Civil Justice Council
The future role of Alternative Dispute Resolution in Civil Justice
Response by Thompsons Solicitors
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Thompsons is a UK-wide law firm with a network of offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland. As the largest trade union and personal injury law firm in the UK, we specialise in civil personal injury and employment law for trade union members, their families and private clients. At any one time we will, as a firm, be handling over 50,000 cases.

In the field of personal injury, Thompsons is a leading specialist in handling serious injury cases, fatal accident claims, spinal cord injuries, traumatic brain injuries, amputation claims and serious medical injury claims.

The firm participates regularly in government consultations on a wide range of issues relevant to our trade union and other clients.

Response to consultation

1. As a preliminary point, we would say that the consultation document appears to be rushed. It is littered with typos and there is no glossary to explain the acronyms which are introduced without definition.

2. There are almost 1m Personal Injury (PI) claims in England and Wales per annum, of which only around 15% are litigated. Of those, only a very small number go to trial. Many, if not most, of those involve genuine, substantive liability disputes.

3. PI already has significant in-built Alternative Dispute Resolution (ADR) and/or procedure which is designed to reduce and narrow the scope of disputes. Much of this has been introduced relatively recently, certainly since 1999, such as Pre-Action Protocols, the Portal and joint expert statements.

4. Paragraph 4.32 of the consultation document, on the RTA Portal, is very problematic. The RTA protocol (as other protocols), provides a process for dealing with claims before the commencement of court proceedings. The very low costs recoverable under the RTA Portal substantially limits the steps that can be taken by the claimant and the fact that claimant solicitors are also often acting on a 'CFA-lite'[1], limits costs recovery even further. Limited costs can be a driver for early settlement and more unscrupulous or cash poor firms may be tempted to under-settle.

5. At paragraph 5.9, it is simply wrong to say that in PI "generous costs recovery is an important ancillary motivator in litigating at all" in circumstances where the very best the Claimant can obtain is a full recovery of their costs. This paragraph is contentious; in fact, where pre-action protocols are in place as they are in PI, the courts have considerable ability to control conduct pre-proceedings by

[1] CFA is a conditional fee agreement

rewarding or punishing pre-proceedings behaviour as appropriate by retrospective costs orders.

6. Paragraph 5.10 is so poorly written as to be almost unintelligible.

7. At paragraph 5.18, the CJC seems to think that the small claims track limit for all PI claims will go up to £5k under current proposals. In fact, the current proposal is that RTA claims will go to £5k but that the limit for all other PI claims, such as employers' liability or public liability (EL/PL), will increase to £2k.

8. Costs in PI are currently either fixed or very modest in the more than 90% of non-Multi Track cases. Lord Justice Jackson's latest proposed reforms would push that further into the intermediate track and capture over 95% of PI cases. ADR is particularly difficult to squeeze into a fixed costs regime and the reasons for encouraging ADR are less pressing.

9. ADR does have a place in PI especially at the extreme ends of the scale (Serious Injury and small claims) but overall the PI system works well, as was accepted by Lord Justice Briggs in the Civil Courts Structure Review (CCSR).

10. In the Fast Track and Multi Track, both parties in PI benefit from experienced legal advisers. The Claimant (usually an individual in PI) is legally represented through the use of CFAs. The current system is not that far from the ideal system as set out in paragraph 3.36.

11. A number of the authorities quoted from para 5.45 onwards are on the specific point of a party's refusal to accept an offer of mediation. However, the costs of mediation can be expensive relative to damages, especially in PI litigation where they can often far outweigh the costs of court adjudication. In one case in which we were involved, a costs budget provided for mediation and ADR. The district judge at the CMC would not approve the amounts set out in the budget, as it would have been more cost effective to go to trial.

12. In many non-PI cases in which we have acted, offers to mediate have been hindered by disagreements over who should pay the costs of the mediation. Rarely will opponents agree that the mediation costs should be paid in addition to the settlement reached. Some mediators charge as much as £10,000 a day.

13. We also know of cases where parties go through the motions of turning up for mediation just to avoid later costs penalties, but do not actually engage with the process on the day.

14. At paragraph 5.8, there is reference to construction, insurance and financial services where parties apparently consider mediation on their own initiative and it works well for them. The CJC suggests that "Provided an affordable and

proportionate process can be made available it seems to us that this approach can be encouraged at all levels of civil justice." This overlooks the above. This works well because the amounts involved in these cases are usually significant (over £1m) and both sides have deep pockets.

15. We agree that Pre-action Protocols do not have sufficient teeth and sanctions for non-compliance should be stiffened. Compulsory ADR is not the solution to that problem.

16. At paragraph 8.8 it is stated that "in most other common law jurisdictions, the vast majority of personal injury cases are mediated." However, that is not at all borne out by the examples given in paragraphs 7.12-7.18 or at pages 77-82, which in fact indicate that:
    a. The situation in the USA is highly varied but, where it is in place, mandatory mediation has failed.
    b. The situation is similarly varied in Australia and there is no example of PI being particularly subjected to or assisted by ADR.
    c. In Canada, only in British Columbia is mediation a noticeable feature of the landscape.
    d. Common law jurisdictions may have similar substantive law but nevertheless have very different costs regimes to that in England & Wales.

17. If mediation were to be considered – and the directions questionnaire stage does seem sensible in terms of timing – the main questions to be asked are:
    a. Who would pay for the ADR, if it is successful?
    b. Who pays if it is not successful?
    c. How would costs-shifting work in practice?

18. The insurer-funder model is the only one which looks likely to work, either on a case-by-case basis or by means of an insurer-levy model.

19. The report recognises the different forms of ADR, including negotiation. This is very much part of the protocols already in place, and works well in PI. JSMs[2] are commonly arranged and often achieve settlements, particularly in larger PI cases. Traditional negotiation works in PI and we can see no evidence that it should be replaced by some form of compulsory ADR.

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[2] JSM = joint settlement meeting