Civil Procedure Rule Committee consultation on the draft protocols in an expanded RTA scheme

Response by Thompsons Solicitors

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Preamble

We welcome the opportunity to submit further representations on the extension of the RTA portal.

We are happy that our submission in response to the 28 February letter from Jonathan Djanogly is to go before the Master of the Rolls. A copy of that is attached as Appendix 1 for ease of reference.

We are very concerned at the suggestion in the 22 October letter from the Master of the Rolls that:

…certain aspects of the draft Pre-Action Protocols are the result of policy decisions which have been taken by Government in relation to their operation which are not open to adjustment by the Committee or are matters not before the Committee at this stage. They are:

(i) the schedule of costs which should be adopted for use in conjunction with the Pre-Action Protocols (Professor Fenn is updating his work on this and the Committee will consider any resulting proposals by Government for changes to the costs rules in due course),
(ii) the exclusion of certain claims from the scope of the Protocols and
(iii) the response period within Stage 1 of the protocols.

Also, work on the detailed operation of the Portal and on the detailed content of the forms for use with the Portal is being carried on by a separate working group convened under the auspices of the Ministry of Justice. These matters, therefore, are not the subject of consultation by the Committee.

No clarification is provided as to which of these matters are not open to adjustment by the Committee and which are not before the Committee at this stage.

In relation to the former, no statutory or other basis is set out for the proposition that Civil Procedure Rules including Protocols may be amended by '…policy decisions …taken by Government …' which are not open to adjustment by the Committee. The Civil Procedure Act 1997, as amended, which sets out the function and powers of the Committee, does not appear to contain any such provision and we are not aware of any notices having been issued under that Act.

This is a constitutional issue of fundamental importance. It raises questions as to the independence of the courts from Government, particularly on matters of procedure before the courts. The 1997 Act recognises this and it is essential that the Committee is clear as to the position under that Act and the extent to which Government can or cannot promulgate amendments to civil court rules or dictate to the Committee the amendments the Committee is to make.

The issue of independence is particularly important in the context of portal procedure and costs. It was a matter we specifically raised in our response to the 28 February letter from Jonathan Djanogly. We had grave concerns as to the improper conduct of the Government in relation to the matters then and we have them now. We said:

'The Number 10 insurance summit of 14 February cannot be said to be stakeholder consultation. It was a private meeting with only one group of stakeholders (insurers) who have a vested financial

interest in extending the portal and in reducing the recoverable costs within it. They are also substantial donors to the Conservative Party. Representatives of injury victims were excluded from that meeting.

To seek views (the minister's letter of 28 February) making reference to the Prime Minister having committed to reduce the costs in the portal is not a review at all. The Prime Minister's mind was made up after a private meeting with donors to his party who would be beneficiaries of this change.

The decision was made and the "consultation" issued before any meeting with those representing injury victims and any evidence being received to reach a genuinely balanced conclusion. The questions all point in one direction only: costs should be reduced.

Subsequent meetings with injury victim representatives have confirmed that a decision has already been made that the costs should be reduced. A paper sent out after one such meeting by ministry officials set out the options for the changes. All of the options included the words 'Reduction in FRC' (fixed recoverable costs)'.

Portal Costs

It is clear from the 22 October letter that portal costs are not a matter for this consultation. We can only conclude that this is because they are not before the Committee at this stage and that there will be a subsequent consultation by the Committee when this crucial issue is before it.

We note that the Parliamentary Under-Secretary of State for Justice, Helen Grant, has proposals on this which she is consulting on. In light of the above, it is not accepted that any decision of the Government or the justice minister binds the Committee when the matter comes before it in relation to the draft rules and/or protocols.

This is particularly so given that the minister's consultation further confirms the Government's closed mind on this by saying: "The Government is also committed to reducing the fixed recoverable costs (FRC) available within the extended RTA scheme."

That is a controversial position to adopt. We do not accept it for the reasons set out in our response to the 28 February letter.

In addition, the minister has proposed reducing the fixed recoverable costs based on Jackson's Table B by an amount 'intended to reflect the forthcoming ban on referral fees'. Again that is a controversial position which we do not accept for the reasons set out in our response to the 28 February letter. No reason is given by Helen Grant for accepting the case made by insurers, who are donors to her party and will be beneficiaries of this change, and rejecting that put forward by injury victims and Thompsons.

In relation to this, it is appropriate to point out that developments since our response to the 28 February letter have further supported our position that the ban on referral fees provides no basis for any reduction in portal and other costs.

The discussion paper on the ban, issued by the SRA, the regulator tasked with enforcing it, and the subsequent SRA's consultation paper published in October, confirm that, subject to consultation:

- Law firms which advertise direct or incur other marketing costs can still do so. There has never been any suggestion otherwise.
- Law firms which pay for collective advertising, such as Injury Lawyers 4u, can still do so..
- Firms which pay to be on a website panel and then pay for cases from that site can still do so where the site provides clients with the details of that lawyer as the firm they recommend within a specified postcode.
- It follows that charities or others who receive sponsorship from law firms to be on their panels where they recommend one or more firms to clients can still continue those arrangements.

The proposed changes to the SRA Handbook in that consultation paper provided as follows:

7. This means that there will be some arrangements that, whilst not breaching the LASPO provisions, will still be considered a referral for the purpose of the Code of Conduct and will still be subject to the relevant outcomes. This is because we believe that our wider definition provides important consumer protection by ensuring transparency, and the primacy of the client's interests, in relation to a wider range of arrangements. For example, we consider it important that where a third party recommends a particular firm, the client is aware of any financial arrangement and can make an informed decision about the recommendation.

It is clear from the above that in addition to advertising and marketing costs, law firms will still be able to make payments to third parties and they will be regarded as lawful referral fees by the SRA and regulated by them as at present.

In our response to the 28 February letter with regards to costs, we stressed that the RTA fixed costs were not modelled on cases over £10,000, or employers liability cases, which are inevitably more complicated. We believe that any extension will require at least proper consideration of re-modelling of the fixed costs and yet it is not clear that Professor Fenn is looking at portal costs or that the table in the 2009 Jackson Report (updated as appropriate) will be used for re-modelling.

Indeed, Professor Fenn has already indicated that, although he has called for and received new data, he will be unable to amend the 2009 table in the Jackson Report to take account of that new data.

Protocol Forms/Timing

On the matter of the forms referred to in the draft EL/PL protocol, we are concerned that we are being asked to comment on a protocol without having had sight of the forms. In our view, and with respect, the consultation is therefore premature and/or incomplete without them.

Further, given that costs within the portal will have to reflect the work done on both the protocol and the forms, unless we know what the costs are proposed to be, we cannot know if either the protocol or the forms (when we see them) are appropriate.

Alternatively, if the intention is to finalise the procedure and the forms at this stage then work on the costs should, we would have thought, wait until that is complete. The costs cannot be modelled on a procedure until that procedure exists in finalised form. At the point at which there is a final procedure there needs to be an appropriate modelling exercise with the full input of all parties and Professor Fenn in order to ensure that the costs prescribed reflect the work required to be done under the procedure.

Subject to our position that we are opposed to any extension of the portal as proposed for the reasons then set out, we comment on the protocols as follows:

PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY (EMPLOYERS' LIABILITY AND PUBLIC LIABILITY) CLAIMS

Definitions

We are broadly content with the definitions apart from the following:

1.1 (2) Claimant. We are concerned about the definition of 'claimant' as 'a person starting a claim under this Protocol' .

In our view, confusion may be caused by this reference. We would respectfully suggest that the same formulation be adopted as is used to define "defendant". The definition of 'defendant' specifically includes the defendant's insurer or legal representative.

1.1 (9) disease. We are concerned that 'employers liability claim' is defined to include workplace diseases.

In light of the above and the 1997 Act we can only conclude that this is a matter which is either before the Committee now as part of this consultation, or not before the Committee at this stage such that there will be a subsequent consultation by the Committee when this crucial issue is before it.

If the former is the case, we refer to our response to the earlier consultation at Appendix 1 as to why disease cases should not be included in this definition.

Subject to that, we are concerned at the definition used. The definition of 'disease' is already set out in the Pre-Action protocol for Disease and Illness Claims as follows;

'2.2 Disease is for the purpose of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement, other than a physical or psychological injury solely caused by an accident or other similar single event.

2.3 In appropriate cases it may be agreed between the parties that this protocol can be applied rather than the Pre-Action Protocol for Personal Injury Claims where a single event occurs but causes a disease or illness.'

It makes no sense to devise a separate definition for the purposes of this protocol. For the sake of consistency and clarity, the definition of disease as set out in the Pre-Action Protocol for Disease and Illness Claims should be adopted for this protocol.

Clinical Negligence

We note that there is no definition of what constitutes a claim for clinical negligence. 4.3 (8) excludes claims which include a claim for clinical negligence.

Clinical negligence needs to be defined as such claims cover not just the negligence of clinical staff but also (and increasingly) product liability. There is a definition of clinical negligence in Section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

1.3 forms. It would be helpful if consultees were able to review the form and consider it in conjunction with the draft protocol.

Scope

4.3 We oppose the protocol applying in a disease claim. However, if it is to do so we agree that it should not apply where there is more than one defendant (4.3 5) nor, applying the same logic, should it apply in multi-defendant accident claims, on which this section is silent. In our view, the portal is not appropriate for any multi-defendant claims.

What happens if, for example, some of the defendants in an accident claim admit liability and some deny and/or some fail to comply with the timetable to admit or deny? Do they need to agree which of them is the lead defendant and, if so, what is the timescale and procedure for that? Including multi-defendant claims will simply lead to confusion, complexity and to many claims falling out of the process.

There is the added complication that many multi-defendant accident claims involve both an employers' liability (EL) and public liability (PL) claim. An example would be where a care home cleaner, employed by a private cleaning firm, is injured by faulty equipment and claims against both the care home which was responsible for the equipment and the employer which exposed them to the risk. Similarly, a home help may suffer injury when working in the home of a client and has potential claims against the individual occupier, the owner of the accommodation (in the case of social housing) and the employer.

Similarly, the majority of construction industry claims are against both the employer and the occupier.

In such cases the claims would have to be separated out as different rules and different time limits for responding apply – 30 and 40 days in EL and PL claims respectively.

Rather than trying to grapple with these issues and somehow force multi-defendant accident claims into the process, we would recommend that the protocol does not apply to them.

Communication between parties

5.1 It is noted that it is to be compulsory to use the process. This is acceptable, provided there remains the currently applicable discretion on costs when a case is pursued without using the prescribed process. This discretion, found in CPR 45.36, is fundamental as it ensures that the court retains the power not to penalise a party where the process is not used for good reason.

From experience, the RTA portal is prone to defects. From time to time we receive notifications from Portal Co that the portal is not accessible or is working extremely slowly. While this is inevitable, no IT system will work perfectly 100% of the time. We fear that the extension of the portal has been rushed and it will simply not be able to cope with the volume, but also, crucially, the complexities of the case types proposed to be included.

We hope we are wrong, but, if not, discretion should be allowed to conduct cases outside the process where the portal repeatedly freezes, closes down completely, operates so slowly or ineffectively as to be unusable or is persistently down for maintenance. CPR 45.36 provides the appropriate discretion for the court to accept that a costs penalty should not be imposed where the claim was conducted outside of the portal. This should be reinforced in the Protocol.

5.1 states that all communication should be by email. We are concerned that this may result in confidentiality issues unless these are resolved by the prescribed portal provider.

We also wonder whether it is acceptable to expect a litigant in person, someone who may have limited access to email, and no email account or address, to communicate in this way?

5.5 refers to paragraph 6.8. We believe this should be 6.9.

Completion of the Claim Notification Form

6.1 This draft protocol is, we believe, the first time that disease cases have been referred to as being in the extended portal process. See above our comments in relation to this. We said in our response to the Djanogly letter:

> *Disease cases would need to be excluded from any EL portal because there may be multiple employers and insurers, or the employer and their insurer may no longer exist or cannot be traced. Insurers invariably raise limitation, liability, causation and apportionment*

as issues in industrial disease cases and exposure in many disease cases has occurred over many years involving numerous defendants. Such cases are unsuitable for a claims portal.

While we appreciate that effort is being made at 6.1 to deal with the issues above, the measures proposed cannot adequately do so and we remain of the view that disease cases are unsuitable for a claims portal.

6.3 We are unable to comment on the mandatory boxes and whether this is a reasonable requirement as the forms have not been provided as part of this consultation.

6.7 We are concerned that there appears to be no mechanism to enable a Claimant to challenge a defendant's decision that the information provided in the CNF is inadequate.

6.10/11 Where an insurer cannot be traced through the Employers' Liability Tracing Office (ELTO) we are required by paragraph 6.1(2) to send the CNF by post to the defendant. The defendant is required to acknowledge receipt within the time limit set out in the Protocol (the day after receipt of the CNF) as is the insurer. But 6.11 only refers to the sanction if no acknowledgment is sent, without clarifying the position if, in this situation or where there is a multi defendant accident claim, only one of the two or more acknowledgments required is sent. In this situation the claimant is left uncertain as to whether the CNF has been received and whether the case will continue under the Protocol.

6.12. The proposed response time limits of 30 days for EL cases and 40 days for PL cases are too long. Please see our response at Appendix 1 as to our reasons and suggested response times. We are not clear if this is a matter which is before the Committee now as part of this consultation or not before the Committee at this stage such that there will be a subsequent consultation by the Committee when this important issue comes before it.

If these time periods are to remain then this impacts on the costs incurred as work will properly and necessarily be done during this period to secure evidence and prepare the case. This is, therefore, a further reason why the costs provided in the current protocol for RTA cases up to £10,000 will need to be increased for EL and PL cases up to £25,000.

6.16 This confirms that the claim will proceed under the relevant pre-action protocol and that the CNF will serve as the letter of claim except where the claim no longer counts under this protocol because the CNF did not contain adequate information. Clearly, it should not just be for defendants to determine whether the information contained in the CNF is adequate and the claimant is, presumably, able to challenge the defendant's position in relation to costs under CPR 45.36 – see above.

6.16 also confirms that the date for time to start running under the relevant Pre- Action protocol will be the date the form of acknowledgement was served. We wonder what happens if no acknowledgement of the CNF is served or if it is served late and from what date the PAP will start to run in these circumstances? We suggest it should run from the day after the CNF was sent.

Medical reports

7.4. It is not clear whether the Claimant is expected to obtain medical records and, if so, whether the Defendant will pay for these. As this is a low value claims process, the Protocol should make it clear that unless the expert confirms that the medical records are required, it is not necessary for

records to be obtained.

The RTA protocol (at 7.2B) states that in most claims with a value of no more than £10,000 the medical expert will not need to see any medical records. We suggest that this form of wording is inserted in the EL/PL protocol.

7.43 (5) (b). We suggest that a definition of ' advocacy' and 'litigation services', in the context of disease claims, would be helpful.

Details of loss of earnings

7.8 We welcome the fact that the defendant must provide earnings information within 20 days of the admission of liability. However there does not appear to be a sanction if the defendant fails to provide earnings information or fails to provide complete earnings information, leaving the claimant unable to prepare an accurate calculation of wages loss.

We suggest that where earnings details are not provided in full, 7.24 should apply with the claimant being permitted to commence proceedings under Part 7 of the CPR. Clearly, if it is disputed whether the details were adequate, the court will have discretion to determine this and make the appropriate order on costs.

7.10 We suggest that this should be amended to: “If the defendant refuses to consent to a stay within 14 days of a request being made, the claimant may give written notice that the claim will no longer continue under the Protocol and start proceedings under Part 7 of the CPR”.

7.13 The words “This will assist the defendant in considering whether to make an offer to settle the claim” are not appropriate. This paragraph deals with interim payments where a case is not ready to settle and these words may result in low offers being made. In view of Professor Fenn’s report and his findings that the RTA claims process had resulted in a reduction in the level of damages, this sentence should be removed.

Non-settlement payment by the defendant at the end of Stage 2

7.56 We think that the paragraphs referred to here should be 7.53 and 7.55 and assume this is simply a typographical error.

PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS

Where the same or similar provision apply to both protocols, our comments above apply to both draft protocols.

1.1 (14) Unlike the same provision in the EL protocol there is no exclusion here for cases where limitation is raised as an issue. We would want to see point (c) “the defendant has no accrued defence to the claim under the Limitation Act 1980” included here.

4.1 The new protocol will apply to claims arising from a RTA occurring on or after 30 April 2010. We query if this is the correct date. We also wonder, as a number of claims remain in the system which are governed by the earlier rules and protocol, will there now be two protocols to refer to? We are not aware of any suggestion that the earlier rules and protocol will be changed and are concerned as to whether the portal will be able to reflect the differences in the protocols, such as the provisions for interim payments and the time frame for payment of costs.

6.10 Unlike the EL protocol at 6.11, there is no sanction for the defendant failing to acknowledge. As with the EL protocol, if the insurer fails to acknowledge the day after receipt of the CNF, the claim should not continue under the protocol.

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