



JUDICIARY OF
ENGLAND AND WALES

REFORMING THE SOFT TISSUE INJURY ('WHIPLASH') CLAIMS PROCESS

CONSULTATION RESPONSE BY THE CIVIL EXECUTIVE TEAM

Introduction

1. This is the response of the judges constituting the Civil Executive Team ("CET") to the Government's consultation on reforming the Soft Tissue Injury ('whiplash') Claims Process (the Whiplash Consultation"). The CET is a recently formed team of four civil judges, led by Lord Justice Briggs, the Deputy Head of Civil Justice ("DHJ"), charged by the Master of the Rolls with responsibility for (among other things) judicial oversight of proposed reforms and changes in civil procedure. It reports to the Judicial Civil Executive Board ("JCJB"), also recently formed. The JCJB has seen and approved this response, as has the Master of the Rolls.
2. This document has been prepared after discussion with the Designated Civil Judges who are the judicial leaders responsible for the oversight of all these claims around the whole of England and Wales. They have in turn have discussed these matters with some of the District Judges in their respective territories. The District Judges currently do most of the judicial work in the Fast Track ("FT"), while their deputy colleagues do the same in the Small Claims Track ("SCT").
3. This response is limited to the proposal to raise the SCT limit for personal injuries claims from £1,000 to £5,000, the subject matter of questions 13 to 15 in the Consultation Paper. It does not seek to address the merits and demerits of the proposal head-on or in full. It is obvious however that there are serious Access to Justice issues for those with genuine but modest personal injury claims in a proposal which would remove over 90% of Road Traffic Accident ("RTA"), Employers Liability ("EL") and Public Liability ("PL") claims from a FT with fixed costs recovery to an SCT with minimal costs recovery, and thereby cause many claimants to be self-represented when bringing claims against parties backed by insurers who are able to engage the services of experienced lawyers.
4. Rather the principal purpose of this response is to address the potential implications of the proposed change for the courts which have to deal with them, particularly in terms of judicial and court staff resources. It does not appear that these implications have been addressed at all in the Impact Statement, and it is not clear what consultation there has been to date with HMCTS on these matters. There has been no such prior consultation with the responsible judiciary, namely the Head and Deputy Head of Civil Justice, the Senior Presiding Judge or the Presiding Judges and Designated Civil Judges ("DCJs") throughout the country.

5. It must be said at the outset that there is a serious level of dismay that a proposal with such serious potential implications for the management and delivery of civil justice has not been made the subject of discussion with the judiciary before being launched as a public consultation and that, once launched, the consultation period had been both very short, and laid partly over a holiday period. The CET has been asked to emphasise by many of the DCJs who have been hurriedly consulted how inadequate has been the time for the presentation of any statistically based and fully researched responses about the implications for the courts' workload.

Executive Summary

6. The gist of this response may be summarized as follows:
 - a. Moving PI, mainly RTA, EL and PL claims up to £5,000 into the SCT will probably, although not certainly, increase the overall amount of judicial and court time needed to deal with this part of the courts' workload, even if, as predicted in the Impact Statement, there is an overall reduction in the number of such claims. This will occur at a time when SCT and FT claims are both on the increase, placing considerable stresses on the existing judicial and court staff teams, in a court estate which is being drastically shrunk at the same time.
 - b. There will undoubtedly be a very large increase in the number of LIPs bringing claims in the SCT, because of the removal of fixed recoverable costs, which currently forms a main plank in the ability of claimants to obtain legal representation. This will increase the judicial time needed per case (compared with an equivalent case in the FT) by a factor of at least two, (but probably three or four), because of (i) the need for judges to assist LIPs at trial, (ii) the absence of legal skill in case preparation and presentation, and (iii) the frequent need for face to face case management hearings, to enable judges to assist and direct case preparation.
 - c. The proposal risks the loss (to LIP claimants) of the Portal, and the possible collapse of the Portal due to the removal of 90% of its economic base in terms of caseload. No explanation is provided in the consultation or Impact Statement as to how the Portal can adapt to accommodate LIPs. There is merely an assumption that it can, unsupported by any reasoning.
 - d. Whether or not the Portal becomes available to LIPs in the SCT there is likely to be a substantial reduction in the proportion of claims settled before trial, further increasing the workload of the judiciary and court staff. The adaption of the Portal to admit LIPs may reduce but not eliminate this.
 - e. Moving claims from the FT to the SCT and into an LIP claimant dominated environment will definitely increase the proportion of those claims which are pursued on appeal, with a further increase of required judicial and court time needed per case, and longer time-lines between issue and final determination.
 - f. The greater average time needed for the resolution of each relevant case that is issued will mean that there will be an increase in the judicial and court staff work needed for each court fee paid, thereby reducing the substantial current profitability of the civil courts. A net reduction in the number of

claims issued will also reduce court fee income from civil claims, which props up the court system as a whole.

- g. Some of these burdens may be alleviated if and when the Online Solutions Court ("OSC") becomes available, but this will not be in time for the proposed change in the SCT limit for PI cases. The OSC is not at present configured to accommodate PI cases, although it probably could be, if additional resources for that purpose are made available.

The Pre Action Protocols and the Portal

7. A significant feature of current Fast Track PI litigation under the various PI pre-action protocols and through the Portal, is that it is conducted with a very high degree of efficiency between the lawyers (and insurance companies) concerned, leads to a very high level of settlement both before and after issue of proceedings, and imposes minimum burdens upon the courts and judiciary. It is, in reality, bulk litigation conducted by seasoned professionals according to rules and procedures which they have played a large part in developing, and which encourages co-operation between them.
8. Numerous examples bear this out:
 - a. The Portal encourages early admission of liability, and contains efficient procedures designed to encourage and enable professional users to negotiate and agree quantum whenever possible.
 - b. Cases which go to court under the Protocol Stage 3 for quantum determination are conducted between experienced advocates, usually on paper (rather than oral) evidence, before highly experienced DJs, and usually last for no more than 15 to 30 minutes (including extempore judgment).
 - c. Cases where there is a liability dispute (and therefore fall out of the Portal) are prepared for trial by professionals on both sides, who know and can present to the court the relevant law. Again, they are usually managed on paper without a hearing, and tried in a day or less.
 - d. FT cases (most of which are PI) have a substantially higher post issue settlement rate than SCT cases. The percentages offered during the hurried consultation with DCJs show that the settlement rate is at least 25% higher.
 - e. Stage 3 cases are concentrated in locations where the most experienced law firms practice (e.g. Birkenhead) which helps develop highly skilled and experienced court centres which deal in bulk with these cases extremely efficiently and quickly (as the DHCJ has personally observed).
9. If the FT is closed to these cases, then over 90% of the aggregate RTA, EL and PL claims which currently go through the Portal will fall into the SCT. The Portal does not apply to SCT cases, and the SCT is (albeit half-heartedly) geared towards providing a route to court navigable by LIPs who will have no previous experience of litigation, cannot be expected to read, understand or comply with pre-action protocols, which do not generally apply to the SCT. Further (as the consultation acknowledges) a consequence of the removal of fixed recoverable costs will be that many if not most PI claimants with claims under £5,000 will be unable to obtain legal representation (otherwise than by buying BTE insurance at much higher premium than currently charged).

10. The proposals advanced by the consultation paper appear to depend on an assumption that the Portal will continue to operate despite the loss of over 90% of claims currently required to be processed through it; and that it will even be adapted for use by LIPS in future. No evidential basis for either assumption is identified. This is a fundamental point. The Portal is designed to be operated by experienced professionals who have learned, and know how to apply, the Pre-Action Protocols upon which the procedure of the Portal is based. The Portal is designed to assist in the settlement of straightforward personal injury claims quickly and within a framework of low fixed costs. The effect of the high degree of regulation of pre-action conduct (through the Pre-Action Protocols referred to above) and the efficient and effective operation of the Portal itself, is that a very high number of potential claims never reach court, with the consequence that court and judicial resource is not required to be provided for them. This is put in jeopardy if the assumptions in relation to the Portal are not realistic or realisable.
11. Although the Portal operator has said it will cooperate in the design and operation of an LIP friendly portal if that is what is desired by those affected, The CET is nevertheless concerned by:
 - a. the absence of evidence to support the assumption that the basis on which the Portal is funded can survive the loss of fixed recoverable costs for 90% of its caseload.
 - b. The Portal is not currently designed for use by LIPs and there is no evidence to support the assumption that it can be re-designed to accommodate LIPs, still less in as efficient and effective a form. Pre Action Protocols are not easily understood by LiPs, with no previous experience of legal proceedings. They are designed to be learned and applied by legal professionals.
 - c. No LIP useable online equivalent to the Portal currently exists in this jurisdiction, and although the very early stages of development of the OSC is intended to produce something similar, but for use only after issue of proceedings, it is unlikely to be available until 2019 at the earliest. Moreover, it is not currently planned that it should accept PI cases, but the contingency that it might have to do so has been recognised (although not yet funded).
 - d. Even if it can be re-designed, the assumption made as to future settlement rates of a re-designed portal are simply that: assumptions without evidential foundation.
 - e. There is, in the experience-based judgment of DCJs who deal with this work, a high probability that settlement rates at the level assumed will not be achieved: LIPs will have no legal advice about their prospects of success in the claim or likely level of quantum, and are unlikely to trust insurers with the consequence that they will have little incentive to settle through a re-designed portal.
 - f. Given the high claims volumes and the high rate of settlement, even a small percentage drop in the number of settlements will lead to an increase in the number of claims coming into the court system.

Increased Burden on Judiciary and Court Staff

12. For every PI claim currently suitable for the FT which would have to go into the SCT, the court would have to face:
 - a. The much lower prospect of settlement pre-issue of proceedings;
 - b. A much greater level of pre-trial case management, to assist LIP claimants getting their case prepared for a reasonably efficient (rather than chaotic) trial. Some LIPs may turn to Claims Managers or McKenzie Friends (including paid but unregulated McKenzie friends), but they are likely to present their own case and court management problems, as well as regulatory difficulties, in particular if their contribution takes place behind the scenes;
 - c. More time taken by court staff assembling bundles and chasing LIPs for missing documents;
 - d. A greater level of adjournments due to cases not being sufficiently prepared on the listed trial date;
 - e. A substantially lower level of settlements between issue and trial;
 - f. Longer judicial pre-reading of the (less well ordered) papers pre-trial;
 - g. A longer trial, caused by the need for the judge to assist the LIP by questioning witnesses, the unlikelihood of sensible pre-trial admissions and narrowing of issues, and by the occasional long winded LIP.
 - h. A greater likelihood of appeal, mainly because unsuccessful LIPs will not be advised as to the prospects of success, and because trials without lawyers to assist the court are inherently likely to lead to less reliable judgments.
 - i. The need to hear cases involving LIP claimants at their nearest home court, where the staff and judges will on average be less experienced in the bulk handling of claims than the specialized courts (e.g. Birkenhead) are at present, and where the smaller average number of available judges would make for much less efficient listing.
13. Each of these items will place a greater burden per case upon the court and the judiciary. The best (but necessarily anecdotally based) estimate is that the per case burden would be at least double, and may be treble or quadruple that imposed by under £5,000 PI cases in the FT, even before the lower pre-issue settlement rate of SCT cases (compared with FT) is taken into account. Of course it is impossible to know in advance whether the savings which would result from a lower number of claims overall will be sufficient to counteract the additional burdens upon resources described above. But those contributing to this response (who consist of DCJs and DJs who actually conduct FT and SCT trials and case management) are generally very doubtful that the increased burdens will be cancelled out by any sufficient decrease in the caseload. If the perceptions about reduced settlement rates and increased court and judicial time needed per case are sound (and they derive from judges who are very experienced in this field) then the reduction in case volume assumed in the Impact Statement will come nowhere near cancelling out the consequential increase in the demands upon court and judicial resources.
14. All this is threatened at a time when there is a large scale closure programme of County Court hearing centres all round the country, and a shortage of full time DJs in many areas. There is already an excessive use of deputy DJs for civil work (as revealed by the statistical research reported in the Civil Courts Structure Review) and

the transfer of a very large body of the caseload of the FT to the SCT would tend to aggravate that imbalance.

Funding Implications

15. It is obvious that if the per case workload of the courts and judiciary in handling under £5,000 PI cases transferred from the FT to the SCT increases by a factor of between two and four, then the current profitability of the civil courts will be significantly eroded, regardless whether the relevant number of cases issued stays the same or (as expected) declines. But a large decline in the number of claims issued will itself cause a large reduction in civil court fee income. Depending upon the amount of the decline, the court service may face having to fund increased resources at the same time as experiencing a reduction in fee income.
16. Neither of these threats can sensibly be addressed by a further large increase in issue fees, just at a time when the burdens on a meritorious claimant are being radically increased by the removal of fixed recoverable costs. Very high issue fees just drive away more cases, as the experience with the Multi-track and the Employment Tribunal has demonstrated during the last three years.
17. It is understood that a powerful influence behind the current proposals derives from the assertion by insurers that they are having to fund PI litigation at an excessive rate, with adverse consequences for premium rates paid (mainly) for motor insurance. But the consequence of removing fixed recoverable costs as a central element in the current structure may well be that the taxpayer ends up having to fill the gap, because of the increased burdens on the court service and judiciary set out above. There is probably no way round the simple proposition that if insurers are to be relieved from bearing the burden of the preparation of cases for meritorious claimants (because the claimants will no longer recover fixed costs), then the claimants will need the additional and expensive assistance of the courts and the judges to be able to prepare and present their cases. There is no sign in the Impact Statement that this likely consequence has been addressed.

The Online Solutions Court

18. It is possible that, in time, the OSC may play a major role in (partially) replacing lawyers in such a way as to enable deserving PI claimants to navigate the court system and obtain the compensation to which they are entitled. But it should not be assumed that the OSC will entirely succeed in fulfilling that role, let alone in sufficient time. In its currently proposed form (for which, see chapter 6 of the Interim and Final reports of the CCSR) it is not planned to include PI claims at all. But the prospect that the FT threshold for PI claims might be raised did mean that the possibility of widening the design and jurisdiction of the OSC to accommodate such claims was recognized.
19. To do so would involve designing online guidance in the form of decision trees for each relevant type of PI claim, in addition to the many that are already awaiting design. This might be relatively straightforward for simple RTA claims, but PL and EL claims are likely to prove much more difficult.

20. Nonetheless PI claims by LIPs against experienced professional opposition funded by insurers are not an ideal type of claim for the OSC in its infancy, both because of the inherent imbalance in the playing field (by comparison with many small money claims) and because of the difficulties and pitfalls likely to face LIPs in obtaining the requisite expert evidence about their injuries, without professional assistance.
21. In any event there is no prospect that a fully-fledged OSC will be available to PI claimants before 2019, due mainly to the lengthy process of designing and piloting the online guidance and associated IT.
22. Nor it is currently proposed that the OSC will use a simple SCT basis of negligible costs shifting. The irreplaceable need for bespoke legal advice on the merits, and skilled cross-examination in appropriate cases, means that the current proposal envisages limited fixed recoverable costs for those purposes in the OSC: see Ch 6 paras 6.22 to 6.39 of the CCSR Final Report. These would be at substantially lower levels than the current fixed costs tariff in the FT, but would enable successful claimants to pass on some limited costs to the defendant's insurers.

Appeals

23. Any proposal which gives rise to a risk of increased appeals gives rise to concern about resources. This is not only because of the extra judicial and court staff time which has to be devoted to the case but also because the burden of appeals falls mainly on the civil Circuit Judges, who are already desperately thinly spread: see paras 8.61 to 8.73 of the CCSR Final Report. Any increase in the burden upon them would put in jeopardy the proposals in that report (now approved by the senior judiciary for implementation) to re-focus more civil work in the County Court and in the regions (rather than in the High Court and in London).
24. The raising of the FT threshold for PI cases would increase the incidence and burden of appeals for the following reasons:
 - a. Cases would be less well prepared and argued at trial by LIPs than by professionals, giving rise to less reliable judgments;
 - b. Unsuccessful LIPs are generally more likely to appeal than those with the benefit of professional advice on the merits;
 - c. SCT trials (usually by part-time Deputy DJs rather than the full-time DJs who do most FT trials) give rise to more appeals;
 - d. The preparation of appeal papers by LIPs invariably lengthens the judicial time needed for dealing with them, on paper PTAs, oral renewals and on full appeals;
 - e. Except where the appeal is exceptionally marked 'totally without merit' on the paper application for permission, a litigant in the County Court (now no longer in the Court of Appeal) has a right of oral renewal.

Lord Justice Briggs
Mrs Justice Simler
His Honour Judge Bird
District Judge Jenkins
06.01.17