The importance of realistic mandatory final offers in small claims under the *Motor Accident Insurance Act* (QLD)

By Luke Randell

I was fortunate to act on behalf of Ms Pryor in a personal injuries action in 2005. The action was heard before the District Court and judgment was given on 8 July 2005 by his Honour Judge Wall.[1]

The action arose as a result of a motor vehicle accident on 20 October 2000. Ms Pryor sustained personal injuries while a pedestrian. Both liability and quantum were in issue.

Under the *Motor Accident Insurance Act*, we attended a compulsory conference with the solicitors for the defendant as well as Suncorp. Realising Suncorp's attitude was to deny liability, I briefed counsel for the conference. Along with liability, the question of quantum was also in dispute and there was a divergence of medical opinion.

My expert counsel advised the client that the range of damages (after a fair apportionment) would be in the order of $20,000 to $35,000, depending upon whether the plaintiff or the defendant's doctors would be accepted by the trial judge.

The defendant's solicitor took a fairly robust approach: the matter was not settled and mandatory final offers (MFOs) were exchanged. The defendant's MFO was in the sum of $18,000 and ours was $25,000.

$25,000 was decided upon based on my expert counsel's advice that the defendant was unlikely to accept our offer, given their attitude throughout the settlement conference. So making a low MFO gave our client every opportunity to beat the offer in court.

It is always important to keep in mind with small claims that unless you beat your MFO the client will receive very little when costs are taken into consideration. Section 55F of the *Motor Accident Insurance Act* is relevant in respect of offers made for small claims:

Costs in cases involving relatively small awards of damages

55F. **(1)** This section applies if a court awards $50,000 or less in damages in a proceeding based on a motor vehicle accident claim (but it does not apply to the costs of an appellate proceeding).

(2) If the court awards $30,000 or less, the court *must* apply the following principles –

(a) if the amount awarded is less than the claimant's mandatory final offer but more than the insurer's mandatory final offer, no costs are to be awarded;

(b) if the amount awarded is equal to, or more than, the claimant's mandatory final offer, costs are to be awarded to the claimant on an indemnity basis as from the date on which the proceedings started (but no award is to be made for costs up to that date);

(c) if the amount awarded is equal to, or less than, the insurer's mandatory final offer, costs are to be awarded to the insurer on a standard basis as from the date on which the proceedings started (but no award is to be made for costs up to that date).

(3) If the court awards more than $30,000 but not more than $50,000 in damages, the court must apply the following principles –

(a) if the amount awarded is less than the claimant's mandatory final offer but more than the insurer's mandatory final offer, costs are to be awarded to the claimant on a standard basis up to a maximum of $2,500;

(b) if the amount awarded is equal to, or more than, the claimant's mandatory final offer, costs are to be awarded to the claimant on the following basis –

(i) costs up to the date on which the proceedings started are to be awarded on a standard basis up to a limit of $2,500;

(ii) costs on or after the date on which the proceedings started are to be awarded on an indemnity basis;

(c) if the amount awarded is equal to, or less than, the insurer's mandatory final offer, costs are to be awarded on the following basis –

(i) costs up to the date on which the proceedings started are to be awarded to the claimant on a standard basis up to a limit of $2,500;

(ii) costs on or after the date on which the proceedings started are to be awarded to the insurer on a standard basis.

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Suncorp was 'punished' for not accepting our very reasonable offer – it had to pay all of its own plus the plaintiff's costs, as well as the judgment sum.

The section sets out the various consequences in respect of a successful MFO at trial for small claims (under $50,000). The *Personal Injury Proceedings Act* has similar provisions.[2]

The use of the words 'the court *must* apply the following principles' indicates that, in respect of matters under $50,000, MFOs are generally determinative.

The decision of Robin J in *Windon v Edwards*[3] would also seem to bear this out and contains a good discussion of the effect of MFOs in small claims. As Robin J found in this case:

> 'The whole purpose of provisions found in the Act under consideration and other Acts – also rules regarding costs – is to punish those who do not make and/or accept appropriate offers.'

For matters over $50,000, it would appear that MFOs are intended to be an important factor, but not necessarily determinative of how costs are awarded.

What is not commonly understood by insurers is that once the MFOs are delivered and the court gives a positive award above the MFO, in claims under $30,000, the plaintiff is then entitled to costs, even though there is no entitlement to costs at the compulsory conference stage and/or before.

The solicitors for the defendant/Suncorp took a hard-line approach in respect of the action and all attempts by the plaintiff to settle the action failed. The plaintiff also attempted to settle quantum to try and reduce costs and put forward an offer on quantum (which it turned out was approximately $500 short of his Honour's assessment). However, this was also rejected and the solicitors for the defendant/Suncorp advised that both liability and quantum would be in issue. A further attempt to try and reduce the issues (by the plaintiff, admitting the defendant's psychiatric evidence on the basis that the plaintiff's psychiatric evidence also be admitted) was also rejected by the defendant/Suncorp.

As a result, we were forced to run a two-day trial in Townsville with approximately six medical specialists. Judgment was given in the sum of $37,275.62, with costs to be paid by the defendant/Suncorp on an indemnity basis. Costs were eventually settled and agreed between the parties at $60,000.

As a result of Suncorp not accepting our very reasonable offer of $25,000 (in toto) it was certainly 'punished', as it had to pay all of its own legal costs (which presumably would be similar to the plaintiff's costs), plus the plaintiff's costs of $60,000, as well as $37,275.62 for the judgment.

The advantage of making a low MFO is that it gives one a tactical advantage when making further offers prior to trial, as well as reducing the risk of litigation.

When making MFOs, it is important that neither the solicitor or the plaintiff get carried away by putting forward offers that represent the very best that they could receive at trial. Chances are they will not beat the MFO and the result will be that – after costs – the plaintiff will receive little, if any, compensation.

In fact, the worst-case scenario is that the plaintiff is awarded less than the defendant's MFO, in which case the plaintiff may be ordered to pay the defendant's costs, which may exceed any judgment sum.

This matter demonstrates how a realistic 'offer to beat at trial' must always be made. ■

Notes: **1** *Pryor v Winterburn & Anor* (Queensland District Court, 8 July 2005). **2** See s56. **3** [2005] QDC 29 (11 February 2005).

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