

# Insurance Alert

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## **OFFERS & COSTS** ***Implications for claims management***

### **1. Introduction**

Legal costs are an important part of any personal injuries claim, as important as any allowance under a particular head of damage. From the claimant's perspective, they want to ensure that at least some of their legal costs are paid for by the defendant insurer, to minimise the impact their legal bill will have on their award for damages. From the insurer's perspective, costs can form a significant part of the claim which the insurer will most likely have to meet. Therefore costs need to be constantly kept in mind when estimating quantum and placing a reserve on a file.

There are two types of costs: indemnity costs and standard costs. Indemnity costs are sometimes called *solicitor and own client costs*. Indemnity costs are the actual costs/professional fees incurred and charged by the solicitor to their client for all the work performed in progressing the matter from the date of instructions. Standard costs are sometimes called *party-party costs*. These are the legal costs associated with performing the *essential* professional work and investigations necessary to progress a matter. Naturally standard costs will work out to be less than indemnity costs for a matter.

At the conclusion of a matter by judgment of a court, indemnity costs become a means by which a court can penalise a party which has behaved inappropriately in the course of the matter. In this context, an award of indemnity costs may be made by a court in an attempt to return the successful party to the position they would have been in but for the behaviour of the other side in failing to explore means of settlement as and when these arise and needlessly pushing a matter to a costly trial and judicial determination.

Of particular relevance in the area of personal injury and motor vehicle claims are the implications involved in offers of settlement and negotiations on the award of costs.

### **2. Costs provisions of the Motor Accident Insurance Act 1994 – Sections 51C (3) & (4)**

Where the issue of costs is being determined with resolution pre-litigation, it is important to have regard to the costs provisions of the MAIA. Section 51C requires that Mandatory Final Offers be exchanged by the parties, either at the compulsory conference in a matter, or within 14 days of the date of an order dispensing with the compulsory conference, where applicable. MFOs made for \$50,000.00 or less are to be made exclusive of costs.

Where an MFO is for \$30,000.00 or less, the claimant is not entitled to any amount for costs. Where an MFO is for \$30,001.00 or more but less than \$50,000.00, then the Act stipulates that the claimant will be entitled to an additional sum for costs, to be assessed according to the Motor Accident Insurance Regulations 2004. These are known as *statutory costs*. Section 29 of the Regulations provides a discounted method by which costs are to be calculated, with a statutory limit on costs in these circumstances of \$2,500.00. It is standard practice to simply allow the statutory limit where offers are exchanged for amounts greater than \$30,000.00 but less than \$50,000.00.

Once MFOs are exchanged for sums of \$50,001.00 or more, costs become an issue for determination between the parties. MFOs will usually be made exclusive of costs regardless of their value in order that the amount offered for the claim and that offered for costs may be easily calculated. It is important to specify in any offer that costs are to be agreed or assessed on a standard basis.

### 3. Costs under the Uniform Civil Procedure Rules

Once a matter is before the courts and a judgment is handed down, the issue of costs will be subject to the operation of the *Uniform Civil Procedure Rules 1999*. The relevant rules in the context of offers are Rules 360 and 361. Rule 360 states:

- (1) If –
- a. *The plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and*
  - b. *The court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;*

The court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

Therefore, if the plaintiff makes an offer to settle and that offer is not accepted by the defendant insurer, should the plaintiff obtain a judgment of the value of the offer or more, then the defendant will be exposed to an order for indemnity costs unless the defendant can show that such an order is inappropriate in the circumstances of the case. MFOs are considered as well as any formal offers in these circumstances.

Rule 361 makes a similar provision in circumstances where the defendant makes an offer, although the Rule specifies a defendant will only recover standard costs from the date of its offer.

In determining whether to make an order for indemnity costs in these circumstances, the court will have regard to the following principle: what were the circumstances in operation at the time the offer was made? In the decision of *Castro v Hillery* (2003) 1 Qd R 651, the Court of Appeal reversed a decision made by a trial judge awarding indemnity costs against the defendant insurer, Suncorp, in circumstances where the plaintiff made an offer which was not accepted. The award received at trial was three times the plaintiff's offer.

The defendant appealed on the grounds that the decision to reject the plaintiff's offer was based on the fact that the Statement of Loss and Damage in operation at the time of the offer being made, did not support the value of the offer and therefore the defendant could make out grounds supporting an alternative costs award in accordance with r360 of the UCPR. This was accepted by the Court of Appeal. Williams JA made the following comment:

*...a procedure such as an Offer to Settle must be evaluated in the light of the circumstances as they exist at the time the offer is made. If a plaintiff enlarges his case after an Offer to Settle is made and rejected, then there will be good reason for refusing the plaintiff indemnity costs notwithstanding that the judgment is better than the offer...a minor difference in the claim will not ordinarily have that consequence. But where the difference is significant, where the risk to the defendant is significantly altered, there would have to be careful analysis before a proper exercise of discretion could result in indemnity costs being ordered.*

#### **4. Conclusion**

Offers to settle are to be considered in terms of both the value of the claim at the time of the offer, and the risks in not making or accepting the offer in time for the costs protection to be obtained. As a matter gets further from an out-of-court resolution and closer to trial, it may be beneficial to review the claim and ensure that the risks in terms of costs have been appropriately considered and the necessary protection is in place.