



Reforming the Soft Tissue Injury ('Whiplash') Claims Process
A consultation on arrangements concerning
personal injury claims in England and Wales

General remarks

The Civil Justice Council (CJC) welcomes the opportunity to respond to this consultation.

The Ministry of Justice will already be aware of the workshop held by the CJC in July 2016 (at which it was represented by officials), and will have seen the note of the discussion (see www.judiciary.gov.uk/wp-content/uploads/2011/03/note-of-extending-the-small-claims-court-workshop-20161206.pdf).

Some of the points raised then are touched on in the response, below. It is worth noting that the main message from the majority of the delegates at the event was that, under any new regime, a claimant for an injury valued at less than £5,000 should be able to progress their claim online and to resolve it without having to use the small claims track processes in the county court.

This should be within the framework of a simplified system in which decisions on liability and the relevant investigations on quantum can be expedited speedily and at minimum cost. The system needs to be accessible to claimants acting in person. The creation of a new IT system should be used as an opportunity to innovate, recognising that the current system of the RTA Portal was never designed to guide those pursuing a claim without the benefit of a lawyer through the process. More detail on how such a system might work is given below.

It is important to recognise that the current RTA Portal used by lawyers and insurers handling claims valued between £1,000 and £5,000 enables 86% of claims to be resolved at the second (pre-court) stage. The ambition of the new system needs to be to achieve at least this level of pre-litigation resolution and probably higher.

Absent such a new simplified system of processing these claims, it is likely there would be adverse consequences flowing from higher levels of cases having to use the small claims track of the county court. We list those below, not as arguments against the proposed reforms but as necessary touch points to be addressed in the creation of any simplified system:

- The general non-availability of legal costs in small claims cases means that professional claimant lawyers will find it uneconomic to bring such claims,

and may either be replaced by claims management companies or litigants in person (or people will abandon a claim altogether);

- Cases in the County Court normally take between two to three hours, but may take up to a day leading to a significant increase in court workload with resultant impact on waiting times for hearings generally;
- Concerns about whether litigants in person would be able to gain access to legal advice or medical evidence; and
- The prospects of benefitting from the already oversubscribed small claims mediation service would be weak; and
- The impact on the advice sector of increased demands from litigants in person.

While there seems no room for litigants simply to be given access to that Portal – to create the requisite number of usernames alone would be unfeasible – any new IT system might learn from Portal’s success in speedily settling those RTA cases in which liability is not an issue, and its use of a ‘pyramid’ structure by which that question of liability in each claim is resolved in the first 15-30 working days of a claim - rather than at the end of a hearing, as would be the case were these claims to be moved to the small claims track.

Comments in response to specific questions

Question 1: *Should the definition in paragraph 17 be used to identify the claims to be affected by removal of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and introduction of a fixed tariff of proportionate compensation payments for all other such claims? Please give your reasons why, and any alternative definition that should be considered*

While CJC members recognise that the definition in paragraph 23 of the consultation was that used in definition 16A of the RTA PAP for whiplash injuries, and while it was acknowledged that there was some benefit in a consistency of approach, there was a feeling among Council members that that definition went wider than just whiplash claims, and that the phrase ‘soft tissue injury’ might be applied to other types of injury sustained as the result of a RTA – for example a trivial thumb injury, chest injury from a seatbelt or sprained ankle from braking. Those injuries should not be subject to any part of a new approach in the area – whether a system of tariffs, a limitation to injury lasting more than six or nine months under the prognosis scheme or to a broad ban on general damages for these injuries.

It was acknowledged that the definition was drawn widely in an effort to pre-empt changes in behaviour in the market with an increase in claims for alternative injuries often associated with whiplash, such as those listed above, and has broadly worked well for two years, but it needed to be recognised that there was a risk of all those also being encompassed in any new scheme.

Question 2: *Should the definition at paragraph 17 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim?
Please provide further information in support of your answer, including if relevant, how this definition could be amended to effectively capture this classification of claim*

A range of CJC members agreed that the definition should be extended to include claims where the psychological element is the primary element, subject to one important safeguard. The CJC was firmly of the view that there was a need to draw a clear distinction here between claims for post-traumatic stress disorder (PTSD) and other recognisable psychiatric injuries which are consequential upon soft tissue injuries, and those for minor psychological trauma, such as travel anxiety associated with minor physical injuries.

Of course, any claims for ‘pure’ recognisable psychiatric injuries suffered as a result of a minor road traffic accident (i.e., those which are not consequential upon any physical injury being sustained) will fall outside of the reforms proposed. Claims for PTSD are subject to well-established diagnostic tests and by their nature not part of the problem which these reforms are intended to address. The CJC recommends that claims for PTSD (diagnosed in accordance with internationally recognised standards) should be specifically excluded from the definition.

Question 3: *The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims. Should the scope of minor injury be defined as a duration of six months or less?
Please explain your reasons, along with any alternative suggestions for defining the scope.*

Question 4: *Alternatively, should the government consider applying these reforms to claims covering nine months’ duration or less?
Please explain your reasons along with any alternative suggestions for defining the scope.*

The views of Council members on these two questions are polarised, well-known and well-articulated, and the CJC agreed to leave representative organisations to respond separately setting out those views.

Question 5: *Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation?*

The decision to remove a head of general damages from an action in tort by legislative change is a significant one. CJC members understood that the broad policy was to reduce the numbers of minor and fraudulent claims made for whiplash injuries, and the costs of motor insurance for all individuals with them, and that the

Government saw the reduction in the availability of damages as a proportionate response to that problem; that it was, in other words, a question of distributive justice.

The CJC's focus was on whether the proposed change was a balanced response to the problem of a proliferation of claims for minor whiplash injuries, and for many members this was an access to justice issue. The question was whether some litigants would end up being disproportionately penalised for any change in approach, and the view among some members was that they would be, not least those on lower incomes for whom the relatively small amounts of damages would represent a significant proportion of their income.

It was noted, further, that the removal of the ability to claim compensation in these tortious actions might be contrasted with what was seen as encouragement by Government to citizens to pursue claims for compensation in contractual claims and disputes.

Finally, there was concern that any change should produce a commensurate reduction in insurance premiums, and a recommendation that the Government should take steps to satisfy itself that savings will be passed onto insurance policy holders in reduced premiums.

Other members considered that the response was proportionate given the large increase and high volume of whiplash claims in this jurisdiction.

Question 6: Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation?

Question 7: Please give your views on the government's proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and at £425 if the claim contains a psychological element.

At the workshop in July 2016, participants discussed the benefits of a system of predictive damages, such as those outlined in this part of the consultation. This suggestion tied in with the view that these claims were best dealt with by the use of an online system rather than in the small claims track. It was felt that a predictive damages tariff would give claimants a clear idea of how damages were calculated and would help the unrepresented claimant understand the likely level of damages for their claim and whether an offer to settle by an insurer was reasonable. As with any new system of online resolution of these claims, such a scheme would promote the early admission of liability by defendants. The small claims track would only be used for exceptional cases, such as mixed claims (that is, those including elements of vehicle damage or hire), or for disputes on liability which have not been otherwise resolved.

Care should be taken in such a 'one size fits all' approach that a more tailored approach would be available for those more complicated claims for which it was

required. Efforts should also be made to avoid any risk of undersettlement, particularly for those on low pay, for whom any margin of error or under-compensation of say £200 would be of greater significance, particularly where this was coupled with problems of internet access and language skills. The point was made by some members that undersettlement in PI claims (unlike in other areas, such as PPI misselling) could have an ongoing effect and impact on an injured party.

Question 8: *If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the 'Diagnosis' approach should be used.*

Question 9: *If either option to tackle minor claims (see Part 2 of the consultation document) is pursued, please give your views on whether the 'Prognosis' approach should be used.*

Question 10: *Would the introduction of the 'diagnosis' model help to control the practice of claimants bringing their claim late in the limitation period?*

Out of the two options, CJC members agreed on balance that the prognosis approach as the fairer of the two. There was a feeling that about two months after the RTA was the right time to assess the impact of an injury from a RTA, when any continuing symptoms would be apparent.

Question 11: *The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided?*

Question 12: *Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?*

As detailed in the response to questions 6 and 7 above, the introduction of a tariff figure would help to cut the costs of these claims, and if introduced in conjunction with a system for the online resolution of such claims would help reduce the costs of resolving such claims, though with the caveats outlined elsewhere in this response.

The CJC believes that thought should be given to simplifying the process by which liability is admitted by defendants, as well as to the process generally.

Key to any new regime would be the ability to handle more complex claims properly and to enable a judge to tailor their approach in those cases. While Council members did welcome the flexibility offered by a system in which there was room for a discretionary uplift by a judge, there was a strong feeling that in reality the amount of money represented by a uplift based on a proportion of damages would be very small, and that cases would not be run for such a small amount of money – or that if they were, would be a disproportionate use of the court time for the actual amount

of money involved. The Council did not support, therefore, the introduction of a discretionary 20% uplift.

Question 13: *Should the small claims track limit be raised for all personal injury or limited to road traffic accident cases only?*

There was a strong view among members that any new system should not apply to work-based claims, for a number of reasons:

- a. Such claims do not fall within the Government's underlying reasoning for the consultation, namely the increase in minor claims for whiplash.
- b. Workplace claims were invariably more complex than RTA claims.
- c. There was an imbalance of power between the employer and the employee – in relation, for example, to access to the site to which the claim related, and to witnesses to the incident and to the documentation and the possibility of a heightened inequality of arms in these claims if the claimant was unrepresented. There is a risk, further, that an unrepresented employee might be deterred from making a claim against their current employer

A distinction was made between these employer liability claims and public liability (PL) claims against hospitals, Councils and other public access areas, where the number of slips and trips cases might grow.

Some members suggested that drawing a boundary between different types of claim would inevitably lead to case law at the boundaries of such cases and wondered if it would even be feasible. They considered other areas of personal injury and felt that clinical negligence claims were invariably assigned to the multi-track (either for reasons of value or complexity) and would inevitably fall outside the effects of such a scheme.

Other disease cases also invariably came out of the small claims track as being too complex. It was further noted by members that the RTA Portal included a provision under which cases could come out if they were complex or unusual, but that that this was hardly used at all.

Question 14: *The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5,000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000?*

It was acknowledged that there had been no inflationary increase in the limit for the PI small claims rack for some period, though an increase based simply on inflationary would be considerably smaller. Some members felt the limit should not be increased to more than £5,000.

In future, it was suggested that incremental increases should reflect the CPI, and the tariff and the small claims limit should be considered together every three or five years.

Question 15: *Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.*

The CJC felt strongly that IT should be further employed to facilitate the easy resolution of these claims – based on the largely successful model of the Portal, though not as an extension of it. Members felt that the CJC had a role to play here, and wished to express their readiness to help advise on the structure and establishment of that model.

Question 16: *Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector?*

There was concern among CJC members about the growing vacuum in the availability of legal advice in this area that an extension of the small claims limit would engender and the likelihood of a proliferation in the activity of CMCs and of paid McKenzie Friends. There is a strong feeling among members that everyone who provides paid-for advice on an injury claim should be regulated – including claims management companies (CMCs) and paid McKenzie Friends.

The MoJ should consider in this context whether a McKenzie Friend who is paid for advising on a personal injury claim is providing regulated claims management services and is therefore already subject to regulation by the Claims Management Regulator. The CMR should also be asked to investigate existing activity in this sector.

A cautionary note was sounded about the sheer numbers of such claims likely to be taken forward by CMCs in particular. A suggestion made at the July 2016 workshop was that a control might be introduced on how much a CMC could charge; it was noted that in financial mis-selling cases, there was a cap of 15% of the amount recovered.

Question 17: *Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries?*

Question 18: *Should there be any exemptions to the ban?*

If so what should they be and why?

Question 19: *How should the ban be enforced?*

The views of Council members were divided on these questions and we leave it to the professional associations and others to set out the respective arguments.

Question 20: *Should the Claims Notification Form be amended to include the source of referral of claim?*

Yes, to reduce the risk of fraudulent claims.

Question 21: *Should the Qualified One-way Costs Shifting provisions be amended so that a claimant is required to seek the court's permission to discontinue less than 28 days before trial (Part 38.4 of CPR)?*

The relevant rules on QOCS are found not within Part 38.4 of the Civil Procedure Rules (CPR) but 44.13 and 44.17 and a fraudulent claimant cannot simply discontinue with impunity in accordance with Practice Direction 44. The Practice Direction also provides the court with existing powers to determine the costs attributable if a claim is found to be fundamentally dishonest.

Question 22: *Which model for reform in the way credit hire agreements are dealt with in the future do you support?*

- a) *First Party Model*
- b) *Regulatory Model*
- c) *Industry Code of Conduct*
- d) *Competitive Offer Model*
- e) *Other*

Please provide supporting evidence/reasoning for your view (this can be based on either the models outlined above or alternative models not discussed here).

Question 23: *What (if any) further suggestions for reform would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market?*

Please provide the factors that should be considered and why.

Question 24: *What would be the best way to improve the way consumers are educated with regards to securing appropriate credit hire vehicles?*

While the CJC agreed to leave these questions to those directly involved in this area, it did wish to note that it believes that some form of agreement between claimant and defendant representative bodies about reasonable hire rates for credit hire agreements is central to the early settlement of such disputes, and notes that there is already a deal of activity directed at resolving rates issues outside court. These rates have also been considered by the Competition and Markets Authority whose findings can be found at www.gov.uk/cma-cases/private-motor-insurance-market-investigation.

It is the CJC's understanding that around 80% of credit claims are dealt with on agreed rates - either through bilateral agreements, or through an agreement known as the ABI GTA (Association of British Insurers, General Terms of Agreement). These cases are settled without the need to issue court proceedings.

Question 25: *Do you think a system of early notification of claims should be introduced to England and Wales?*

Please provide reasons and/or evidence in support of your view.

The CJC agrees that a system of early notification should be introduced, but there was a range of views as to the period for that notification which ranged between a few weeks and 12 months, the latter in order to give the claimant enough time to receive a police report. The CJC suggests that late notification should not stop compensation – but that a system of costs penalties should be introduced to discourage late claimants, in other words that the claimant would have to bear the costs of any disbursements that they had incurred, a penalty that would relate principally to the cost of their medical report.

Question 26: *Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be ‘minor’.*

Members were cautious about answering this question without a definition of the term ‘minor’. It was also agreed that the burden on the NHS of introducing any such requirement could be considerable and needs to be carefully investigated before any proposal is considered.

Question 27: *Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?*

Option 1: Rehabilitation vouchers

Option 2: All rehabilitation arranged and paid for by the defendant

Option 3: No compensation payment made towards rehabilitation in low value claims

Option 4: MedCo to be expanded to include rehabilitation

Option 5: Introducing fixed recoverable damages for rehabilitation treatment

Other:

Question 28: *Do you have any other suggestions which would help prevent potential exaggerated or fraudulent rehabilitation claims?*

Question 29: *Do you agree or disagree that the government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports? Please explain your reasons.*

Here, the CJC deferred to the work of the Rehabilitation Working party, other than to note that getting prompt payment from a defendant for any rehabilitation was important and should be firmly encouraged.

Question 30: *A new scheme based on the ‘Barème’ approach, could be integrated with the new reforms to remove compensation from minor road traffic accident related soft tissue injury claims and introduce a fixed tariff of compensation for all other road traffic accident related soft tissue injury claims. What are the advantages and disadvantages of such a scheme?*

Please give reasons for your answer and state which elements, if any, should be considered in its development.

The CJC left responses on this question to others with immediate practical experience of the point.

Question 31: *Please provide details of any other suggestions where further government reform could help control the costs of civil litigation.*

Other than the points already made in relation to the digitisation of these cases, members also wished to note the work currently underway by Lord Justice Jackson and looking at the extension of a system of fixed recoverable costs for civil claims 'so as to make the costs of going to court more certain, transparent and proportionate for litigants'.

The establishment of any such regime would have an immediate impact on personal injury claims broadly. Members also wished to return to the question of court fees and noted that recent and any further increase in those also had a substantial impact on the costs of a civil case and the likely ability of a claimant to pursue a claim.

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