Ministry of Justice: Resolving Disputes in the County Courts

Response from Thompsons Solicitors

June 2011

About Thompsons

Thompsons employs over 400 lawyers in 28 offices across the UK. At any one time we will be running 70,000 claims on behalf of people who have been injured at or away from work, through no fault of their own.

Introduction

We oppose an extension of the RTA portal to claims above £10,000 and also to employer liability (EL), clinical negligence and public liability (PL) claims.

We refer to the MoJ's response to the consultation *Case Track Limits and the Claims Process for Personal Injury Claims* and the reasons given then for not extending the portal to EL claims. Nothing has changed to alter the validity of these reasons.

> *21. The Government recognises that there are strong arguments on both sides. However, the Government considers that RTA cases tend by their nature to involve fewer complexities than EL and PL cases and therefore lend themselves to the new claims process more immediately than the others.*
>
> *22. The Government considers that EL cases in particular involve a different dynamic in terms of the economic and power relationship that exists between an injured employee making a personal injury claim against their employer, and two parties contesting a road traffic accident.*
>
> *23. The Government has therefore decided not to include EL and PL cases in the new process, as currently constructed, but to restrict it to RTA cases, which constitute around 70-75% of personal injury claims.*

We agree with the problems described in Paragraph 10 of the consultation.

> *Para 10: However, despite improvements in some areas, there are still far too many cases where parties find themselves going to court unnecessarily, and are faced with disproportionately high costs when they get there. For example, more than three-quarters, or 87,000 of all claims allocated to the fast and multi-tracks are still settling between allocation and trial (see Annex A) – this means significant unnecessary cost for the parties involved and a waste of court resource and judicial time. Late settlement is something on which Lord Justice Jackson commented on in his Review of Civil Litigation Costs[1]:*

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“A number of cases, which ought to settle early, in fact settle late in the day. Occasionally these cases go to trial. The cause of such futile litigation is (a) the failure by one or both parties to get to grips with the issues in good time or (b) the failure of the parties to have any effective dialogue.”

We do not agree with Jackson’s analysis of the reasons for late settlements.

In our experience – and we are very happy for our files to be examined should it assist - it is the failure by defendants and their insurers to make satisfactory offers which results in late settlements. We explained this to Jackson LJ and provided figures to demonstrate the point. They showed that costs were significantly higher when cases are issued or go to trial.

In our response to the recent consultation *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* Thompsons said it wants to see cases settled more quickly and we have long called for the courts to rigorously enforce PI protocols and punish “bad behaviour” by defendants who allow claims to drag on instead of entering into proper settlement negotiations.

Rules already exist and systems are being tested and improved that are producing earlier settlements and savings for claimants and defendants. The proposed reforms in this consultation and any primary legislation are simply unnecessary.

The RTA portal

The RTA portal, which covers 75% of all PI cases, is said to be having a significant impact on case duration, with claimants getting their damages faster. It appears that the number of claims notification forms are on target to exceed 500,000 in the first year.

Insurers are reporting considerable savings – an ATE claim in the portal is costing £100 against £400 outside of it.

There have however been considerable problems setting up and then operating the portal and it is simply too early to say for sure that it is a success.

All sides agree that the RTA Portal needs to be allowed to bed down before consideration is given to extending it to higher value RTA claims and to other types of claim.

All sides agree that at least a year’s worth of data is needed in order to assess whether the portal is working properly. Portal Co members acknowledge that the start up period will always give “false” information, not least because it simply wasn’t used in the early days and the extent of the use has been building since.

Thompsons’ data, provided to Professor Fenn, shows that only a small fraction of our cases in the portal have concluded within the process so it is impossible at this stage to draw a comparison between admission rates, turnaround times and other indicators.

User pays

Funding remains a significant problem. The Motor Insurance Bureau is effectively providing the funding and the day to day management of the portal.

RTA Portal independent chairman Tim Wallis confirms that funding and ownership issues are a major barrier to the system’s future development [*Post Magazine Lawyers welcome joint RTA Portal funding proposals 4 May*].

He told the Post Claims Club:

> "So far, the portal has been funded by insurers, as was the agreement. But the claimant lawyers have said it is no good having a joint venture if they can't have a 50% stake.

> "Therefore, changes are being put in place to find ways where insurers will only have to pay half of the costs, with the other half being paid by lawyers."

Funding and ownership are likely to be hugely problematic if the portal is extended to EL and PL claims. How can the MIB have a role in relation to EL claims? Why should motor insurers pay for EL insurers?

Even if the funding issues are resolved (though there is no timetable for doing so) the portal is not a pre-action protocol. The claims process gives rise to the IT portal provision and it has effectively become the protocol, but the rules and the protocol are not actually reflected in it. There is no punishment for bad behaviour by defendants.

Members of the IT portal behaviour committee describe the committee as a form of non-binding arbitration. A claimant can complain to them about a defendant's behaviour, and the committee can take a decision as to what is good or bad behaviour and can recommend a way forward, but they cannot enforce a resolution or issue penalties.

Section 2

Q1 Do you agree that the current RTA PI Scheme's financial limit of £10,000 should be extended?

No. The consultation paper offers no justification for extending the scheme other than that the proposal is the recommendation from Lord Young in his review of health and safety regulations.

We do not agree that the current RTA PI Scheme's financial limit of £10,000 should be extended. Our opposition to the extension is fivefold:

1. The RTA claims process for claims below £10,000 needs to be allowed to bed down. While indications are that the process is beginning to operate effectively, there have been teething problems which are still to be resolved.
2. Claims above £10,000 are not straightforward cases. They will often require more than one medical report and, as well as the valuing of general damages they will often require a special damages calculation, including pension loss calculations in many cases.
3. The fixed costs structure agreed for the RTA claims process were not modelled on more complicated cases. Any extension will require significant re-modelling of the fixed costs because of the inevitably increased costs they will involve.
4. As the value of cases increase so do failures by defendants to admit liability. It is statistically likely that in claims above £10,000 more cases will fall out of the portal which will undermine its credibility.
5. The portal scheme is designed for cases that settle quickly and easily with little in dispute. The more it is extended the further it moves from its original rationale. It will be undermined by cases which cannot be valued while a final prognosis is not available, such as cases requiring subsequent medical reports and evidence from multiple specialities.

Q2 If your answer to Question 1 is yes, should the limit be extended to £25,000, £50,000 or another figure.

No. We do not agree that the limit should be extended, for the reasons given above.

Q3 Do you consider that the fixed costs regime under the current RTA PI Scheme should remain the same if the limit was raised to £25,000, £50,000 or some other figure?

No. We do not agree that the fixed costs regime under the current RTA PI Scheme should remain

the same if the limit was raised to the suggested figures.

The scheme was modelled on straightforward cases under £10,000 and the fees were agreed by the stakeholders. Defendant insurers remain happy with these for those type of cases.

Extending the scheme would inevitably increase costs because higher value claims involve more medical evidence and complex calculations including potential pension losses.

It is fundamental that the costs recovered reflect the work needed to be done. If it doesn't the quality of the legal representation claimants get will be driven down and injury victims will not have effective representation or equality of arms.

Q4 If your answer to Question 3 is no, should there be a different tariff of costs dependant on the value of the claim? Please explain how this should operate.

Yes there should be a different tariff of costs dependant on the claim as a means of addressing the problem i.e. there should be a tariff for claims up to £10k and another for claims above £10k to a specified limit.

A key reason for any success of the Portal (if it is a success) is that the parties agreed its workings and the costs associated with it. In the spirit in which the government champions greater mediation as opposed to litigation it should champion inter party negotiations, with the stakeholders reaching agreement on what the tariffs for higher value claims should be. To do otherwise would undermine the current industry agreement in RTA cases.

Both the current RTA fixed costs regime and the fast track fixed costs matrices proposed by Jackson provide for costs recoverable to increase as the value of the settlement increases. This reflects the complexity, additional work required and extra costs incurred as the claim value increases.

Costs need to match the work that needs to be properly carried out on the claim. The guideline hourly rates should apply.

The data produced by Professors Fenn and Rickman on predictable RTA costs made it clear that these should not be applied to more complex claims.

Automatic uprating is also essential. Costs fixed today will inevitably be based on today's hourly rates and will quickly become inadequate as inflation reduces the true value of those figures.

Q5 What modifications, if any, do you consider would be necessary for the scheme to accommodate RTA PI claims valued up to £25,000, £50,000 or some other figure?

The value of the claim makes a real difference. There is an immediate correlation between value and complexity.

More time would need to be built into the system to enable sometimes numerous medical reports to be obtained.

It would also be necessary to allow for schedules of loss to be regularly updated.

Claimant lawyers would also need to provide more client care in a higher value claim.

At present, a maximum of 70% of cases being put into the portal proceed to stage 2 with the rest fall out of the existing system due to liability issues. We anticipate that far higher numbers will have to be taken out of the system if higher value claims are included and so we query what value there is in extending it at all.

Case study 1: the complex RTA

Mrs X, aged 47, was driving a work vehicle when another car ploughed into her. She suffered back, neck injuries and psychological injuries. She has not yet returned to work and it is possible that she may never return, which will result in ill health retirement. She may need long-term care and assistance.

The claim was initially submitted by completing the claims notification form (CNF) and lodging it with the defendant via the portal. The claim has been accepted and liability admitted, but as the complexities increase, and the value goes up, it has become impossible to deal with the claim within the portal.

Medical evidence was first obtained from a GP who gave an overview of the claimant's injuries and recommended that she be examined by an orthopaedic consultant and a psychologist. The psychologist's report recommend a variety of treatments. The defendant has been asked to confirm that they will cover the cost of this or arrange to provide the treatment.

The GP also advised that Mrs X needed physiotherapy. Although the defendant agreed to provide this the claimant was unhappy with their nominated physiotherapist. They have been asked if they will arrange for her to be treated by her preferred physio or provide an interim payment to cover the cost.

The experts have also requested to see Mrs X's medical records, which will increase the length of the claim, as will the need for the further medical evidence.

Depending on the outcome of the orthopaedic report, it may be necessary to arrange further physiotherapy.

This example demonstrates that modifications would have to include:

- Provision for more than one medical report.
- Provision for witness evidence to support the claim.
- Provision for an interim payment if claimant unable to work.
- Ability to issue court proceedings if interim payment not forthcoming.
- Provision for a more involved schedule of loss including assessment of loss of earnings, costs of treatment and pension loss.

Q6 Do you agree that a variation of the RTA PI scheme should be introduced for employers' and public liability personal injury claims?

No.

We have very serious concerns about the opportunity the scheme would give employers and their insurers to put improper pressure on their employees who are witnesses to the accident.

The MoJ accepted this in its response to the *Case Track Limits and the Claims Process for Personal Injury Claims:*

> *The Government considers that EL cases in particular involve a different dynamic in terms of the economic and power relationship that exists between an injured employee making a personal injury claim against their employer, and two parties contesting a road traffic accident.*

Insurers have previously claimed that the period which they have to admit liability would need to be 30 days rather than the current 15. If it remains at 15 days many cases would simply fall out of the system because insurers say that is not enough time for them to investigate the claim.

All parties acknowledge that even straightforward EL cases involve issues of significantly greater complexity than an average RTA case. That is why the insurers have said they would need 30 days to admit liability.

Currently, in EL and PL cases insurers often fail to admit liability within the pre action protocol period and, when they do, they frequently raise arguments of contributory negligence which have no basis in fact or law, but which require further investigation.

If, for the 30 days which the defendant has to investigate, all the claimant can do is to submit the CNF, the defendant will have the initial opportunity to apply pressure on fellow employees who are witnesses or to rectify the fault that caused the accident without the claimant having the opportunity to gather evidence of that fault. It also gives the employers the advantage of gathering their evidence first, when it is most reliable.

In the current economic climate, claimants and witnesses are especially vulnerable to pressure from their employers.

The new claims process was modelled for RTA PI claims under £10,000 – the vast majority of claims – and continues to be developed. In RTA claims, the damaged cars remain with their owners and so cannot be “tampered with” by another party, and in any case, inspections are not needed in low value claims.

That is not the case in EL cases.

The portal is based on the claim being made against one or more named defendants. The portal then identifies the insurer from the motor insurance database and passes the claim to the relevant insurer(s). This cannot apply in EL or PL cases.

In EL cases there may be a dispute as to whether a worker is an employee or not and so whether any EL policy applies. Where compulsory insurance does not apply, such as in those cases and in PL cases, there may be no insurer. The portal works only where there is an identified insurer.

In industrial disease cases there are often multiple employers each with separate or overlapping insurers and the same employer may have multiple insurers over the relevant exposure period. There will also be many cases where the exposure pre-dates compulsory insurance so there may be no insurer and extensive difficulties tracing insurers.

The ABI has a pitiful record in locating insurers in disease cases through its voluntary tracing scheme. A review of the scheme revealed that the scheme had failed to find 48 per cent of policies for mesothelioma sufferers.

The portal cannot begin to cope with these complexities.

As we say in our introduction, there have been significant teething problems which have by no means been completely ironed out. And the issues of funding and ownership we refer to would need to be resolved.

Once the process has been allowed time to bed down, it may be appropriate to consider whether it is practical to include other types of claim. But that will require careful deliberation and sensitivity to the different characteristics of employers liability claims in particular. It may require substantial modifications to the process and portal.

The following case studies illustrate how even apparently straightforward EL claims are too complex to be put through an RTA portal system.

Case study 2 : apparently minor knee injury

Our client, who worked for a hospital cleaning contractor, was injured by a sharp scalpel which caught her knee. The claim looked reasonably straightforward from the outset. There was no scar and liability appeared to be clear.

A letter of claim was issued in October 2009. Liability was admitted for the original injury in April 2010 and an offer of £1,300 was made. However, the medical evidence became complicated after the first report was obtained as it set out additional problems.

The claimant was still suffering pain in her knee so it was necessary to instruct an orthopaedic expert for the original injury in order to establish if the pain was caused by it.

The expert confirmed that our client had developed Type 2 Complex Regional Pain Syndrome which can be caused by nerve damage as a result of an injury or surgery.

The claimant went on to suffer depression after the claim was commenced, and so it was necessary to obtain a report from a psychiatrist.

The claim eventually settled in January 2011 for £14,500, although the claimant only received their damages after enforcement action was taken.

Case study 3: complications after apparently minor head injury

A bakery foreman struck his head on the side of a machine in as he tried to free a blockage. He suffered a 2 inch cut to the side of his head. He suffered blurred vision and severe headaches in the days following the accident.

He returned to work after a few days but continued to suffer blurred vision and headaches. His GP referred him to an ophthalmic specialist who diagnosed vitreous detachment.

He remained at work but after several months his condition had deteriorated to the point that he was suffering sleeplessness, anxiety attacks, shaking and was struggling with co-ordination. He was diagnosed with depression and signed off sick.

The A&E report concluded that the claimant had suffered a blow to the front of his head and a laceration which left him with a small and insignificant scar and that the symptoms relating to the blow would be resolved within six weeks and would not recur. It said the ongoing headaches attributable to the accident lasted two to three months and that any continuing headaches beyond that time were related to the depression or vitreous detachment or both.

A claim was made on his behalf and liability conceded. The A&E report was disclosed as was a preliminary report obtained by a consultant psychiatrist which concluded that the claimant had suffered a moderate depressive disorder and recommended Cognitive Behavioural Therapy (CBT).

The insurers then made a Part 36 offer to settle of £4,000. This was rejected and the claimant started the CBT sessions. At the end of these the consultation psychiatrist concluded that he depression had got worse and that he was likely to suffer relapses. A structured return to work programme under the guidance of a vocational rehabilitation specialist was recommended.

However, the depression got still worse and a report from an employment expert concluded that it was unlikely the claimant would return to work. This was confirmed by a vocational rehabilitation specialist.

The defendants then made their first offer to settle, in June 2009, since the initial £4,000 offer. It was rejected and after a joint settlement meeting £260,000 was agreed.

Case study 4: a straightforward trip?

A clerical coder at an NHS Trust tripped on wires at work and sustained a moderate cut to her head. Her claim appeared to be a straightforward low value fast track case. A letter of claim was issued and liability was admitted.

The initial medical report stated that the claimant had sustained a minor head injury but no significant head trauma. Residual symptoms were expected to settle about 18 months after the accident.

After 12 months the claimant developed epilepsy. Epilepsy is a known risk from head injuries, so it was necessary to investigate whether it was connected to the original injury.

A report by a neurologist was sought. The neurologist was unable to say that the epilepsy had developed as a result of the accident so ultimately only the original injury was claimed for and settlement was reached.

However, these further investigations were a necessary part of the claim.

Q7 If your answer to Question 6 is yes, should the limit for that scheme be set at: £10,000; £25,000; £50,000 or another figure?

For the reasons given, we do not agree with extending the scheme to EL and PL claims. If it were, then the limit should be set at £10,000, for the reasons set out above.

Q8 What modifications, if any, do you consider would be necessary for the scheme to accommodate employers and public liability claims?

We refer to our response to Q6. Many modifications would be necessary for the scheme to accommodate EL and PL claims. These are:

- A procedure providing for the claimant to gather evidence including from witnesses when the CNF is submitted, to prevent the potential difficulties outlined.
- A procedure for preserving the scene of the accident.
- The ability of the claimant solicitor to inspect the scene of the accident before the end of the relevant investigation period .
- Remodelling of the costs system to reflect the work done by the claimant solicitor during this initial period and in preparing the CNF.
- A fundamental re-design of the portal to accommodate the insurance complexities referred to above.

In our view, the majority of EL claims will drop out of the process before they reach stage 2 because defendants will not admit liability within the period set by the system. The portal will then have added to the cost of those cases and further delayed settlement.

Q9 Do you agree that a variation of the RTA PI scheme should be introduced for lower value clinical negligence claims?

No. We would welcome measures that would speed up the resolution of lower value clinical negligence claims, but putting them through an RTA portal-type system would not achieve this.

The National Health Service Litigation Authority (NHSLA) rarely admits liability and this is the main barrier to reaching speedier settlements. The RTA portal would not resolve this issue.

The stages involved in a clinical negligence claim are:

1. The informal complaint and response which is a frank exchange of views between the patient and the treating body. This can narrow the issues where the response has been informed by a clinical peer review of the standard of care eg by way of clinical incident review.
2. The medical records are requested and the protocol time for disclosure of records is currently 42 days.
3. Expert evidence obtained on liability by claimant to inform the letter of claim.
4. The protocol letter of claim and response : 4 months allowed and independent expert evidence to be obtained if liability is denied .

There are four main areas where improvements could be made that would speed up the resolution of claims without the need for a portal:

1. Earliest possible notification of claim post the informal complaint and response. A letter of notification as advocated by the Clinical Disputes Forum.
2. Speed up the release of medical records - the present 42 days is rarely adhered to.
3. Separate out the issue of liability from quantum.
4. A joint panel of experts who agree to provide opinions within four/six weeks at a reasonable price and are prepared to provide screening opinions on breach and causation .

The RTA portal depends largely upon a rapid acceptance of fault in cases where there is little factual dispute regarding liability. As said, the opposite is true in clinical negligence claims. There is usually either a factual dispute such as over the history of treatment, followed by significant legal dispute over breach and causation. It is unusual for both breach and causation to be admitted at the early stage of the claim and cases in the £10k - £50k bracket are amongst the most complex that we have in terms of legal argument.

The delay in clinical negligence claims therefore centres upon the failure to narrow the issues without expensive expert evidence at the earliest possible stage.

Proposal: This could be addressed by greater detail being provided in the complaint investigation stage, earlier notification of a legal claim, speeding up the release of records and facilitating the provision of speedy expert evidence.

Early notification are speedier expert reports are key. Experts often have very little time to set aside to produce reports and in our experience obtaining a report can take many months. We are currently running a meningitis claim where the expert is not available until the end of the year.

Proposal: A joint panel of experts providing early identification of the issues would greatly speed up this process and would avoid the need for multiple (expensive) expert advices.

The new Welsh “Redress” scheme (The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 is now running.

Proposal: The MoJ should wait until that system has bedded down and review it as a working model after at least a year, before considering any extension of the RTA portal to clinical negligence claims.

We note that the NHSLA has also proposed a voluntary scheme and we have serious concerns about the four stages being suggested, including the time scales for the NHSLA to investigate on liability and that the NHSLA rather than the claimant solicitor decides whether a condition and prognosis report is required and whether to select breach of duty or causation from the expert report.

The key to facilitating a speedier settlement is early notification and an early narrowing of the issues between the parties. The complaint and response system serves its purpose very well where it is a) efficient and b) frank.

Two case studies provide contrasting experiences of speed and efficiency, which is positive, versus and the more typical slow to settle claim.

An RTA portal system would have made no difference in either claim, though the latter would simply have been removed from the portal as soon as there was a failure by the defendant to respond.

Case Study 5: early narrowing of the issues

The exchange of two letters in this case significantly narrows the issues. Within a month of the original letter of complaint only causation remains in dispute (now the subject of an independent expert opinion).

On 27 September 2010 Mr R complained of pain in his back and neck. The family GP suspects a urine infection. Two days later the back pain had worsened and the GP diagnosed a slipped disc. By the next day there was no improvement and an ambulance was called.

The hospital carried out the full range of blood tests and administered IV fluids, antibiotics and a chest x-ray. The initial working diagnosis was a possible urinary tract infection or ureteric colic.

A CT scan was carried out on 1 October and an MRI scan on 5 October. But by 7 October Mr R's condition had so deteriorated that he was subsequently confirmed a paraplegic.

On 12 January 2011 Thompsons was approached by the wife of Mr R. On 18 January a letter of complaint was drafted and submitted to the Hospital Trust.

On 16 February a complaint response confirmed senior doctors had reviewed the case to identify what could and should have been done differently and to identify learning points. The clinical leading senior consultant in radiology confirmed that on reviewing the MRI scan:

"It was possible to see the abnormality….but attention had clearly been focused elsewhere in the spine…despite this, discitis could and should have been seen on the original scan. Had this been identified, it may have been that an earlier referral to the neurosurgical team could have been made and that surgical intervention could have taken place before Mr R's condition deteriorated to such an extent that his condition was inoperable".

An apology was then offered in the followed terms:

"This is of course speculative and it may have been that there would not have been a different outcome but sadly Mr R was not given this opportunity and we will therefore never know if a different outcome could have been achieved which is deeply regrettable and I offer you my heartfelt apologies".

Case study 6: refusal to admit liability

This dental negligence claim was commenced in 2008 and has only recently settled.

The claimant suffered problems with a bridge which her dentist refused to remove on the basis that it was specialist restorative work that needed to be carried out a hospital. But the hospital refused to treat her and discharged her back to the dentist saying that it was routine dental treatment.

The dentist failed to perform the treatment.

A letter of claim was served on the Dental Protection Society (DPS) on 13 February 2008. This was prepared without expert evidence as liability appeared clear. But the DPS failed to serve a response.

Thompsons chased the DPS several times and gave them every opportunity to respond. But when no response was forthcoming we instructed an expert to report on liability and causation. As the report was supportive we issued proceedings.

The DPS then advised, on a without prejudice basis, that they wanted to settle the case but that their member's instructions were to defend it. A defence denying liability was then served, with an offer of £2,000 which we rejected. A counter offer was made but it was only after we served our expert evidence and threatened to apply for an Unless order that the DPS finally responded to this offer and entered into settlement negotiations. The claim finally settled for £10,000.

It was clear from the outset that the claim could not be defended yet the DPS dragged it out and delayed settlement – significantly increasing costs as a result.

Q10 If your answer to Question 9 is yes, should the limit for the new scheme be set at: £10,000; £25,000; £50,000 or some other figure?

No.

We do not agree that lower value clinical negligence claims are appropriate for an RTA portal. However, if a pilot scheme was trialled then the limit should be £5,000 to deal for example with the mis-prescription of drugs and small scarring injuries where liability is likely to be accepted and the case turns on discrete issues of fact so that expert evidence would only be required for quantum.

Q11 What modifications, if any, do you consider would be necessary for the scheme to accommodate clinical negligence claims?

If a portal system were to be considered, it would have to be able to cope with the uploading of a great deal of documentation, such as several expert reports.

It would require separate case flows for breach, causation and quantum.

And there would have to be realistic but stringent time scales for the required steps - in particular, the protocol letter of claim and response.

Four months for the response is probably a realistic minimum where clinician comments are required. The current 15 days allowed by the RTA portal is wholly unrealistic with the NHSLA present operating procedures.

Consideration could also be given to an agreed panel of experts who would prepare a screening report at a fixed fee of, say, £450 and guarantee a four to six week turnaround with automatic disclosure of reports obtained.

Fundamentally, it is important to ensure that any scheme is fit for purpose to ensure a full and thorough investigation is carried out and that there is no infringement of Article 6 of the Human Rights Act: the right to a fair trial and that hearings must be by an independent and impartial tribunal.

Q12 Do you agree that a system of fixed recoverable costs should be implemented, similar to that proposed by Lord Justice Jackson in his Review of Civil Litigation Costs: Final Report for all Fast Track personal injury claims that are not covered by any extension of the RTA PI process?

No.

Fixed costs control what is able to be recovered but not the actual costs incurred in a claim. They are a reward for defendants and penalise claimants irrespective of behaviour.

Certain categories of case should not be included in any fixed costs regime and either be allocated to the multi-track or, if they are to remain in the Fast Track should be specifically exempt from fixed costs.

The process of fixing costs including success fees has to date been expertly mediated by the CJC using extensive data collected by Paul Fenn from both claimants and defendants. The result has been a lasting agreement which in our view should be a model for other areas of litigation and is the only basis on which fixed costs should be considered.

If a system of fixed recoverable costs were to be implemented for claims outside of the RTA claims process, the Jackson figures, which followed a mediated process event using Fenn-based research, would need to be updated. They are already two years old, based on 2009 data.

We suggest the uprating of the recoverable costs matches the ACCC recommendation to the Master of the Rolls for increases to hourly rates.

There has to be a match between costs reasonably and properly incurred and costs recoverable. Arbitrarily decreeing that there should be a reduction in costs recoverable without equating those costs with the work required would be the equivalent of asking a pilot to fly the same distance in less time without looking at the type or age of the aircraft, the load or the prevailing winds.

We believe that there are ten reasons why fixed costs will harm injury victims and access to justice and will only benefit insurers.

1. They will remove the financial incentives on insurers to 'behave' in litigation. Instead they will create a perverse incentive (the reverse of the current incentive) to deny the undeniable and contest the unarguable. The result will be that the claimant's solicitor will incur wasted costs which cannot be recovered.
2. No business can run at a loss. Where fixed costs fall short of actual costs incurred, cases will either be turned down (reducing access to justice) or clients will be charged the excess (removing free access to justice).
3. In the Coal Health Scheme, some lawyers undersettled cases rather than pursue the matter in the best interest of the client. In that way they recovered the same fixed cost for less work.
4. Access to justice in meritorious but risky personal injury cases has been ensured by a system of reasonable costs recovery and standard success fees set at 100% for those cases proceeding to trial. Fixed costs based on an average will render those risky cases requiring more work than the average uneconomic.
5. In personal injury cases the claimant is always an individual with limited means and the defendant always a large insurance company with substantial financial backing. Equality of arms is fundamental to ensure fairness and equal access to justice. This is undermined where fixed costs are less than those and reasonably incurred costs.
6. Lawyers can only recover their "reasonable, necessary and proportionate" costs. If the defendants do not agree with any costs claimed they have the right to challenge them by way of the Costs Assessment Process and can recover their costs of doing so if they make an early offer which is not beaten on assessment. In our experience the defendants' do not properly use this procedure and rather than engage with it they allege the system is flawed and call for the simplicity and certainty (for them) of fixed costs.

7. There has been no independent or verifiable evidence produced by the Government or the insurance industry that costs in personal injury cases are out of control. Insurers wrongly claimed that there was a compensation culture and this was rejected by Government following an extensive investigation. Their claims on costs are no more accurate.
8. It is morally right that when someone has caused injury they should meet not only the compensation for the injury but the full reasonable, necessary and proportionate costs caused by their negligence.
9. Fixed costs will undermine the health and safety deterrent on employers, of having to pay not only compensation but the cost of proving negligence in EL cases. Fixed costs may also encourage cynical calculations of the financial risk of injury from an unsafe work practice
10. Costs arrangements based on recovery of costs reasonably and properly incurred have delivered nil cost to Claimants and access to justice. It is Defendants and their insurers who press for fixed costs as shorthand for reduced costs. Reducing costs recovered so that they fail to match costs incurred can only undermine access to justice by removing equality of arms.

Q13 Do you consider that a system of fixed recoverable costs could be applied to other Fast Track claims? If not please explain why.

No. We oppose fixed costs for the reasons set out above.

Q14 If your answer to Question 13 is yes, to which other claims should the system apply and why?

No comment.

Q15 Do you agree that for all other Fast Track claims there should be a limit to the pre-trial costs that may be recovered?

No. We do not understand to whose benefit this would be.

What would happen if the reasonable and proportionate costs incurred exceeded this cap?

Who would be liable to pay the amount above the cap?

Will claimants be outspent and forced to drop or undersettle a meritorious claim leaving the defendants with a windfall?

Imposing a cap on pre-trial costs that can be recovered would be entirely arbitrary. Costs that are recoverable are by definition reasonable, proportionate and properly incurred for the work that has to be done.

Q16 Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

We already have mandatory pre-action directions in the form of pre-action protocols. What is required is proper enforcement with teeth with stakeholder involvement. Any system should be modelled on that run by Master Whittaker in asbestos claims where hopeless tactical defences are frequently struck out.

Any system would have to enable claimants to deal with limitation issues by being able to get before a judge or to register a claim with a court in order to preserve limitation.

Any such proposal would have to deal with the matters currently covered by the courts such as applications for disclosure, strike out, clarifying a party's case, interim payments and summary judgment.

There is also the issue of judicial case management and how that would operate in such a regime.

Costs recovered would still have to reflect the work properly done, which will be as much as at present as no indication has been given as to how this proposal would reduce the work required in pursuing claims.

Q17 If your answer to Question 16 is yes, should mandatory pre-action directions apply to all claims with a value up to: £100,000 or another figure?

No comment.

Q18 Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not please explain why.

Yes.

Defendants should be barred from defending a case where they have failed to engage in settlement discussions designed to settle the case or narrow the issues.

Where parties are represented there should be no need for compulsory mediation as any such proposal would lead to more front-loading of costs and any party that will suffer a reduction in their costs for failing to engage with the issue of mediation will do so whenever they think there is a reasonable prospect of its succeeding.

Q19 If your answer to Question 18 is yes, should prescribed ADR process be specified? If so, what should that be?

We support settlement conferences, but they do need to be targeted and specific.

This does not mean mass use of mediation or other forms of ADR as these are rarely required in PI claims as both parties are represented by experienced practitioners who should be able to resolve cases by settlement discussions or conferences

Nor does it mean settling for more or less than a case is worth or settling those (few) cases where there are genuine issues of dispute requiring a trial.

A change in attitude from insurers is required so that resources are focussed on securing early settlement.

We suggest there should be a requirement for pre-proceedings settlement discussions and real sanctions for non-compliance with protocols and processes.

Where mediation/ADR is called for as a legitimate means to resolve a dispute, the costs should properly follow the event. A victim of another person's negligence should not be required to pay part of the costs of mediation out of their damages.

Q20 Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If not, please explain why.

No. Costs must reflect the work that is done pre-issue and issues such as the level of seniority at which it is properly done.

Q21 Do you consider that fixed recoverable costs should be: for different types of dispute; based on the monetary value of the claim; If not, how should this operate?

We oppose fixed costs but where they are introduced they should reflect the work properly done which will differ in cases of different type and value.

Q22 and 23

No comment

Q24 What do you consider should be done to encourage more businesses, the legal profession and other organisations in particular to increase their use of electronic channels to issue claims?

Make those channels more easily available and secure and provide information and incentives to use those channels.

Q25 Do you agree that the small claims financial threshold of £5,000 should be increased? If not please explain why.

No. To do so would exacerbate the asymmetric relationship that exists between claimants and defendants There is frequently an inequality of arms, with defendants often legally represented in the small claims court.

However we would consider supporting an option where an employee or a self-employed person bringing a claim subject to the £5,000 limit, such as for breach of contract, could *opt* for the small claims track, though there would have to be safeguards.

Q26 If your answer to Question 25 is yes, do you agree that the threshold should be increased to £15,000 or some other figure?

No, for reasons given above.

Q27 Do you agree that the small claims financial threshold for housing disrepair should remain at the current limit of £1,000?

No comment.

Q29 Do you agree that the fast track financial threshold of £25,000 should be increased? If not please explain why.

No.

By definition the fast track is for quick and straightforward disposal of simple claims which can be tried in a day.

Above £25,000 most claims are more serious, more complex and may need extensive expert and other evidence. Already, many cases under £25,000 have to be allocated to the multi track due to complexity and the fast track concept would be undermined if that became more frequent with an increase in the track limit.

Section 3 ADR

Q32 What more should be done to regulate civil and commercial mediators?

No comment

Q33. Do you agree with the proposal to introduce automatic referral to mediation in small claims cases?

Not without further information such as who would pay for this.

Q34. If the small claims financial threshold is raised (see Question 25), do you consider that automatic referral to mediation should apply to all cases up to £15,000; the old threshold of £5,000 or some other figure?:

No.

Q35. How should small claims mediation be provided?

It will vary depending on the issues in dispute and the parties involved.

Q36. Do you consider that any cases should be exempt from the automatic referral to mediation process?

See Q33 above.

Q37. If your answer to Q36 is yes, what should those exemptions be and why?

Not applicable, see Q36 above.

Q38. Do you agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper?

Yes. Parties should also be given the opportunity to choose to have their small claims hearing conducted in person at court as at present.

Q39. Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000?

There is no need if the parties' have representatives. If the representatives are doing their job they will always consider the option of mediation or settlement conferences. They will be penalised in costs if they fail to do so.

Q40. If yes, please state what might be covered in these sessions and how they might be delivered (i.e. electronic means?)

We do not agree that it should be compulsory and we question who would pay if it was.

Q41. Do you consider that there should be exemptions from the compulsory mediation information sessions?

See our response to Q39 above.

Q42. If your answer to Q41 is yes, what should those exemptions be and why?

No comment.

Q43. Do you agree that provisions required by the EU Mediation Directive should be similarly provided for domestic cases?

The EU mediation directive is already cross border [paragraph 169] and it is already agreed to be for domestic cases.

Q44. If your answer to Q43 is yes, what provisions should be provided and why?

Provisions should be as per the directive and the conduct regulations.

Section 4 Debt recovery and enforcement

Q45 to 56

No comment.

Q57. Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order? If not, please explain why.

No.

It is inappropriate for the private enforcement sector to replace County Court judges, staff and bailiffs.

The Citizens' Advice Bureau reports that it deals daily with complaints about the actions of private enforcement companies, including those enforcing judgments transferred to the High Court. County Court rules provide important protections for vulnerable debtors, such as by allowing for instalment orders and applications to suspend warrants.

Removing this protection would disproportionately impact on people who are genuinely unable to

pay off their debts, including those whose circumstances have changed through no fault of their own, such as those injured and unable to work and therefore struggling to pay their bills.

They must have the protection of being able to apply to the County Court to have their payments reduced. To remove it would contradict this government's stated pledge to protect the vulnerable, sick and elderly.

Q58. How would you envisage the process working (in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities, etc)

We oppose the proposal. The majority of individual debtors are not avoiding payment but are genuinely unable to pay. It is morally wrong to remove the protection of the County Court rules from vulnerable people.

Section 5 Structural reforms

Q60 County court equity jurisdiction too low?

No comment.

Q61

No comment.

Q62. Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low?

No.

Q63. If your answer to Q62 is yes, do you consider that the financial limit (other than for PI claims) should be increased to £100k or another figure?

There should be no increase.

Q64. Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts?

No comment.

Q65. Variation of Trusts, Companies Act etc remove County Court jurisdiction?

No comment.

Q66.

No comment

Q67. High Court judge sitting in county court, remove need for specific request of the Lord Chief Justice after consulting Lord Chancellor?

We agree.

Q68. Do you agree that a general provision enabling a High Ct judge to sit as a judge of the county court as the requirement of business demands should be introduced?

Yes.

Q69. Do you agree that a single county court should be established?

What is important is that claims can be heard where it is convenient to the parties and particularly the claimant who has the conduct of the case.

Given that PI claims are defended by insurers the location of the accident or of the defendant employer should be of little relevance to the location of the court where the proceedings are pursued.

Impact assessment

Q70: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

No. The full impacts have not been properly considered.

Q71: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

No.

We do not agree that claimants would receive earlier compensation payments under the proposals, other than those with low value RTA claims for which the portal is designed. More complex claims will simply come out of the portal at the first hurdle and will be delayed.

We agree that ultimately defendants gain from reductions in legal costs, court fees and ATE they have to pay, though we do not accept that extending the portal will reduce costs incurred or result in these outcomes other than for low value RTA claims for which it was designed. Other cases will be taken out of the portal for the reasons given in answer to Question 8.

We do not agree with the assumption that the fixed cost regime will identify and implement a more efficient approach to resolving cases, with no change to case outcomes.

We agree that the risks of the proposals for claimants include that fixed costs are set at the wrong level and lead to worse case outcomes, worse service standards, and to less involvement by legal services providers.

We consider that the inflexibility of the fixed cost regime will, not may, lead to reduced fairness for claimants and do not agree with the assumption that this will impact equally on defendants.

An assumption is made at paragraph 2.20 of the impact assessment that claimants would receive payment from defendants for their damages and would have their legal costs paid by defendants, including court fees and any applicable ATE premiums.

But this isn't the case under the wider civil justice reforms which will end recovery.

It is also assumed that the fixed costs for the cases brought into the RTA PI process, once developed, will accurately reflect the work required and undertaken by legal services providers on a case by case basis. We hope that assumption is correct, but no evidence for it is offered.

We agree that if the fixed costs developed do not reflect the work required, or do not adapt effectively to changing circumstances, this could lead to a wide range of unintended impacts, including unfair outcomes and reduced quality of legal services, though we note that there has been no impact test in relation to the impact of fixed costs on the quality of service, only on competition.

Q72: Do you have any evidence of equality impacts that have not been identified within the equality impact assessments? If so, how could they be mitigated?

We don't. However we do not agree with the assessment that fixed time periods and costs make the process more equal for the injured party.

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