proceedings if there is a reasonable possibility of settlement and must give a 10 clear days' notice of his intention to commence legal proceedings if the settlement negotiation fails.

The above allows both parties to have opportunity to investigate the claim, understand respective

positions, assess the strength and weakness of respective cases, and hence facilitate settlement prior to the commencement of legal proceedings. Under the new Practice Direction, there is no doubt that both parties can save substantial costs and time.

Simpler Litigation Process

Samples of the letter of claim and reply are set out in the new Practice Direction for adoption by the claimant, the potential defendant, his insurer and their respective lawyers.

In the event that the parties have agreed on liability but wish to litigate on the issue of quantum, the claimant shall file a Writ of Summons endorsed with a simple Statement of Claim which pleads the agreement of liability. He must also file the Summons for Direction for the assessment of damages within 14 days after the Memorandum of Appearance is served. A sample of the Statement of Claim can also be found in the new Practice Direction.

Transparency of Legal Costs

Prior to the introduction of the new Practice Direction, there was no fixed scale of legal costs in respect of road accident cases. The advice on costs was either based on the lawyers' previous experience or indication by judges at Primary Dispute Resolution Centre, Pre-trial conferences or in the Case Management hearings. The indication often varied from lawyer to lawyer and judge to judge. This unavoidably resulted in inconsistency and uncertainty.

Creating a standard costs scale and revealing it to the public will bring about a significant impact in settlement negotiations. In the past, due to the uncertainty in respect to costs, many defendants and their insurers had difficulty in balancing the risk of costs and the settlement offers. As a result, they were often unable to decide whether it was economical to proceed with the action or make a compromise in the settlement negotiation. The breakdown of the negotiation in respect to costs was also found to be one of the contributing factors to the failure in reaching a settlement.

The costs scale set out in the Practice Direction enables the defendant and his insurer to make decisions based on commercial consideration and settle the claim in a more economical way. For instance, according to the scale, the difference in costs for a $1000 claim at the stage of letter of claim and the stage of issuance of Writ of Summons is $700. It may be more economical to make a compromise settlement if the difference between parties' offers is only $100.

Consequences of Non-Compliance

The compliance of the Practice Direction will be monitored by the courts by way of a Pre-action Protocol Checklist which is to be filed together with the Writ of Summons.

The default party who has failed to comply with the Practice Direction, will be sanctioned by the courts. The Practice Direction provide that the court will take into consideration any non-compliance when they exercise their discretion as to costs and the period of interest to be calculated in regard to the damages. This will no doubt force parties to take a more realistic and commercially sensible approach to handling and settling the claims.

Conclusion

In the past, there was no mechanism in the legal system to promote pre-action settlement of non-injury road accident cases. A lot of legal costs and time were wasted when cases could have been settled prior to the commencement of the legal proceedings. The new Practice Direction certainly enhances the litigation system in this respect. Practitioners are now given clearer guidelines on procedures and costs. A better and earlier discovery gives both parties earlier opportunities to assess their cases and explore any possibility of settlement. Under this system, it can be expected that more cases will be disposed of in a just, expeditious and economical way.

There are certain areas in the new Practice Direction which may require further clarification and review:-

- The Practice Direction provides that the letter of claim and the responses are not intended to have the effect of pleadings in an action. Arguably, parties may add further claims in the pleadings after proceedings are commenced.
- In cases where liability is not in dispute, the plaintiff must now file the Summons for Directions for assessment of damages within the time frame set for the filing of the defence prescribed under the Rules of Court. Accordingly, filing of defence is not required. As a result, some material issues on quantum (e.g. mitigation) which must be pleaded in the defence in the past is no longer required to be pleaded now. The plaintiff may be deprived of his right to have a full picture of the defence case on quantum before trial.
- The potential defendant and his insurers are required to request inspection of vehicle at the time of reply. It is not clear if he fails to do so, whether the courts will disallow him to carry out inspection subsequently.

Although actions for property damages in road accident cases are rarely commenced at the late stage of the limitation period (i.e. 6 years from the date of accident), there is no provision in the new Practice Direction governing such cases facing time bar within the 8 weeks of the receipt of the letter of claims. It is submitted that the claimant should proceed to issue the legal action to protect against a time bar. However, the burden to justify to the court why he does not commence the action earlier to avoid imposition of penalty on him.

The Practice Direction currently applies to non-personal injury cases only. Hong Kong, our neighbour, has implemented similar Practice Direction in personal injury cases since February 2001. The Practice Direction includes pre-action protocol, earlier discovery of documents and witnesses' statements, penalty on costs in respect of unmeritorious interlocutory applications, etc. This system is proven with success. One of the features under the Hong Kong personal injury practice which our jurisdiction may wish to consider is the requirement of filing a "Statement of Damages" together with the Statement of Claim. This "Statement of Damages" sets out not only the backgrounds of the claim but also the quantification of both special and general damages (which is revisable in the event of change of circumstances). It has assisted in settling a large number of cases in Hong Kong at much earlier stage.

In conclusion, if parties and their lawyers follow strictly the new Practice Direction, truly utilise the opportunity for investigation and negotiation, and do not pursue some unreasonable claims or unmeritorious defences, the new Practice Direction will be of great benefit in non-injury motor accident claims.

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