Ministry of JUSTICE

Analysis of responses to the call for evidence in relation to extension of the road traffic accident personal injury scheme

19 October 2012

ANALYSIS OF RESPONSES TO THE CALL FOR EVIDENCE IN RELATION TO EXTENSION OF THE ROAD TRAFFIC ACCIDENT PERSONAL INJURY SCHEME

Background

1. The Government's response to the consultation *Solving disputes in the county court*[1] confirmed its intention to extend the current Road Traffic Accident scheme for personal injury (the RTA scheme) to include:

    - claims up to a value of £25,000 (currently £10,000) (vertical extension); and
    - claims for personal injury in employers' liability (EL) and public liability (PL) cases (horizontal extension).

2. The Government is also committed to reducing the fixed recoverable costs which are available within the scheme.

3. On 28 February 2012, the Ministry of Justice published a call for evidence to inform implementation of vertical and horizontal extension. Jonathan Djanogly MP wrote to stakeholders to seek views on the appropriate level of revised fixed recoverable costs within the scheme and how the current scheme should be extended to cover EL and PL claims.

4. The call for evidence was sent directly to 119 organisations/individuals and was posted on the Ministry of Justice website. Seventy-two responses were received from the following groups:

    - Law firms and solicitors (50% of respondents)
    - Insurers (25% of respondents)
    - Others - consisting of a mixture of claimant/defendant representative groups (25% of respondents).

Responses to questions raised in the call for evidence

Q1. The level of fixed recoverable costs you think would be appropriate at each stage of the process for <u>RTA claims</u> and those arising from <u>employer and public liability accident claims</u> and any evidence you can provide to support your views.

- 40% (20) of respondents to this question favoured a dual tariff covering claims in two value bands (£1,000 -£10,000 and £10,000 - £25,000)
- 30% (17) favoured a single tariff of costs to apply to claims between £1,000-£25,000 for RTA claims
- 25% (15) favoured the approach taken in Table B of Annex 5 to Lord Justice Jackson's report on civil costs which links costs to the amount of damages awarded[2]
- 5% (4) favoured no change to fixed recoverable costs.

1 Consultation Paper Solving disputes in the county courts: creating a simpler, quicker and more proportionate system CP6/2011

2 Review of Civil Litigation Costs: Final Report (December 2010)

General views on fixed recoverable costs

5. Those who favoured a dual tariff were predominantly from the insurance industry, the consensus being that this is necessary to reflect the extra work required for cases valued at £10,000 - £25,000. This view was shared by major claimant representatives, although many argued that this approach could go further with multiple tariffs, or costs linked to damages. A number of defendant insurers expressed the view that straightforward motor claims or those of a low value should attract lower costs given that the current costs for such claims are disproportionate to the level of claimant expertise and resource involved and the damages paid.

6. Those who favoured a single tariff appear to be individuals from small law firms who focused exclusively on RTA costs and did not provide any suggestions for the costs that should apply to horizontal extension. This view was contrary to that of major claimant representatives who argued that a single tariff of costs for claims of £1,000 - £25,000 would not be appropriate and that, at the very least, a dual tariff for cases above and below £10,000 would be needed to reflect the extra work required in higher value cases.

7. Many respondents, predominantly from claimant representative organisations, argued for costs to be linked with damages, as in Table B, although with revisions to the figures. Others argued that there should be multiple tariffs to reflect the very different work involved in bringing claims of differing values.

RTA claims - figures

8. Some respondents suggested figures for the level of fixed recoverable costs in RTA claims, especially for claims between £1,000 and £10,000 which settle at stage 1 or 2. These were polarised between claimant and defendant respondents. Claimant representatives including individuals from small law firms suggested figures between £800 and £1,300. Four claimants suggested that maintaining the existing £1,200 figure for a claim which settles at stage 2 could be reasonable whilst the 21 defendants who provided a figure suggested one of around £400 on average.

9. Fewer respondents put forward suggestions for cases between £10,000 and £25,000, especially on the claimant side.

EL and PL claims - figures

10. Approximately 30% of respondents suggested figures for EL and PL claims. Around 10% of defendants suggested that, in general, EL and PL claims should attract the same or similar costs as RTA claims, with the exception of a major claimant legal expenses insurer (ATE/BTE) which accepted that EL and PL claims could be more expensive.

11. The majority view amongst claimant representative organisations was that the level of fixed recoverable costs for each stage should increase with the value of the claims — similar to the costs matrix applicable in the RTA predictive costs regime. Many claimants put forward arguments for a “Table B” approach.

12. One defendant representative suggested a regime of staggered costs, with a two tier system paying more for claims of higher value but pointed out that the differential should be modest to avoid providing an incentive for claim inflation.

Q2 What, if any, modifications would need to be made to the pre-action protocol and the electronic portal for claims in value of <u>between £10,000 and £25,000?</u>

13. The majority of respondents saw no reason why the RTA scheme could not be extended to cover claims up to £25,000 and indicated that this would require minimal modification of the protocol and portal.

14. Those who thought modification would be necessary suggested that the following issues should be addressed:

- *Claims valued at more than £10,000 are likely to involve multiple injuries*

    a. Claimant representatives argued that claims valued at more than £10,000 are likely to involve multiple injuries which may require more than two experts

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    b. Defendants, on the other hand, argued for the need for independent medical evidence in claims of higher value, to be obtained either through a nomination process or by the introduction of an agreed panel.

- *The current rules on interim payments prevent claimants from being able to request a payment without first having a medical report which recommends a further medical examination.*

    a. Claimant representatives suggested there should be changes to rules to accommodate claimants who suffer future and ongoing loss. (See detailed response on interim payments in question 3 below)

- *The protocol needs to stipulate that advice on quantum can be obtained from the Bar.*

    a. As argued for EL and PL claims (see below in question 3) claimant representatives suggest that the protocol and rules should be amended to allow for advice on quantum from Counsel in RTA and EL/PL cases.

- *Timing on stage 1 payment to prevent the "£400 Club" needs addressing*

    a. Claimant representatives were open to discussion on whether stage 1 and stage 2 costs should be paid on conclusion of stage 2 to help eliminate the "£400 Club" i.e. the registration of claims notification forms (CNFs) in the RTA Portal (for which the stage 1 fee is paid) in relation to which the claimant solicitor takes no further action.

b. Defendant insurers took the view that whatever the fee level decided upon, the stage 1 fee must be a relatively small sum so as not to encourage the type of behaviour described above.

Q3 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?

15. Respondents (mainly from the insurance industry) believed that beyond stage 1, there should be little, if any, need for change from the RTA Scheme. However, some did not consider this to be case, suggesting a separate EL/PL Protocol. In any event, the majority of respondents accepted that some significant modifications would be necessary to accommodate EL and PL claims. In answering this question respondents drew the distinction between modifications required for the protocol and modifications needed for the portal. Some respondents pointed out that, unlike RTA claims, there is no requirement for compulsory insurance in public liability claims and this issue would need to be addressed when thinking about extending the protocol.

16. The following modifications for EL and PL claims were suggested:

Admissions on liability

	Employers' liability	**Public Liability**	**Number of respondents**	**Percentage of respondents**
Claimant representative	15 days	15 days	5	30%
Defendant representative	30-45 days	40-60	12	70%

17. Claimant representatives argued that in most EL cases, employers should already have knowledge of the accident. Some pointed out that if insurers were permitted additional time to investigate EL and PL cases (i.e. over the 15 days permitted in the RTA protocol), the claimant would be placed at a disadvantage (because of the danger of evidence being lost) and the Government would fail to meet its stated aim of speeding up settlement. A major union representative voiced concern regarding possible "witness nobbling" by the employer if extra time were to be allowed for admission of liability.

18. Defendant representatives argued that, because liability issues are often more complex for EL and PL claims than for motor claims, more time is required to carry out investigations. Insurers predominantly favoured a flexible approach to time scales to enable claims involving contributory negligence to stay in the protocol. Insurers also said that although claims involving complex contributory negligence issues may not be appropriate for the protocol, a stay within the protocol may well assist claims in which these issues can be simplified to remain in the process.

Claim notification form (CNF)

19. Claimant representatives pointed out that the CNF form will need to be amended to remove references to RTA, vehicle damages etc. They also suggested that the accident details section should be amended to include details of the employee. It was suggested that, if liability is denied, defendants must disclose (as they are currently required to do under the General Pre-Action Protocol for personal injury claims) documents in their possession which are material to the case and which assist with resolving the dispute and narrowing the issues. Changes would be needed to allow for these documents to be included in the response pack.

20. Defendant respondents agreed that there should be more details of the accident in the CNF as this would allow defendants to undertake the necessary work to investigate the claim in order to determine liability.

Contributory Negligence

21. Claimant representatives were of the view that all contributory negligence claims should fall out of the scheme automatically. According to one respondent, the Law Reform (Contributory Negligence) Act 1945 allows the court to apportion liability for damages between the claimant and the defendant where the claimant's negligence has materially added to the loss or damage sustained and that claim involving contributory negligence should be ultimately reserved to the court to determine.

22. Defendant respondents pointed out that with EL and PL claims there are more likely to be issues around causation and contributory negligence and that the best way to avoid claims falling out of the protocol is to allow further time for admission on liability to allow discussions to take place in order to narrow issues between the parties for consideration to be made on liability.

Medical evidence

23. Those who raised points about medical evidence were predominantly claimant representatives. They suggested that there should not be any restrictions on the type of expert being instructed, to reflect the fact that EL and PL claims involve a wider range of injuries than RTA cases. In addition, if the claimant has suffered multiple injuries that require several reports from experts in different disciplines, medical reports should be obtained simultaneously to avoid delay. One defendant representative suggested the need for independent medical evidence in claims of higher value to be obtained either through a nomination process or by the introduction of an agreed panel.

24. A major insurer pointed out that EL and PL claims are more likely to take longer to resolve, to require multiple medical reports and to involve other experts, and to require more interim payments. They are also more likely to raise other heads of damage due to the claimant having more serious injuries. An electronic portal would therefore need to be able to cope with uploading very large documents at speed.

Interim payments

25. Claimant representatives suggested that there should be more provision for interim payments than currently. Others pointed out that the rules should be amended to allow an application to be made to the court without the requirement to issue a claim.

Interim payments must also increase in frequency and in value.

26. Claimant representatives pointed out that that the current rules on interim payments prevent a claimant from being able to request a payment without first having a medical report which recommends a further medical examination. Where the claimant is suffering ongoing loss of earnings and having to pay for treatment, an interim payment may be required. It has been suggested that the protocol will need to remove the requirement that a medical report should be obtained in the first instance and to allow for interim payments to be made to repay ongoing special damages.

Multiple defendants

27. Those who covered this point stated that multiple party claims would present a challenge for the portal system, although it could be made to work if the process is kept simple. For example, if a claimant commenced proceedings against a defendant where liability could rest with one or more defendants, it would be for the defendant receiving the claim to decide whether to deal with it. If the defendant made a decision not to do so, because of the multi-party nature of the case, the claim would leave the protocol.

28. Where a claim involves multiple defendants, there would need to be a means for communication between those defendants outside the portal (in order to negotiate liability apportionment). One insurer suggested that a reasonable period of time for discussion should be allowed (as with a stay of proceedings), during which the claimant should not be allowed to exit the portal.

Advice from Counsel

29. Some claimant representatives suggested that the Protocol should be amended to allow for advice on quantum from Counsel in RTA and EL/PL cases. It was argued that allowing advice from Counsel at Stage 2 would protect damages from being driven down, and that this should be recoverable as a disbursement rather than coming out of the fixed fee.

Q4 Why do you think, since the commencement of the RTA protocol, claims have exited the scheme and any ways this might be addressed?

30. The majority of claimant representatives cited insurers' inefficiencies and general delays. On the other hand insurers cited issues around liability and suspicion of fraud as a factor in admitting liability. One insurer representative reported that some claimant solicitors seek to exit the portal when insurers attempt to correspond by email, letter or fax as part of negotiations. One major claimant representative suggested that there could be a number of reasons for this including a cash flow benefit of not paying stage 1 costs in those cases that exit

and getting an extra three months to investigate as a result of moving into the protocol that cover general personal injuries.

Q5 The types of employers' and public liability claims that lend themselves to a standardised and streamlined process.

31. Most respondents suggested that cases would be suitable for this type of process:
    - where there is a straightforward accident
    - where liability and causation are not disputed
    - where the injury is easily identifiable.

32. The claimant view is that there is an infinite number of variables between each case and that it would be difficult to group one set of cases together under one standardised process as is the case with the RTA claims.

33. Most insurers took the view that all employer and public liability claims are suitable. A few insurers pointed out that it may be better to not have a stage 1 process for EL and PL claims but rather that they should enter at stage 2 once liability has been admitted and investigations have concluded.

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