

Ministry of Justice – Transforming
our justice system: summary of
reforms and consultation

Thompsons Solicitors' response

November 2016

Introduction

Thompsons is a UK-wide law firm specialising in personal injury and employment law. At any one time we will, as a firm, be handling over 10,000 employment cases and we run over 35,000 personal injury cases. In this submission we are focusing on the areas of the market in which we operate.

At Thompsons, we can see the significant advantages which may accrue from bringing the English and Welsh civil courts service into the 21st century with a serious programme of investment in digitalisation. Our Sheffield and Stoke-on-Trent offices, in particular, have been ahead of the curve in terms of introducing new systems.

Our major concern is that modernisation should not be piecemeal or token, or, fundamentally, come at the cost of reducing access to justice and the quality of the courts service available to working people.

Helping those who need it most

Any new system should aim to help ordinary people, those who aren't necessarily confident with computer use, may not be computer literate or don't have easy access to a computer.

The current system's strengths and advantages are too often enjoyed primarily by those sufficiently wealthy to be able to pay for the professional cost of legal representation, or sufficiently confident to navigate their way around it. Add rapidly rising court fees to the cost of representation and most ordinary people struggle to benefit from the strengths of our civil justice system.

The people that any new system needs to work for are those that the prime minister spoke to directly on the steps of Number 10 Downing Street in July 2016:

"If you're from an ordinary working class family, life is much harder than many people in Westminster realise. You have a job but you don't always have job security. You have your own home, but you worry about paying a mortgage. You can just about manage but you worry about the cost of living and getting your kids into a good school.

If you're one of those families, if you're just managing, I want to address you directly.

I know you're working around the clock, I know you're doing your best, and I know that sometimes life can be a struggle. The government I lead will be driven not by the interests of the privileged few, but by yours.

We will do everything we can to give you more control over your lives. When we take the big calls, we'll think not of the powerful, but you. When we pass new laws, we'll listen not to the mighty but to you."

According to 2015 ONS figures, 11% of adults (5.9 million people) in the UK have never used the internet. Those without access to the internet or technical know-how, for example, to scan and upload documents onto a portal system, must not be cast aside in the creation of a new system that will suit only the IT literate.

Around 74% of adults in the UK use mobile devices to access the internet and a significant proportion of these use mobile devices exclusively. In the absence of evidence to the contrary there must be a real risk that any system that requires equipment to scan, print or upload documents to the online court will be of no use to a large percentage of the population.

Personal injury

The introduction of online courts poses a threat to personal injury claimants, a large proportion of whose cases would be unsuitable for an online court as they are deeply subjective. A case involving a faulty dishwasher is very different to bringing a claim for a broken leg due to the negligence of your employer.

An online court could also be overly sympathetic to insurers. If a claimant does not have legal assistance, they would find it very hard to understand court procedures. Given that every case Thompsons has ever taken over from individuals who have attempted to deal with insurers directly, has involved insurers attempting to under settle or mislead the claimant in some way, we are very hesitant at the notion of leaving claimants to battle with insurers alone. You can't teach an old insurance dog new tricks and judges will only have so much time available to them in their busy work days to be the claimant's advocate.

We therefore welcome Lord Justice Briggs' recommendation that personal injury claims be excluded from the online court. The claims portal which was extended in 2013 to cover almost all lower value personal injury claims is not ideal but it does at least provide for claimants to be represented.

Employment Tribunals (ET)

No discussion about the justice system would be complete without referring to the impact of ET fees on access to justice. The House of Commons' Justice Select Committee published a report in June 2016 which was highly critical of the level of ET fees and concluded that the fees had led to an undisputed drop in claims – which, in turn, has had a "significant adverse impact on access to justice". The figures are startling. There has been between 60% to 70% drop in claims in the ET since fees were introduced.

Tribunals were originally intended to provide a relatively cheap, speedy and informal means of settling employment disputes between employees and employers. However over the years tribunals have become more legalistic and complex. If there is a push for some cases to be heard on a paper-only basis online, then there is a considerable risk that such a process is likely to favour employers, who generally will be better able to process online cases than employees, particularly the most vulnerable and disadvantaged.

Funding

We are particularly concerned as to whether the government will provide the civil courts service with the necessary funding and other resources to allow the proposals to be implemented effectively.

In an era of ongoing austerity and with the instability over Brexit, the government is highly averse to spending money. The 2015 Autumn Statement set out that the Ministry of Justice is expected to make departmental savings of 50% by 2019-20 and overall resources savings of 15%.

We would suggest that a pre-requisite for the reform is a specific Treasury guarantee for the significant investment required. The risk otherwise is that we will get a half completed system and the worst of all worlds.

The notion of a two-tier system where those who do not have access to the online court use an offline version instead is a nightmare scenario that, aside from being expensive and complicated to run, would complicate access to justice yet further.

A move to a digital system should not lead to a reduction in staff in courts. The changes should be seen as an opportunity to invest in the justice system and improve it, to make it accessible to all, not save costs and further restrict access to justice.

Demand

The proposals assume that all cases will go to the online court. If that becomes the public's perception too, then it will quickly mean that many litigants will have no incentive to negotiate or seek other forms of dispute resolution before entering the court system.

Currently, lawyers are often able to keep cases out of court and a high proportion of personal injury cases, for example, settle without court proceedings. If all disputes go through the online court, even with an automated triage system, the court's workload will surely increase significantly. There is already evidence of that now with the increased number of litigants in person taking up more of the court's time.

Going to court should be a last resort step in terms of dispute resolution. Thousands of claims settle without court proceedings and without 'disproportionate' cost. The courts usually only see those (small percentage of) cases where attempts at negotiation and alternative dispute resolution have been exhausted.

Likewise, those cases where court proceedings are commenced usually settle. Only a very small proportion of cases go to trial. While costs may be disproportionate in those very few cases, that is because all other avenues have been exhausted and the disputes between the parties are highly contentious.

Litigation costs

Removal of costs shifting could encourage a nonchalant or, worse, vexatious attitude to negotiation, evidence and pleadings. Those claimants who do engage lawyers could lose a substantial proportion of any damages they recover by way of costs. Without costs shifting, the risk of a large bill from a lawyer combined with court fees could deter legitimate claims as defendant insurers take advantage of not having to pay for their conduct in costs.

Personal injury litigation is an obvious example of an area where the cost of legal representation does not lead to the result that individuals are forced either to litigate in person or to forgo access to justice. We submit that that is a desirable state of affairs and one to be spread across the civil justice system rather than being further restricted to an ever smaller class of cases.

On the subject of recoverable costs, we note that the senior judiciary is to consult on this. We have yet to see the consultation. In our view any consultation should be evidence-based and as wide as possible.

While Civil Procedure Rules used to acknowledge that costs would be proportionate and depend on the amount of work necessary in a case, costs have now been fixed by the government, leading to a completely inappropriate system that is geared towards the benefit of insurers and defendants.

Insurers claim that the reason motor insurance premiums are so high and vary so wildly is because a variety of factors can determine the level of a premium for any individual. This is a premise which should also apply to recoverable costs.

There are huge number of variables which can determine the level of costs fighting a legal case. Complexity, length of time and ease of access to the client are just three such variables.

Conclusion

We are entirely supportive of reforms to the justice system which allows claimants to get their compensation easier and quicker. However, if a new digital system is neither fully funded nor works for everyone (as opposed to just the 'privileged few') it should not be contemplated, let alone embarked on.

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