Ministry of Justice

Call for evidence: extending the road traffic accident scheme

Response from Thompsons Solicitors May 2012

About Thompsons

Thompsons employs over 700 lawyers in 27 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), and public liability (PL) claims.

We agree with the problems described in the MoJ's 2011 consultation *Solving Disputes in the County Court* (paragraph 10] that in far too many cases parties find themselves going to court unnecessarily and are faced with disproportionally high costs when they get there.

However we do not agree with Lord Justice Jackson's analysis, in his Review of Civil Litigation Costs.

In our extensive experience, the reason for late settlements is the failure by defendants and their insurers to make satisfactory offers. Our figures, provided to Jackson LJ, showed that costs are significantly higher when cases are issued or go to trial.

We would be happy to share that information with the department.

We want to see cases settled more quickly and we have long called for the courts to rigorously enforce personal injury (PI) protocols and punish "bad behaviour" by defendants who allow claims to drag on instead of entering into proper settlement negotiations.

No attempt has been made to address the real issue here of delay. Instead, extensions of the RTA portal are being proposed which are inappropriate, unnecessary and appear to have been decided on in advance.

When the government responded on 9 February 2012 to the Solving Disputes consultation, it said:

While the majority of respondents supported the principle of extending the RTA PI scheme, many advised caution in doing so too quickly. The scheme was only launched in April 2010 and there is limited management information available to enable an evaluation of its impact. Therefore, while the Government plans to increase the financial limit of the RTA PI Scheme to £25,000, consideration will be given to the timing of the extension, following a full evaluation of the existing RTA PI scheme, following which we will publish our final impact assessment of the proposed extension.

Concerning a similar scheme to cover employers' and public liability claims, the Government is aware of specific concerns raised in relation to issues of causation and contributory negligence. Consequently, while we plan to introduce a scheme for such claims, further consultation with key stakeholders will be required to agree the detail.

And yet, only a couple of weeks later, the letter of 28 February asks questions that make extremely premature assumptions. No discussion was had with claimant stakeholders before it was issued.

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).

It would appear that press briefings have also suggested lower costs. The Sun newspaper reported on 30 April:

Lawyers will be forced to slash costs for small claims — and banned from offering no-win, no-fee deals.

The position, therefore, appears to be:

- The insurers have argued for a reduction in fixed recoverable costs at a private meeting with government.
- Before seeking evidence on that proposal from stakeholders or meeting those representing injury victims, the government has accepted the insurers' case.
- Now the government seeks evidence having made up its mind.

To facilitate the changes draft rules have already been commissioned by the MoJ and will be before the Civil Procedure Rules Committee prior to the date this consultation ends.

Nothing has changed since the government's response to *Case Track Limits and the Claims Process for Personal Injury Claims* consultation. The reasons given for not extending the portal to EL claims remains entirely valid:

> *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.*

This current consultation is in a vacuum.

No justification for extending the portal has been provided. No minutes or account of the 14 February insurance summit have been published that might enable injury victims or their representatives to understand or challenge the reasons why the Prime Minister agreed to reduced costs in the extended portal at a private meeting with donors to his party.

Our opposition to the extension to £25,000 is fivefold:

1. 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 a special damages calculation is often needed and that frequently includes calculation of pension loss.
2. The fixed costs structure agreed for the RTA claims process were not modelled on more complicated cases over £10,000. Any extension will require at least proper consideration of re-modelling of the fixed costs.
3. As case value increases so do defendant denials of liability. It is therefore statistically likely that in claims above £10,000 more cases will fall out of the portal. That will undermine its credibility.
4. 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. How will it cope with cases that cannot be valued because a final prognosis is not available? What about cases requiring subsequent medical reports and evidence from multiple specialities? None of the myriad complications are discussed. They will all undermine any extended portal scheme.
5. There is no evidence that the RTA portal is producing savings or speeding up cases. Indeed the government has refused to publish the evidence that there is in a report of Professor Paul Fenn.

Our opposition to an extension of the PI portal to EL is based on very serious concerns that:

1. Even straightforward EL cases involve issues of significantly greater complexity than an average RTA case.
2. The MoJ accepted 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".
3. Extension to EL will give employers and their insurers the opportunity to put improper pressure on employees who are claimants or witnesses to accidents during the time they have to respond.
4. A solicitors' professional duty to investigate an accident as soon as possible will be compromised and key evidence lost.
5. Insurers often fail to admit liability within the pre-action protocol period in EL and PL and frequently raise arguments about contributory negligence which need investigation.

Our comments on the points for consideration:

Question 1. The level of fixed recoverable costs you think would be appropriate at each stage of the process for RTA claims and those arising from employer and public liability accident claims and any evidence you can provide to support your views.

For Stages 1 and 2, the costs for employers liability cases should be £2,934 (18 hours x £163 per hour) .

This is based on detailed analysis of our statistical information based on thousands of cases (which we are prepared to share with the department):

1. The amount of work required to be done in these cases was calculated by reference to:

a. The amount of work currently undertaken in employers liability cases which will move into the portal, ie those with a value of less than £25,000 that settle without proceedings and where liability is admitted.

b. Applying a discount or additional component to represent any reduction/increase in work that the portal has delivered to date in RTA cases.

2. The appropriate hourly rate was calculated by reference to:

a. The hourly rate currently applied to cases in the portal.

b. Increases in that to reflect the additional complexities in employers liability cases up to £25,000 as compared to RTA cases up to £10,000.

c. The Guideline Hourly Rates issued by the Master of the Rolls.

d. Any discount to be applied to reflect the referral fee ban.

3. A cross check of the resulting figure based upon the fixed costs tables proposed by Jackson LJ in Appendix 5 of his Final Report in December 2009.

Our approach, based on the fundamental principle that costs must match the work that needs to be properly carried out on a claim shows that if that principle is undermined then the quality of legal representation will be driven down and injury victims will not have effective representation or equality of arms.

Our research shows:

- The introduction of the portal has not resulted in any reduction in time spent on cases.
- EL claims require considerably more time than the portal currently allows.
- Referral fees have no impact on costs and cannot be used as the basis for any reduction in recoverable costs.

From this it follows that as there are already agreed fixed costs for RTA cases up to £10,000, there should be wholly separate tariffs of costs for RTA claims above £10,000 and for EL and PL cases.

Extending the scheme to higher value or more complex case types will inevitably increase costs because higher value claims involve more medical evidence and complex calculations including potential pension losses.

Claimants should be entitled to counsel's advice if applied for and this should be able to be included as a disbursement.

Figures currently being suggested by the Association of British Insurers seek to justify portal fees being slashed to £350, apparently because referral fees will be banned and referral fees can be "£800 plus" and because of efficiency savings they assume the portal produces. This figure, which was supported by Jonathan Djanogly at the roundtable discussion with stakeholders on 22 March, is inappropriate because:

1. It is assumed that the structure agreed for RTAs under £10,000 can be applied wholesale to significantly more complex cases requiring much more work.

2. It ignores that Jackson LJ's Final Report accepted costs incurred increase as the value of the claim increases. The tables at Appendix 5 of the report are reflective of higher costs being incurred in EL and PL cases.

3. It adopts the approach to referral fees used by insurers: they expect their panel law firms to pay substantial referral fees. That is not the norm in the market and yet all other models appear to be disregarded.

4. It assumes that all cases remain in the portal which they plainly do not.

5. It ignores proper marketing costs.

The correct process should be based on that followed when the current fixed costs for the RTA portal were determined. That was evidence based and included detailed statistics from all stakeholders, expert assistance from Professor Paul Fenn and an inclusive process involving stakeholders mediated by the Civil Justice Council. The result was stakeholder agreement.

These proposals appear to be being driven forward according to a political and media agenda orchestrated behind closed doors by insurance companies. Incredibly, the data compiled by Professor Fenn in 2011 is not being made available when its whole purpose was to establish the effectiveness of the portal and to review the appropriate costs.

The government seeks to extend the portal as proposed, modify procedures and determine costs all without publishing the only piece of research available on the operation of the portal to date.

The Fenn data and report should be made available to all parties and, as championed by the government in relation to dispute resolution, there should be stakeholder mediation.

Automatic uprating is also essential as costs fixed today will quickly become inadequate as inflation erodes their value. Appropriate indexation is crucial and equitable and indeed was wholly accepted by Jackson LJ in his Final Report [Chapter 6 (iii) Review of fast track fixed costs para 2.8].

We have conducted a detailed statistical analysis and can provide this data to Professor Fenn or such other expert as may be appointed for this purpose. This will enable remodelling to proceed as suggested above.

Our calculation

1a What is the amount of work currently required in employers liability cases which will be dealt with in the portal, ie claims under £25,000 which are currently settled without proceedings where liability is admitted?

We have conducted a data analysis of all 3,792 Thompsons cases in this category which settled between 1/4/11 and 31/3/12. The total recorded hours in those cases was 68,898, an average of 18.17 hours per case.

1b What, if any, discount or additional component should be applied for any reduction/increase in work that the portal delivers?

It is too soon to analyse statistics when the vast majority of cases in the relevant datasets are ongoing. That means the data we have and that we give below reflects the minority which have settled quickly and easily.

Based on the evidence of the portal to date in RTA cases, no discount or additional component should be applied. Our date of cases that have entered the portal from 29/3/11 (when recording for these purposes was possible), shows that 129 cases have settled in the portal with recorded time totalling 1,221 hours, an average of 9.47 hours per case.

Based on the same period, ie RTA claims made from 29/3/11 but looking at a data set of those cases that settled having either exited or having never been in the portal, there are 116 cases and the total recorded time is 1,098 hours, an average of 9.47 hours per case.

However, if a decision is to be made now, which we believe would be an error, the clear evidence

from such statistics as we have to date is that the portal has delivered neither a reduction nor an increase in work required to settle cases.

It follows from 1a and 1b above that the time that will be spent in employers liability cases up to £25,000 in the portal will be an average of 18 hours per case.

This is consistent with our own modelling of the time required for such cases in the newly extended portal. A breakdown of time for each stage of the process is attached as Appendix 1.

2a As the starting point to determine the appropriate hourly rate, what is the hourly rate currently applied to cases in the portal?

In Stages 1 and 2 the RTA portal costs are £1,200. This figure was agreed after a mediation facilitated by the Civil Justice Council. No specific figures were agreed for hourly rates or time spent but the following is on record.

- The insurer stakeholders starting point in the mediation was that the time required was 5 hours 15 minutes and that informed their proposed base costs of £755. The calculation must have been based on an hourly rate of £143.80
- The claimant stakeholders starting point in the mediation was that the time required was 11 hours 12 minutes and that informed their proposed base costs of £1,787. The calculation was based on an average hourly rate of £159.50
- Equal increases/reductions were applied to each of the stakeholders' respective starting positions on hourly rates and time spent to reach the £1,200 agreed, a total of 8 hours at £149 per hour

Accordingly, on the best evidence available, the hourly rate currently applied to cases in the portal is £149. At the time when the portal was introduced, this rate equated to 3.5% above the Band 2/3 rate for a Grade C fee earner under the 2009 Guideline Hourly Rates (GHRs). Applying the same calculation to the current (2010) GHRs that figure would now be £151 per hour. This equates to the 1.7% increase recommended by the Advisory Committee on Civil Costs (ACCC) when the 2010 GHR's were set.

2b/c What increases in the current portal hourly rate should be applied to reflect the additional complexities in employers liability cases up to £25,000 as compared to RTA cases up to £10,000?

When compared to RTA cases worth less than £10,000, work in employers liability cases worth up to £25,000 involves greater input from senior fee earners and less work that can be delegated to lower grade paralegals. The higher the value of the case the greater the responsibility and level of skill and specialism required.

We suggest that the hourly rate be set at £163 per hour, being the average rate applied within Stage 1 and 2 of the attached table. If this is not considered acceptable the correct body to determine the appropriate hourly rate is, we would suggest, the Supreme Court Costs Office or the Advisory Committee on Civil Costs.

2d What, if any, discount is to be applied to reflect the referral fee ban.

This issue has been independently considered by the Advisory Committee on Civil Costs (ACCC) in *Guideline Hourly Rates – Conclusions* in March 2010. They cite the insurers' case that:

…the very existence of GHRs at their current level enables claimants' solicitors to pay referral fees and that the CMI is, therefore, only able to exist in its present form because GHRs are significantly higher than the "market rate". The argument is set out in detail in ABI (2009), "Marketing Costs for Personal Injury Claims: Evidence of Market Failure", ABI Research Paper No. 15, Report from Oxera Consulting Limited. (ABI (2009)) and we summarise it below.

There are four basic steps to the ABI approach:

i) Conditional fee agreements (CFAs) plus cost shifting (loser pays winner's costs) ensure that there is no pressure from customers to limit claimants' solicitors spending. The basic costs of each PI case for claimants' solicitors are reflected by defendants' solicitors' hourly rates. So the gap of 20-35% between these and GHRs is available for marketing costs including referral fees.

ii) CMCs have bargaining power vis-a-vis claimants' solicitors. As a consequence "the current level of referral fees appears significantly higher than the cost for making such a referral incurred by many intermediaries". (ABI, 2009, p.4)

iii) Marketing costs, in general, and referral fees, in particular, are much higher relative to revenues in the PI sector than in comparable legal sectors, such as divorce and employment tribunals. They are comparable relative to revenues in the wills sector but this is because of the fixed costs associated with marketing and advertising, so they are bound to be relatively higher for smaller value activities.

iv) So if GHRs were reduced, claimants' solicitors could only afford to pay lower referral fees and referral fees would thus fall. This would not cause much of contraction in the market because it would merely cut the excess profits generated by CMCs. They would continue to do the same job, making an adequate return. So there would be a minimal reduction in PI cases entering the legal system and no serious access to justice issues.

The justification for any reduction in fixed costs is the highly contentious argument that hourly rates are inflated in order to pay referral fees, so reducing GHRs will drive referral fees down and banning referral fees would justify a reduction in fixed recoverable costs, using the same logic.

The ACCC Report then considered the insurers' case and made two points in rejecting it:

a) The fact that marketing costs are high in PI cases is not, per se, a very powerful argument. Presumably, a key variable here in the total value of extra cases gained from each extra unit of marketing/advertising spend. In ABI (2009), Figure 4, we see that proportional marketing costs for wills and PI cases are a lot higher than for divorces or employment tribunal cases. This is argued to be a compelling fact in the case for the proposition that the PI sector overspends on marketing. However, it is hardly surprising because advertising will get more wills or PI cases into the legal net than divorce cases or employment tribunal cases. Since one cannot get a divorce without entering the legal network, advertising is unlikely to get many, if any, extra cases into the legal system. And a good proportion of employment tribunal cases are moved into the legal system by trade unions, law centres and other advice centres.

As a consequence, there is bound to be a lesser role for marketing/advertising in these cases and a firm specialising in divorce or employment law is liable to spend less on marketing as a proportion of turnover than a firm specialising in wills or PI.

In view of this, there seems little weight to the argument that marketing expenditure by PI firms is excessive simply because it is higher than such expenditure by divorce or employment tribunal firms.

b) A thread running through the ABI argument is that CMCs are making excess profits (e.g. point ii) above). In some sense, if GHRs are "too high", either someone is making excess profits or one/both of the CMI and claimants' solicitors are grossly inefficient. It is not claimants' solicitors,

because the gap between their rates and defendants' solicitors rates is entirely accounted for by marketing costs. So it must be CMCs. By making use of the FAME database, based on the published accounts of all limited companies, we gathered some evidence on this question. The majority of CMCs are in two sectors of the 4-digit Standard Industrial Classification (SIC), namely Non-Life Insurance (6603) and Other Business Activities Not Elsewhere Specified (7487). The first sector (6603) contains around a third of larger CMCs with a total turnover of around £800M. For those firms with turnover above the median in this sector, the median profit margin (profits/turnover) of CMCs in 2004-7 is 13.1%. The median profit margin for all firms above median turnover in this sector in 2004-7 is 12.7%. In the second sector (7487), the median profit margin of CMCs is well below that of all firms in the sector. Similar results are obtained using turnover weighted mean profit margins. Overall, therefore, in a large, significant sample, there is no evidence that CMCs are making profits significantly in excess of comparable non-CMC firms.

So CMCs appear to be setting prices at a mark-up on costs which is standard for the overall sector in which they are located. There is no sign of excess profits here. But it could be that CMCs are grossly inefficient thereby dissipating the excess profits. In this case, of course, we may be led to ask why more efficient CMCs do not enter the market and capture the readily available profits on offer.There may be some barriers to entry here but it is not easy to pinpoint precisely what these are. As a consequence, a reduction in GHRs leading to a reduction in referral fees either leads to a contraction of the CMI and hence a reduction in access to justice or it would lead to a more efficient business model in the CMI with only a minimal reduction in access to justice. We are not in a position to discriminate between these two outcomes but we can argue that it is not the job of the ACCC to attempt to manage the industry structure by price regulation, particularly on the basis of an argument about inefficiencies in the CMI which is purely speculative and for which we have no evidence.

The insurers' case on this point is based on the flawed assumption that the discredited insurance model of high referral fees is the norm in the market and that all other models should be disregarded.

We are the largest employer liability firm in the UK and we do not adopt the insurers' discredited model of inflated referral fees. Our spend on referral fees is only **£39.80** per case. We suspect this will not be untypical.

Relying on others to do the marketing and paying referral fees is only one model among many to market for cases and is not remotely the norm. In many cases, including Thompsons, law firms will adopt a mix number of the options below:

a. Gaining a High Street presence (for which they will pay a rental premium) and relying on passing trade.

b. Investing in advertising such as in newspapers, TV, radio or on the web.

c. Establishing a reputation for quality by investing more in its lawyers and in training. This is often combined with specialisation in a particular legal field, enabling the firm to work with voluntary and campaigning organisations such as asbestos victim groups, serious injury charities, trades unions etc.

d. Direct marketing methods such as mail shots or web marketing through search engine optimisation.

Thompsons main marketing strategy is based on option c – quality/reputation. It is that which delivers trade union clients to instruct Thompsons. Our reputation for recovering the maximum compensation for injury victims was independently verified by the government statistics on the average damages per firm in the respective miners compensation schemes.

Thompsons average damages of £16,379 and £9,202 in the two schemes were significantly higher than other firms. [Hansard 26 Jun 2009 : Column 1201W]

Thompsons has also used direct marketing, with mail shots to union members to encourage them to use the union legal service. One typical example is a mail shot campaign of 120,000 members

of a public sector union in January 2010. This cost £41,700 and delivered 177 additional cases – a cost per case of **£236**.

Putting to one side that any firm paying the level of referral fees as they suggested by the insurance industry must be forced to invest a huge percentage of its resources in case acquisition rather than on employing and training high quality lawyers, their case still falls.

The assumption on which the insurers' case would need to be based is that the law firm is paying a referral fee for an RTA case that they may know will win but without knowing when or how. Some of the cases will settle in the portal, some will settle without proceedings outside the portal, some will settle out of court after litigation and some will be fought to trial.

On the insurers' scenario, the same referral fee will apply regardless of when it settles but the costs recovered will be vastly different: the law firm would be paying £800 for a case whether the costs recovered were £1,200 (thus leaving only £400 to spend on the case) or a much higher sum.

The correct analysis is the percentage of fees overall. The issue is not whether a firm can viably run a portal case on £400 net fees, the issue is whether it can run all of the cases for which it paid the high referral fee for the net average costs recovery (after deduction of the referral fee).

On our figures (see below) some 79% of cases have fallen out of the portal. That means the vast majority of cases result in a recovery well in excess of £1,200. So to consider the cost of acquisition of cases by reference to an outcome that applies in only a minority of cases is perverse.

3. It is then appropriate to apply a cross check of the resulting figure based upon the fixed costs tables proposed by Jackson LJ in his final report in December 2009 – see Appendix 5, page 539 which applies a discount for early admission of liability.

An employers liability case which settles for £3,000 without proceedings would under Jackson's fixed-costs table recover base costs of £1,350 plus 17.5% of damages, ie a total of £1,875.

The corresponding figures for cases settling up to £25,000 are:

£5,000 damages - £2,225

£10,000 damages - £3,100

£15,000 damages - £3,975

£20,000 damages - £4,850

£25,000 damages - £5,725

Our proposed figure of £2,934 is considerably lower than the average recoverable costs under the fixed costs proposed by Jackson LJ.

This is consistent with Jackson LJ's comments at page 44 of his final report:

3.6 It must, however, be accepted that however skilfully the rules may be drafted, civil procedure is bound to be complex and the process of civil litigation is bound to be costly. As Professor Dame Hazel Genn observed at the Birmingham seminar, "there appears to be an irreducible amount of work that must be done even to recover damages of £2,000 or less".[Professor Genn's seminar paper, 26 June 2009, paragraph 10 which can be found at http://www.judiciary.gov.uk/docs/costs-review/analysis-costs-data.pdf]

The full quotation from of Professor Genn's 2009 paper is:

The following figures… show that there is a considerable variation in costs among cases of similar value, and that for low value claims costs are regularly higher than the amount awarded or agreed

in damages. This reflects the fact that the amount of work done on a case is a reflection of many factors and there appears to be an irreducible minimum amount of work that must be done even to recover damages of £2,000 or less

Question 2. What, if any, modifications would need to be made to the pre-action protocol and the electronic portal for claims in value between £10,000 and £25,000?

The portal is not a pre-action protocol. The claims process gives rise to the IT portal provision and whilst it has effectively become a protocol, the rules and the protocol are not actually reflected in it.

The portal sanction for bad behaviour by defendants is the claim exiting the portal which is, therefore, solely down to the defendant eg failure to provide a liability response, a denial of liability, failure to pay an interim payment or costs etc.

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

The modifications would have to include:

- Provision for witness evidence at stage 3 to support the claim on quantum from both the Claimant and friends / family members who have provided domestic assistance
- Provision for more than one interim payment if the claimant is unable to work.
- Ability to issue court proceedings immediately if an interim payment is not paid.
- Provision for a more detailed schedule of loss, including assessment of loss of earnings, and for a claim for disadvantage on the open labour market where appropriate. There must also be facilities for the schedule to be regularly updated.
- Pension losses must be able to be assessed as a separate head of claim.
- Ability to include costs of treatment as part of the schedule.
- Provision to include counsel's advice.
- Provision to compel employer defendants to produce relevant quantum documents such as earnings details.

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

Also, letters of claim in these cases have to be much more detailed than those in the RTA portal. If that detail is to be included in the CNF then it will take longer to modify and there will be no saving in time or costs.

The current portal design will need development to handle the change in maximum value. The current timescales for relatively minor amendments to the portal are around a year from request to release. The next release is due for September 2012 and the planning for the one after that, which may include the increase in value, will start after that time.

At present, a large proportion of cases being put into the portal do not proceed to stage 2, ie they fall out of the existing system due to liability issues or a failure by the insurers to provide a liability decision within the 15 day timeframe. We anticipate that far higher numbers will exit the portal if higher value claims are included and query the value in extending it at all.

Any proposal to give defendants more time to make a decision on liability rather than the current 15 days in RTA cases will disadvantage the Claimant as, when the claim exits the portal if no liability decision is provided by the insurer, the Claimant will be forced to wait another three months to issue proceedings unless the pre-action protocol is amended or it is accepted by the courts that time in the portal counts under the protocol.

This is contrary to the stated aims of the MOJ announced before the introduction of the RTA portal which were:

- quicker compensation to the Claimant

- early settlement
- streamlining the process

3. What, if any, modifications would need to be made to the pre-action protocol and the electronic portal to deal with employers' and public liability claims?

We do not see how the current RTA portal could be extended to deal with EL and PL claims. Even if an extension excluded occupational disease cases, the range of EL and PL claims are extremely wide and invariably complex. It is unlikely that they could realistically sit together in one portal.

The current software used for the RTA portal is wholly unsuitable for non-RTA cases. It will need a complete redevelopment.

It takes a year to make minor amendments to the existing software so it is difficult to see how a proper redevelopment or an entirely new development (of a more necessarily more complicated system) can be put properly in place in any less than a year.

The current software suppliers are contracted to deliver a portal for handling RTA claims and are paid for maintenance based upon number of users. These payments currently are met by the insurance industry. There is no contractual provision for them to provide or maintain any other portal or any other category of claim. That will need to be addressed and any new portal for non-RTA cases will need to go out to competitive tender and cost and payment terms negotiated.

There should be no requirement for witness details to be included in the CNF for EL cases. If there were we would have very serious concerns about the opportunity the scheme would give employers and their insurers to put improper pressure on employees who are claimants or witnesses to an accident. It is a point acknowledged by the government 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.*

Whilst we believe the time limits should not change from the current 15 days it is interesting that insurers say they would need 30 days to admit liability, which is an acknowledgement by them that even straightforward EL cases involve issues of significantly greater complexity than an average RTA claim. If however insurers are permitted additional time to investigate EL and PL cases (ie over the 15 days permitted in the RTA protocol), the Claimant will be placed at a disadvantage and the MOJ will fail to meet its stated aim of the portal – speeding up settlement.

Insurers often fail to admit liability within the pre action protocol period in EL and PL cases and, when they do admit they frequently raise arguments about contributory negligence which have no basis in law or fact, but which we have to investigate.

It is a solicitors professional duty to investigate an accident as soon as possible. They cannot 'sit on a case' for the period the insurer has to admit before securing evidence of the fault that led to the accident, the evidence of the claimant and that of witnesses.

The current portal is based on a claim being made against a named defendant. It then identifies the insurers from the motor insurance database and passes the claim to the relevant insurer. This cannot apply in EL/PL cases because there is currently no complete EL insurance database.

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.

The current RTA portal is supposed to be able to allow litigants in person to operate but there is, in fact, no provision for them to be able to do so. Any other portal is even less likely to be able to accommodate litigants in person, which is likely to be a problem as the proposed changes to the costs regime as a result of the LASPO Act may mean that more claimants will be forced to conduct their own litigation.

The modifications that we believe would be necessary for the scheme to accommodate EL and PL claims include:

- A procedure providing for the claimant to gather evidence including from witnesses when the CNF is submitted. This goes to Article 6 of the European Convention on Human Rights which guarantees the right to a fair hearing in civil and criminal proceedings.
- 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.
- The exclusion of disease cases.

Question 4. The reasons why, since the commencement of the RTA protocol, claims have exited the scheme and any ways this might be addressed.

Our data of cases that entered the portal since 29/3/11 shows that 638 have remained in the portal until settlement or have exited the portal. Of those, 129 have settled in the portal and 509 have exited the portal – an exit rate of 79.8**%.**

It is too soon to rely on these figures as there are another 1,233 cases which have neither settled in the portal nor exited the scheme. These cases are ongoing.

The purpose of Professor Fenn's research was to establish the effectiveness of the portal and to review the appropriate costs. The government is now seeking to extend the portal, modify procedures and determine costs without publishing the only piece of research available on the operation of the portal. The Fenn data and report must be made available to all parties to see if our impression of how the portal is operating for RTA is right or not.

Of those that have exited the portal, 56.8% dropped out because the insurer failed to respond, 23.6% came out because the insurer denied liability and the remainder were for other reasons such as contributory negligence being alleged (5.5%), failure to pay stage 1 costs (2.9%) etc.

On our statistics (and possibly on Professor Fenn's too) there is clear evidence of improper conduct by insurers in deliberately allowing claims under £2,000 to exit the portal. They have done so cynically as the costs in the Fixed Recoverable Costs regime are lower than in the portal for any case under £2,000. The insurers are having their cake and eating – they included cases under £2,000 damages to drive the costs figure down to £1,200 by, and have been systematically removing those from the scheme.

This provides evidence in support of fixed costs being based partly on damages as in the current Fixed Recoverable Costs regime and as in the fixed costs proposed by Jackson LJ. Indeed the latter is the most recent exercise in fixing costs, was dealt with through an appropriate procedure as outlined and, subject to uprating to reflect inflation since 2009 when the figures were finalised, is therefore the most appropriate basis for costs in the portal to reflect the work done and ensure proportionality with the damages recovered.

Question 5. The types of employers' and public liability claims that lend themselves to a standardised and streamlined process.

The only types of EL cases that could lend themselves to a standardised process would be very straightforward ones where there is one defendant, where liability is strict and where the insurer does not raise contributory negligence or causation issues.

In any case where liability is not strict, considerable work has to be undertaken and evidence gathered to determine whether a case has reasonable prospects of success and to prepare the protocol letter of claim. In such cases there will be no saving in cost and thus no point in putting such cases through a claims portal.

If the government follows up on its plan to remove strict liability and introduce in its place a defence of 'reasonable practicability', then that new category of cases would not be suitable for a portal.

We can think of no PL cases which would lend themselves to a streamlined process.

In PL cases such as pavement trips, our experience is that liability is denied in 80 – 90% of cases. We see no point in such cases going through a portal. Again, it will only disadvantage the claimant and lead to delay. Claimants will invariably have to issue an application for disclosure of all inspection records, as happens currently.

We query what would happen in cases involving householders such as a refuse collector slipping on ice whilst walking on a private driveway or injuring themselves on unsuitable items in bins. How can these be dealt with through a portal and who would pay for it? There is no database so far as we are aware of household insurance for individual householders.

Similarly accidents in local authority swimming pools, parks or at recreation grounds involve complex liability issues and are simply not appropriate for a claims portal. Again, who will pay for such a claims portal?

A claimant having to wait until the end of the PI protocol period to issue proceedings because an insurer fails to provide a liability decision and allows a case to exit the portal would be completely contrary to the MoJ's stated aims when the portal was introduced.

In any portal an insurer that denies liability must be required to produce all documents and reasons for that denial. If this requirement is not introduced, delay will follow with Claimants being forced to issue increasing numbers of pre-action disclosure applications as a claim exits the portal. This will again be contrary to the stated aims of the MoJ.

Further information:

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