



CIVIL JUSTICE COUNCIL RESPONSE

CASE TRACK LIMITS AND THE CLAIMS PROCESS FOR PERSONAL INJURY CLAIMS

Preamble

This response by the Civil Justice Council is less comprehensive than might otherwise have been so, due to; (i) the references in the consultation paper that indicate a continuing role for the Council in taking forward certain aspects of the proposed reforms; (ii) the contents of the Council report "Access to Justice - Funding Options and Proportionate Costs" (2005) which advanced recommendations to the Lord Chancellor (see in particular recommendations 2,3, and 4).

The consultation paper promotes recommendation 2 (increased fast track to £25,000 for all personal injury cases), and merges recommendations 3 (predictable costs for all personal injury cases up to £25,000) and 4 (streamlined system for road traffic accident cases below £10,000) by proposing a streamlined procedure and costs system for all personal injury cases up to £25,000.

The consultation paper proposals go further than the Civil Justice Council recommendations in 2005. Rather than further analysis of the pros and cons of the CJC recommendations and MoJ proposals, this response recognises that there are differing views as to whether the proposed streamlined procedure, supported by predictable or fixed costs, is suitable for RTA claims under £10,000 only, or for RTA, EL and PL claims up to £25,000. Further whether it is more attractive simply to extend the existing predictable costs scheme to all personal injury cases in a fast track extended to £25,000, adjusting the figures to take account of a streamlined process for RTA claims under £10,000. The CJC will similarly not comment on whether the proposals relating to ATE insurance will or will not destabilise the insurance market.

The CJC does not advance a final view on the issues identified above, but urges the Secretary of State to recognise the balance to be struck in addressing the strongly opposed views that are known to the CJC from its close and regular consultations with all the main stakeholders.

Question 1 Do you agree that the small claims limit for personal injuries should remain at £1000 in view of the proposals to improve the claims process? If not, please set out your reasons why and state what you consider the appropriate level would be.

The Civil Justice Council agrees with the proposal that the small claims limit for personal injury should remain at £1,000. We have seen no evidence to suggest that the resolution of personal injury claims between £1,000 and £5,000 is not working satisfactorily for the consumer and only a very small number of such claims do not settle. Provided that proportionality of costs is insured by means of streamlining, we can see no benefit to be gained by raising the small claims limit. On the contrary any such move that removes costs recovery in such cases we believe would work contrary to the public interest by removing quality controlled and regulated law firms from their role in resolving such claims which are still important to the injured consumer. The resulting gap in access to justice would be filled by unrepresented consumers unequal to the task of taking on the complexities of personal injury law and procedure or by non-lawyers whose only means of remuneration would be to deduct contingency fees from the consumer's damages.

We agree that the small claims limit for housing disrepair cases should remain a £1,000. We note the paper says that housing advice including disrepair is a priority for the Community Legal Service because it is usually the most deprived and excluded groups, who inhabit properties which are older, have been less well maintained over the long term and hence are in greatest need of repair. We are concerned to note that the number of housing contracts has gone down considerably with 788 contracts in 2000-2001 shrinking to 587 contracts in 2005-06, which may raise access to justice concerns. These figures are from the Constitutional Affairs Select Committee Third Report of Session 2006-2007.

Question 3 Your views are sought on whether the process for dealing with housing disrepair cases can be improved and simplified, and if so, how this could be achieved.

We understand that the housing disrepair protocol has significantly improved these claims which are usually settled pre-issue, so on this basis make no further proposals.

Question 4 Do you agree that the small claims limit for other claims should remain at £5000? If not, please set out your reasons why and state what you consider the appropriate level would be.

We agree that the small claims limit for other claims should remain at £5,000 as we have seen no evidence to suggest that there is any difficulty with the current limit and, as the consultation paper highlights, the limit in England and Wales is one of the highest limits for a small claims track in Europe and worldwide. We support an extension of the fast track limit from £15,000 to £25,000 for personal injury cases, particularly if predictable costs are extended to cover all fast track personal injury claims. This would reflect the success of the fast track in promoting speedier settlement. We believe it is now justifiable to increase the level 5 years after the introduction of the CPR which are now well established and it will assist the delicate balance of the ATE market which supports

conditional fees as the main means of bringing a claim on the basis of “the many paying for the few”. The Civil Justice Council would go further and propose an opt in facility for cases of up to £50,000 if the parties agreed so to opt in. If the fast track is raised to £25,000, the proposed guidance to be issued by the Head of Civil Justice to encourage the allocation of proportion of fast track cases to District Judges would then not be required.

Question 6 Are there any measures that would make the handling of intellectual property claims more efficient and effective? Is so please tell us what those measures are.

Question 7 If the difficulty of dealing with intellectual property cases is not the court process, what are the difficulties and how could they be resolved?

Question 8 You may consider that different measures would be appropriate for different kinds of intellectual property – for instance because patent cases involve questions of technology. If you have a response directed to a particular kind of intellectual property only, please say so.

We have no comments to make on these proposals.

Question 9 Do you agree that these proposals set out a procedure for dealing with claims which will provide fair compensation in a more timely and cost-effective way? If not please say why and set out any alternative proposals.

The Civil Justice Council supports the overall structure of the proposed streamlined model and the principles on which it is based and applauds the Government for aiming to deal with proportionality in a manner which genuinely attempts to improve the handling of claims rather than by use of a blunt instrument such as an increase to the small claims limit.

As to whether the proposed procedure will provide fair compensation in a more timely and cost-effective way, we believe that the overall structure has a potential to do so but we make the following points about the detail of the proposals, in particular in relation to any potential impact on consumers as follows:

1. We are concerned about the proposal in paragraph 88 on page 36 which proposes that where an application is made to the court for damages to be decided and the value of the claim is less than £2,500, the claimant solicitor will not be entitled to their costs of the hearing if the claimant offer is not beaten. There needs to be incentives for both parties to make reasonable offers and we have concerns that this proposal provides defendants with no incentive and may make claimant solicitors excessively cautious. The total effect will be to considerably drive down the level of damages and cause detriment to the consumer within the process.

2. Although we understand the spirit behind the proposal to encourage the provision of discretionary extensions of time limits between claimants and defendants, in practical terms we believe this could have a serious impact on consumers. As the claimant lawyer will have done no investigation into the claim at the time that the defendant makes a request for such an extension, they will be in no position to say whether any number of requests for extensions are reasonable or not and will have no choice but to automatically grant all requests for extensions and the practical impact on this will be to extend the time limits indefinitely. If a denial of liability later emerges, the ability of the claimant to investigate the claim may have been seriously damaged by the passage of time. For example, evidence and witnesses may no longer be available. This being the case we believe that the only way such a system will be safer for the consumer is for the time limits to be absolute or to provide for a single extension of a short but absolute period.
3. We believe admissions should be binding as to liability, causation and extent of damage to avoid the consumer finding themselves in a position of having to commence an investigation of their claim months after liability has been admitted (and when evidence may no longer be available) because a dispute later arises on causation or extent of damage. We also recognise concerns about the possibility of defendants ending up admitting on a £2,000 claim and ending up with a £20,000 claim that has neurological or psychological complications, particularly as medical evidence will not be available at admission stage.

Question 10 Do you have any comments or suggested amendments in relation to the draft forms?

In general, we think the forms are very helpful. It may be confusing to describe the early notification form as a claim form given that is the established name for the proceedings claim form. Perhaps initial letter or letter of claim.

Our only concern is about the extent of mandatory information required from a consumer perspective. For litigants in person we think the form may be overly complex and some of the information is unnecessary at this stage of the claim, for example, road conditions, weather conditions, etc.

The Inland Revenue have developed some very user friendly forms, which require very simple core information from all applicants, and then provide schedules for additional information from different types of tax payers. We believe this format would work very well in this scenario. Instead of having separate forms for RTA and non RTA, core information could be gathered with schedules depending on whether the accident was RTA or non-RTA.

Question 11 Do you agree with the above time periods? If not please state why not and what they should be.

We support the time limits as proposed.

It would be helpful to have an additional time limit inserted after the claimant solicitor sends the notification of claim for the defendant to acknowledge receipt of the notification so that everyone is clear that time is running on the investigation of liability (i.e. the form has been received by the insurer). We believe a time limit of 5 working days would be appropriate.

There are a series of time limits in paragraphs 73 and 74 as follows:

- 1 Settlement pack sent out within 15 working days of the medical report being agreed by the claimant
- 2 Defendant considers offer to settle and accepts claimants offer or makes a counter offer within 10 working days
- 3 Further period to consider any counter offer and for negotiation of 20 working days.

We believe that all these time limits should be 15 days for clarity and ease of use. Otherwise, there is a risk of confusion.

In paragraph 68 it is proposed that, in the claim form and response, the parties should be asked to identify a senior person who has overall management of the claim. We support the principle of what is trying to be achieved here but as the senior person is likely to be a single individual within an insurance company, they are likely to become quickly overwhelmed with case queries and this will create a bottleneck in the system and undermine the quick, streamlined nature of the process.

Question 12 Do you agree that where the amount of damages cannot be agreed there should be an application to the court through the simplest procedure possible? Please comment on what that procedure should cover.

We believe that the proposed simple court procedure will work well, especially in the lower value claims.

Some issues may arise with lack of consistency between courts in relation to backlogs and how quickly they can deal with cases. At present some courts deal with cases very quickly while others have delays of up to two months even to deal with paper hearings.

For cases under £2,500 we can see no point of an oral hearing as, once sealed offers are submitted to the court, there is nothing further to discuss at a hearing.

Question 13 Your views are sought on whether additional measures could be introduced that would help improve the process where liability is not admitted, or is denied.

The Civil Justice Council is very keen to see the currently proposed streamlined process work. As this is a fundamental change to the way cases are dealt with, our preference would be to concentrate on making this as efficient and effective as possible initially, however, as the claims process is reviewed, the MoJ should keep it in mind that as ADR and mediation develops there may be scope to introduce its use into this particular area.

Question 14 Do you agree with the proposals set out in Appendix 6? If not, please say why and set out any alternative proposals.

We support the proposals in that they standardise certain special damages as proposed in paragraph 81, and as such, we believe this is helpful in streamlining the process.

Paragraph 66 implies that the standardised schedule covers all special damages and we think it needs to be made clear that this is not the case (e.g. it doesn't cover employers liability special damages). The Settlement Pack will, therefore, need to contain the schedule of standardised damages plus a list of any additional special damages. This aspect will need to be considered in the setting of any fees.

The figures will need to be reviewed before any launch, as the AA recommended mileage has already increased since these were agreed.

Question 15 Do you agree that regional hourly rates should be set and if so, how should they be set?

Yes we agree that regional hourly rates should be set in order to encourage streamlining. This should be done in the simplest way possible using published data.

Question 16 Your views are sought on the development of an assessment tool for general damages.

We accept the invitation issued within the consultation paper to facilitate a forum to help inform further considerations on this issue.

Question 17 Do you agree that there is little scope for standardising contributory negligence? If not, please set out how it might be done.

We assume that contributory negligence is outside the streamlined process. At the stage where CN is being discussed, the claimant will have not yet investigated the claim, so it is difficult to see how there could be a meaningful discussion between claimant and defendant in order to establish an agreed level of CN at this stage.

Question 18 Do you agree with the proposals in relation to costs? If not, please give your reasons and set out any alternative proposals.

In our 2005 Costs Paper mentioned above, we advocated the extension of fixed fees to all PI claims and thus, we support, in principle, fixed fees for the streamlined process.

The streamlined process has staged fixed costs, a departure from the current system, but we believe that this is the right approach for this process. Very careful consideration should be given to the setting of fixed fees and how to reflect the reality of what the steps of the process are likely to involve and to reflect commercial reality.

In our second Costs Paper 'The Future of Funding of Litigation – Alternative Funding Structures' (2006) we recommended the establishment of a Costs Council to review annually the recoverable fixed fees in the fast track and guideline hourly rates between the parties in the multi-track. Such a body would be well placed to undertake the work needed to establish appropriate fixed fees for the streamlined process.

Question 19 Do you agree that ATE insurance cannot be justified in the circumstances set out above? If not, please give your reasons, identifying the risk that is being insured, and set out any alternative proposals.

Question 20 What would be the impact on the ATE market of these proposals?

The Civil Justice Council expressed views on the potential impact on the ATE market of changes to the claims process which could potentially remove a large proportion of claims from the market both in the 2005 Costs Paper and the more recent paper 'The Future Funding of Litigation – Alternative Funding Structures' published in June 2007. The CJC is working with the Ministry of Justice to develop practical proposals on this issue and therefore we will make no further comment at this stage.

Question 21 Do you agree that the new claims process should apply to all claims for personal injury, except clinical negligence, with a value of less than the fast track limit? If not, please give your reasons and identify which cases should use the proposed system.

As per the preamble above:

The consultation paper proposals go further than the Civil Justice Council recommendations in 2005. Rather than further analysis of the pros and cons of the CJC recommendations and MoJ proposals, this response recognises that there are differing views as to whether the proposed streamlined procedure, supported by predictable or fixed costs, is suitable for RTA claims under £10,000 only, or for RTA, EL and PL claims up to £25,000. Further whether it is more attractive simply to extend the existing predictable costs scheme to all personal injury cases in a fast track extended to £25,000, adjusting the figures to take account of a streamlined process for RTA claims under £10,000. The CJC will similarly not comment on whether the proposals relating to ATE insurance will or will not destabilise the insurance market.

The CJC does not advance a final view on the issues identified above, but urges the Secretary of State to recognise the balance to be struck in addressing the strongly opposed views that are known to the CJC from its close and regular consultations with all the main stakeholders.