Solving disputes in the county courts: creating a simpler, quicker and more proportionate system.

A response by the Association of Personal Injury Lawyers

30 June 2011

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20 year history of working to help injured people gain access to justice they need and deserve. We have over 4,300 members committed to supporting the association's aims, all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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INDEX

EXECUTIVE SUMMARY

- APIL supports legal reform where it produces efficiencies such as the early admission of liability by defendants and a predictable and fair procedure for obtaining the appropriate level of damages for the injured person.
- We continue to remain open to co-operation with all parties to address these issues, including the development of a fixed process for lower value claims, providing that the development of such a process takes into account the following steps:
    1. Setting of the foundations such as the need for compulsory insurance, a database akin to askMID and a direct right of action against the insurer;
    2. Mapping out of a process;
    3. Development of the rules to reflect the process;
    4. Building of the IT solution;
    5. Testing of the IT system;
    6. A pilot of the process.

Road traffic claims

- The RTA claims process must not be extended at this time to include RTA cases over £10,000. There are many ongoing problems that need rectification before extension is considered.
- There must be a full review of the system once the problems have been remedied before the scheme is extended further.
- Complexity such as complicated claims for future care, past and future loss of earnings and pre-existing medical conditions make the current scheme in its current form inappropriate for extension.
- It would simply be unfair to retain the same fixed cost regime for the current RTA scheme for any extended scheme. The RTA claims process was developed with the costs being fixed according to the amount of work and level of fee earner involved for each element of the process.

- The costs for the current process need to be reviewed in any event in line with any increase in guideline hourly rates.
- It is essential that there is provision within any streamlined process for advice and advocacy from the Bar. Barristers provide an invaluable service to injured people.

Employers' liability claims

- There is a degree of complexity and difficultly with employers' liability (EL) accident and disease cases which makes it difficult to see how such claims could be run through a simplified process similar to the RTA process. If such a process could be devised we anticipate that of the small number of cases that would start within such a process, very few would remain in scope once intimated, because of issues arising over liability, causation, apportionment of liability and evidence. We therefore question whether such a development would be proportionate.
- A streamlined process for EL claims must involve compulsory insurance, a database akin to askMID, a direct right of action against the insurer; mapping out of a process; development of the rules to reflect the process; building of the IT solution; and testing of the IT system and a pilot before any scheme is implemented.

Public liability claims

- Public liability claims are wide ranging. There is no definition in the CPR for PL cases. Essentially they are all cases that do not fit within the definition of RTA, EL accident or disease and clinical negligence.
- Given the wide range of claims that fall within this definition, a one size fits all approach will not be appropriate. The degree of complexity and difficultly with

these cases makes it difficult to see how such claims could be run through a simplified process similar to the RTA process.

Other considerations for EL and PL cases

- A one size fits all approach would not work for EL and PL cases. Separate processes would need to be developed for each. We therefore question whether developing a streamlined process and portal for EL and PL claims is proportionate.
- The RTA scheme is currently paid for by the insurers who essentially pay a levy to the MIB for every claim submitted through the portal. The numbers of RTA claims are far greater than EL, PL and clinical negligence cases, therefore we have to question what the actual cost per claim will be for those put through a portal if this scheme is extended and who will be responsible for the cost of that.
- If a scheme for EL and PL cases is developed it should not be set any higher than that initially adopted for the RTA claims process.
- Any fixed costs regime in our view must have clear exit points in order to drive behaviours.
- The RTA claims process and portal cannot and must not be replicated for employers' and public liability cases. If a scheme is to be developed for these cases we must start from scratch with a bespoke scheme and bespoke portal for both EL and PL cases separately.

Clinical negligence claims

- There is merit in exploring a streamlined process for low value clinical negligence cases. We have already agreed to discuss with the NHSLA the merits of such a scheme for claims in England which fall within the scope of the Clinical Negligence Scheme for Trusts.

- A streamlined scheme for clinical negligence cases should be defined by the time it takes the individual to recover from the injury and not by reference to value.
- The RTA claims process and portal cannot simply be replicated for clinical negligence cases a bespoke system is essential.

Fixed costs

- We do not believe that a fixed cost matrix is the solution to managing costs in the fast track; such steps will simply prevent claimants from being able to successfully bring difficult but meritorious cases. Extending fixed costs throughout the fast track whilst the process remains unpredictable will cause the injured person to suffer.
- A more appropriate method of dealing with costs outside of a streamlined process would be for judicial cost management of cases, something akin to the pilot in the Mercantile and Construction courts, but suitably adapted for personal injury cases.
- The matrices appended to Lord Justice Jackson's final report[1] were developed in isolation from the claims process. Bolting a fixed cost matrix on top of the claims process does not manage costs in the same way as the claims process seeks to do. In our view cost management where the judiciary promotes effective case handling at proportionate cost fits more comfortably with the objectives of the claims process than simple fixed costs.

Mandatory pre-action directions

[1] Review of Civil Litigation Costs: Final Report

- We do not agree that mandatory pre-action directions should be developed. There already exist pre-action protocols for dealing with personal injury, disease and clinical negligence cases.

Fast track

- We do not agree that the fast track financial threshold should be increased for personal injury claims.

Compulsory mediation information sessions

- Mediation is one of a number of forms of alternative dispute resolution (ADR). ADR is already a routine part of handling of claims. The introduction of compulsory mediation information and assessment sessions is not in our view the means of achieving the routine consideration of alternative dispute resolution.

Structural reforms

- Personal injury claims above £50,000 involve a level of complexity that makes them appropriate for hearing at High Court level.

- We would not object to a single designated court rather than multiple courts; providing that a claimant still has the right to have their claim heard in their local court.

TACKLING MISCONCEPTIONS

APIL recognises the need to cut costs in the current economic climate, and the association has always played its part in discussions and negotiations aimed at improving the civil justice process. Too often recently, however, efforts to reduce costs have meant an erosion of the rights of people, injured through no fault of their own, to full and fair compensation.

The constant belittling of this right by commentators and the insurance industry risks discouraging people from bringing legitimate claims and holding negligent parties to account. Misleading information about the compensation system is common, and we take the opportunity here to address some of the premises on which this consultation is based, as expressed in the ministerial foreword.

We fundamentally disagree with the analysis in the foreword about a so-called 'compensation culture'. Furthermore, so did Lord Young of Graffham who, in his review for the Prime Minister, found that 'the problem of the compensation culture prevalent in society is, however, one of perception rather than reality'.

The ministerial foreword also refers to the 'phenomenon of individuals suing employers and businesses for disproportionately large sums, often for trivial reasons and without regard to personal responsibility'. This claim is totally without foundation.

It is a courageous individual who brings a claim against the employer who pays his wages. In the experience of our members it is never a decision which is taken lightly. Employees have every right to expect that they can go to work and come home without suffering needless injury at the hands of employers. To dismiss these cases as trivial and disproportionate does our workforce a serious injustice. It should also be

remembered that the Government's own Compensation Recovery Unit statistics show that workplace claims have been on a downward trend for the past seven years.

The 'prize', as described in the final paragraph of the foreword is a 'less litigious society and one where justice is affordable for those who do need to litigate'. The reality is that the key beneficiaries of the relentless drive to cut costs will be the defendants who cause needless injury, and their insurers. This is particularly the case if the provisions of the *Legal Aid, Sentencing and Punishment of Offenders* Bill, as first published, are taken into account. The only just outcome in a modern, civilised, society is for those who have caused needless injury to be fully accountable for their own negligence.

FOUNDATIONS OF ANY STREAMLINED PROCESS

APIL only supports legal reform where it produces efficiencies such as the early admission of liability by defendants and a predictable and fair procedure for obtaining the appropriate level of damages for the injured person. We have been involved in discussions with the Ministry of Justice (MoJ) and defendants to improve the procedures for dealing with personal injury claims. We continue to remain open to co-operation with all parties to address these issues, including the development of a fixed process for lower value claims, providing that the development of such a process takes into account the following steps:

1. Setting of the foundations such as the need for compulsory insurance, a cases a database akin to askMID and a direct right of action against the insurer;
2. Mapping out of a process;
3. Development of the rules to reflect the process;
4. Building of the IT solution;
5. Testing of the IT system;
6. A pilot of the process.

It is a requirement on employers to have employers' liability (EL) insurance (Employer's Liability (Compulsory Insurance) Act 1969). There is at present no complete EL database. Whilst one has recently been formed it is untried as to its success at tracing policies of insurance. Other than in the realms of RTA and some but not all EL, there is no obligation on a potential defendant to a personal injury claim to have any insurance at all. There is no fund of last resort for EL or Public Liability (PL) claims where insurers are not traced, therefore such claims would go unpaid.

What makes the RTA claims process possible is the ability to search for an insurance policy. When a vehicle is insured the insurance policy is notified to the Motor Insurance Database (MID). The information collated by MID is incorporated into the website askMID which was developed to allow victims of road traffic accidents to trace an insurer quickly. As part of the RTA claims process the insurers agreed that if they were listed as the insurer for a particular vehicle on the database they would deal with the claim. Every driver of every vehicle on the road in the United Kingdom is required to have road traffic insurance. Where the driver is uninsured then the Motor Insurers Bureau will deal with the claim.

The European Communities (Rights Against Insurers) Regulation 2010 also allowed for claims proceeding to stage three of the claims process to be dealt with quickly. This provides that lawyers acting for claimants in an RTA case can sue the insurer directly[2]. At present this does not exist for employers' liability and public liability cases.

EXTENSION OF THE RTA SCHEME

Q1: Do you agree that the current RTA PI Scheme's financial limit of £10,000 should be extended? If not, please explain why.

[2] European Communities (Rights Against Insurers) Regulation 2010 s3 (1) and (2)

The RTA claims process must not be extended at this time to include RTA cases over £10,000. There are many ongoing problems, detailed below, that need rectification before extension is considered. There also needs to be a full review of the system once the problems have been remedied before it is extended further. In addition, cases over £10,000 in value involve additional complexity such as complicated claims for future care, past and future loss of earnings and pre-existing medical conditions which make the current scheme inappropriate for extension.

Complex cases

When the process was fixed for lower value RTA cases, APIL argued consistently for the process only to be developed to deal with cases up to a value of £2,500. We had serious concerns about more complex cases proceeding through the portal until the process was tested and proven. The MoJ rejected these arguments and made a policy decision to fix the process for cases up to £10,000. We still believe that given the way that the process was developed it will be difficult to extend the process to more complex cases, as every possible permutation of a claim will need to be addressed and costed for. There will need to be serious consideration of how to deal with complexities arising in these higher value cases before extension is contemplated.

The greater the value of the case, the more likely it is that complexities will arise, such as complicated special damages including claims for future care, the need for adaptations and rehabilitation. There is also a likelihood that there will be claimants suffering from pre-existing medical conditions that will need to be addressed. Complexity will arise in loss of earning claims for example loss of overtime, bonus opportunity, promotion prospects and career advancement may all need to be considered. Such losses will require expert evidence to discharge the burden of proof on the claimant to prove each element of their claim. The current process does not allow for witness statements, nor does it allow for the provision of oral expert evidence. The more complex the issues in a case, the more likely a judge is to decide

that the burden of proof is not satisfied if the evidence is not available. There is already a concern amongst the judiciary in RTA cases up to £10,000 that a medical report alone is not sufficient to enable a judge to determine quantum[3].

Ongoing problems with the current scheme

The RTA claims process is still very much in its infancy. Huge changes were brought about by the implementation of this new process and because of the timeframes imposed by the Ministry of Justice the problems have been many. Claimant and insurer representatives are still working collectively to make the portal reflect the rules. The first update at the end of March this year brought some improvements to the portal, but there are further changes planned to improve the portal and bring it further into line with the pre-action protocol and Civil Procedure Rules. We are currently expecting at least two further updates in the next 12 months to achieve this. Before the changes have been made and the process monitored post improvement, it is far too soon to be extending the process for RTA claims.

To provide a clear indication of the extent of the changes required, the second wave of IT changes (change request two) will deal with eleven further changes to the portal to bring it into line with the rules. This is in addition to the thirteen changes in request one. 'Release two' includes modifications to stage one payment of costs, the interim settlement pack, stage two settlement pack, child claims, and court proceedings pack. Despite these changes the portal will still not be user friendly. The portal is inflexible, solicitors are unable to transfer claims to another firm of solicitors when they cease acting for a claimant, and the portal does not allow for errors to be corrected. There have been occasions when the website has been 'down' and inaccessible to both parties. Practitioners are constantly suggesting ways of improving the portal to make it more user friendly; such change requests have not yet been actioned and will not be

[3] Solicitors Journal 6 June 2011, Hit the Road by District Judge Julie Exton

considered until all mandatory changes have been made. It is expected that these will not be completed until 2012.

The portal is managed by Portal Co. Portal Co consists of an independent chair and equal representation from the defendant and claimant side of the industry. The claimant representatives form Claimant Co. APIL sit on Portal Co and Claimant Co. The representatives on Portal Co are actively engaged in resolving the problems with the portal to ensure that it reflects the rules and that it becomes more user friendly.

The portal is currently funded by the insurers and managed on a daily basis by MIB Management Services (MMS). Claimant Co has raised concerns about this clearly conflicted role since early 2010. The MIB is carrying out this role at the behest of its members on a non-profit making basis. If the portal is to be extended to other areas of litigation, then we question whether the MoJ can impose something that the industry must pay for. Additionally it must not be assumed that the running cost of a portal of EL and PL claims will be the same as for RTA claims. The cost per claim is likely to increase substantially for EL and PL cases, as there are fewer claims being made in these areas of personal injury.

There is also the additional issue of ownership of the portal. Portal Co owns the intellectual property rights to the system, but CRIF, the IT company responsible for the IT development, owns the actual IT programme. If the portal is going to be extended then ownership is another issue that will need to be resolved. It may be that the only solution is to start again with a bespoke system.

Although claimants and insurers are equally represented on the board, the absence of contracts and clear governance arrangements must be addressed before the process is extended further, either horizontally into other areas of personal injury law or vertically, meaning more RTA cases will be started through the portal.

Q2: If your answer to Q1 is yes, should the limit be extended to (i) £25,000, (ii) £50,000 or (iii) some other figure (please state with reasons)?

For all the reasons given above, it is currently far too soon to be extending the process for RTA claims further. The current portal scheme was designed for straightforward whiplash injury RTA cases. These make up the majority of all personal injury claims. The insurer ought to be able to make a decision on liability quickly in most of these cases after speaking with their insured driver to confirm the accident circumstances. The quantum evidence in many of the lower value cases is a single medical report from a GP and a short schedule of losses and expenses. Cases above £10,000 will invariably require more than one medical report and involve complexities and variations that cannot be adequately dealt with through the current computerised procedure.

Q3: Do you consider that the fixed costs regime under the current RTA PI Scheme should remain the same if the limit was raised to £25,000, £50,000, or some other figure?

It would simply be unfair to retain the same fixed cost regime for the current RTA scheme for any extended scheme. The RTA claims process was developed with the costs being fixed according to the amount of work and level of fee earner involved for each element of the process. Time was also built in for supervision of more junior fee earners. If the process were to be extended it would simply not be representative of the process to bolt on a fixed amount. When the costs were fixed the MoJ agreed that the costs should be reviewed in line with guideline hourly rates, so that claimant lawyers were not left in the same position with the fixed costs under the claims process as they are with predictable costs, namely that they have not been reviewed or up-rated since commencement.

In addition to this it is essential that there is provision within any streamlined process for advice and advocacy from the Bar. Barristers provide an invaluable service to injured people. If the Bar is cut out of lower level claims junior barristers will not be given the opportunity to advise on lower value cases they will not then develop their expertise for complex cases. This could leave a shortage of experienced counsel to advise on complex cases. It is a service that both claimants and defendants require and should not be eroded by government reforms.

Q4: If your answer to Q3 is no, should there be a different tariff of costs dependent on the value of claim? Please explain how this should operate.

The RTA claims process was developed by fixing the process for dealing with liability admitted lower value RTA cases. Once the process had been fixed it was costed from the bottom up; namely the amount of time taken to deal with each element of the fixed process was costed according to the appropriate level of fee earner needed to conduct the work. A blended hourly rate was then applied, taken from the guideline hourly rates for 2009. Additional time was then built in for supervision by an appropriate level of fee earner, and this was costed in the same way according to the applicable hourly rate. To ensure parity with lower and higher value claims it would be necessary to do the same exercise for cases over £10,000.

The level of fee earner would need to be re-evaluated to ensure that claims were being run by a lawyer with the appropriate level of expertise. Only once this was done could the process be accurately costed to ensure that lawyers were being fairly and properly remunerated for the amount of work involved.

Q5: What modifications, if any, do you consider would be necessary for the process to accommodate RTA PI claims valued up to £25,000, £50,000 or some other figure?

If the process were to be vertically extended, it would need to be reviewed in full, from the bottom up. Procedures previously put in place for lower value RTA claims will not be suitable for higher value ones. Cases involving more complex accidents will routinely require medical notes, x-rays and MRI scans to be considered by the expert. There will also need to be the opportunity for medical experts to comment on reports from other experts in more complex cases. Experts are now vulnerable to being sued[4] which could result in them adopting a more cautious approach when dealing with their evidence. They will request MRI scans to ensure that they have provided an accurate prognosis. Not only will steps need to be built into the process to deal with this, but there will also need to be modifications to the portal to ensure that the bandwith (rate of data transfer) is increased to allow larger documents to be uploaded to the portal as attachments. This is a current problem with the portal.

Rehabilitation will need to be factored in for more complex cases to ensure that injured people have access to the treatment they require. The current process makes it difficult to obtain rehabilitation. The need for early rehabilitation is something widely recognised by all parties, claimant, defendant and government. It is imperative that this is retained. The current Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents for allows for an interim payment of £1,000 against general damages where the claim is effectively stayed because of the need for additional medical evidence. The process and portal do not allow for interim payments to be requested for other things, such as rehabilitation and loss of earnings.

It would also be expected that there would be additional work involved around providing more detailed care and loss of earnings claims the more serious the injury involved. The additional work required in proving these elements of the claim would need to be factored into the process and then costed. The higher the value the case

[4] Jones v Kaney 2011 UKSC 13

the more difficult it is to set out the standard issues and steps to be taken in an 'average' RTA case over £10,000, because the issues vary so much.

The process was fixed so the amount of work was certain and there was less scope for defendants to challenge claimants at every stage of their claim. The claims process was developed in an attempt to drive the right behaviours of both claimant and defendant representatives.

EXTENSION TO EMPLOYERS AND PUBLIC LIABILITY CLAIMS

Q6: Do you agree that a variation of the RTA PI Scheme should be introduced for employers' and public liability personal injury claims? If not, please explain why.

Employers' liability

It is clear from the wording of paragraph 74 of the consultation document that the reference to employer's liability personal injury claims is intended to refer both to accidents at work and also industrial disease claims.

When considering whether to develop a streamlined process for any additional category of claim it is necessary to consider the breadth of that category and the types of claims that will fall within it.

Accidents at work

The current Civil Procedure Rules provide a definition at CPR 45.20 of an accident at work:

> "The dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment"

The setting where an accident at work happens is extremely varied. They can occur in an office, factory, hospital, farm, offshore, overseas, on an employer's own premises, on other people's premises, including domestic premises or a construction site, to give some examples.

The types or mechanics of such accidents are also extremely varied. They can be falls, trips or slips, a falling object, injury using the wrong equipment, injury using defective equipment, injury lifting something or lifting a person, a failure to supply any or the correct personal protective equipment, exposure to chemicals, explosion, or injury arising from the use of lifting equipment. Again, this is merely a selection of the incredibly varied circumstances in which accidents at work can happen.

At the present time the pre-court proceedings conduct of employers' liability accident claims is governed by the Pre-Accident Protocol For Personal Injury Claims ("the PI PAP").

The PI PAP affords employers and their insurers up to nearly four months in which to investigate claims and provide a decision on liability. It is the experience of claimant lawyers that liability insurers routinely fail to comply with this time limit in accidents at work claims. While no hard statistical records are available the rate of compliance is significantly less in such claims as compared to road traffic claims, even before the introduction of the road traffic claims process in 2010.

In employers' liability accidents the circumstances of the accident can be complex. There are many detailed facts that can determine if there is any liability on the part of the employer. For instance, has the appropriate training being given to the claimant? What is the precise weight of the item the claimant was lifting? What was the precise position of the claimants' hands and arms when lifting the load in question?

Further, in a road traffic accident case it is almost always clear who the proposed defendant is or should be. This is not necessarily the case in an accident at work claim. For instance, there may be many employers or contractors or self-employed subcontractors on a construction site. Each of them owes duties of care not only to their own employees but also to other employees or workers on the construction site. Further, it is well established law that, for the purposes of health and safety, the definition of "employee" is much wider than simply who is on the payroll of an employer. Therefore, it can be necessary to submit claims to more than one potential defendant.

Industrial disease claims

At CPR 45.23 there is also a definition of an employers' liability disease claim:

> "The dispute is between an employee (or, if the employee is deceased, the employee's estate or dependents) and his employer (or person alleged to be liable for the employer's alleged breach of statutory or common-law duties of care); and the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory duty or common-law duties of care in the course of the employee's employment"

There are a great variety of different types of industrial disease claims. These include: asbestos-related diseases, asthma, vibration injuries, stress, bullying, harassment, dermatitis, work-related upper limb disorders, repetitive back injuries, and deafness.

The nature of some of these diseases such as asthma means that the length of time between exposure and onset of symptoms is usually short. Therefore, any claim being made is likely to be made against the claimant's current or most recent employer. However, the nature of other diseases, including asbestos-related diseases, noise

induced hearing loss and vibration related injuries is that there can be a delay of many years (up to 40 plus years in asbestos cases) between the relevant exposure and the onset of symptoms caused by that exposure. It is most typical in those categories of cases for the claim to be made against one or more previous employers from some years ago.

At the present time the conduct of employers' liability disease claims is governed by the Pre-Action Protocol For Disease And Illness Claims ("the D&I PAP").

The D&I PAP again affords defendants and their insurers with nearly four months to provide a decision on liability. With the exception of claims on behalf of people with mesothelioma, particularly those that are still alive but with a short life expectancy, liability insurers are even slower in disease claims to provide a substantive response to the claim.

In disease cases even where a defendant or insurer admits a breach of duty it is commonplace for causation to be disputed. For instance, in an asthma case, an employer or its insurer may admit that they have wrongly exposed an employee to potentially harmful dust of fumes. However, they may dispute whether that dust or those fumes had any effect on the claimant and dispute whether the asthma that they suffer from is occupational or simply constitutional. Similar arguments can be raised in every disease case.

Further, because of the nature of disease cases and the exposure alleged by claimants, it is commonplace for claims to be made against a number of employers. In addition to arguments as to whether each or any employer was in breach of its duty to the claimant, and whether the exposure in question caused any harm to the claimant, there can also be arguments as to the apportionment or share of responsibility as between different employers.

Tracing an insurer

Although there is a statutory obligation for every employer to have insurance there is at present no database that contains all details of all employers' employment liability insurance. An employer's liability tracing office (ELTO) has been set up by the insurance industry. Membership of the ELTO is not compulsory. Further, the ELTO database will contain only new and renewed insurance policies from April 2011. It will not provide a database of EL insurance before April 2011.

In longtail disease cases in particular, where the employer itself may no longer be trading, it can be necessary to trace the relevant insurer. The ELTO is intended to replace the previous voluntary Employer's Liability Code Of Practice (ELCOP) tracing service. The most recent statistics for the ELCOP show that the success in tracing is only 31% for pre-1972, 49% for 1972-1999 and 48% even for post-1999.

An essential feature of the current RTA process is the ability to directly contact the relevant insurer. There is nothing akin to the askMID search for EL claims. The askMID search was a fundamental building block for the RTA process; ensuring that the Claim Notification Form (CNF) could be sent directly to the applicable insurer and therefore allowing for prompt responses on liability within 15 working days. That is not possible in either employer's liability accident claims or employer's liability industrial disease claims. If a fully comprehensive and compulsory database is brought into being in the future than that prerequisite may then be available for accident cases. However, if such a database is only prospective and only providing details of current employer's liability insurance, the necessary information will not be available for disease cases.

APIL has always argued for a compulsory database of insurance information established by statute, backed by a fund of last resort for where an insurer cannot be traced. Without a fund of last resort, all the workers who have been failed by the tracing system will be left without any compensation. If an effective EL insurance

database search facility akin to askMID is not offered then one of the core objectives of a streamlined process, namely prompt responses on liability, will not be achieved.

Public liability

Public liability claims are wide ranging. There is no definition in the CPR for PL cases. Essentially they are all cases that do not fit within the definition of RTA, EL accident or disease and clinical negligence. Not only do they include slips and trips and occupiers' liability claims, but any other claims for personal injury where the injury is suffered by a member of the public as a result of the defendant's negligence. Examples include cases relating to child abuse, environmental disease claims, sporting injuries, accidents in schools, food poisoning, accidents abroad, sports and leisure accidents, accidents involving animals and failed beauty treatments).

Given the wide range of claims that fall within this definition, a one size fits all approach will not be appropriate and the process will need to be mapped out for different types of claim.

Slips and trips

Identifying a defendant

These are probably the most common type of public liability claim. Identifying defendants in these cases is not always straightforward. The defect in the pavement, road or elsewhere may have been caused by a utility company, or be the responsibility of a private land owner, as opposed to the statutory highway authority. Currently our members tell us that defendants are more likely to routinely fail to disclose documents in support of their position, particularly where this relates to the statutory defence under the Highways Act 1980. Consequently it is difficult for the claimant's solicitor to accurately risk assess these cases to ascertain whether there is merit in pursuing them.

Responding on liability

It is of course for the claimant to prove his claim. As with employers' liability cases, there is a difficulty with response times if the defendant is allowed substantially more than the 15 days stipulated under the RTA claims process, and if the claimant is not allowed to further his claim during that period. For example there is the potential for public authorities to repair the defect and for witness evidence to disappear. If the current rules of the RTA claims process are to be applied, the claimant's solicitor would need to notify the claim immediately he is instructed and then wait for the defendant's response on liability and take no further action. These rules would in our submission have to be changed. Otherwise the claimant could be entirely dependent on the defendant preserving and producing documents to prove the claimant's claim; our members' experience shows that such records cannot be relied upon as being as detailed as they need to be in order for the claimant to do so to the satisfaction of the court. For example they will often not record the exact location of a defect or the date of the repair. Evidence currently gathered by claimants usually includes photographs of the defect which show its extent and context. Such evidence simply will not be available to the court if the defect is repaired before a claimant is allowed to investigate his case. This will irreparably damage a claimant's ability to prove his claim.

Child abuse cases

Starting a claim

At the time of writing public funding is still available for some child abuse cases. A full investigation of funding options is necessary in all child abuse cases to ensure that the appropriate advice is being given to the client. This must happen before a claim is intimated.

Generally child abuse cases may concern abuse by an individual (brought in trespass to the person – i.e. assault, battery and false imprisonment), a claim for vicarious liability against the abuser's employers if that individual was acting in a way that can

be said to be closely connected to his employment, and/or a claim in negligence against the abuser and his employers. Claims may also be brought against social services for either negligently caring for a looked after child, or failing to remove a child into local authority care from an abusive family situation. Human Rights Act issues may arise, and a breach of statutory duty may be pleaded, if (for example) the conduct complained of gives rise to a claim under section 3 of the Protection from Harassment Act 1997.

All child abuse cases need full investigation before a claim can be assessed as having reasonable prospects of success, and in particular to identify the potentially culpable defendant(s). Whilst identifying the abuser may be straight forward (especially if there has been a criminal prosecution), determining the correct institutional defendant (who may be insured and is therefore a 'safer bet' to sue) often cannot be ascertained without a detailed consideration of the evidence – for example, to ascertain whether the circumstances of the abuse give rise to a claim in vicarious liability. Acting for young children or vulnerable adults (protected persons) can be particularly challenging for solicitors in identifying the abuser and the precise details of the abuse alleged, and of course this client group features strongly in cases of this type. For cases in negligence against social services, access to the social services records will almost certainly be required in order to establish Bolam negligence against a local authority (just as in clinical negligence claims often detailed analysis of the medical records is needed to establish a causative breach).

Many defendants in abuse claims are uninsured. Even if abusers have some form of public liability insurance, which is rare in itself, they are very unlikely to benefit from it because as a matter of public policy one cannot insure oneself against a deliberate criminal act. In any event, abusers generally will have been prosecuted for their crimes and are often in prison at the time when the claim against them is made. If they had a livelihood at all, they will have lost it by the time of the compensation claim, and cannot afford representation and will not have an insurer to represent them. We

question how unrepresented and uninsured defendants will be able to access the portal and defend their claim.

Tracing a defendant's insurer

Unlike RTA claims there is nothing for PL claims akin to askMID to trace a relevant insurance policy if there is one. Defendants may be individuals, employers, foster parents, those operating children's homes, schools, charitable or religious organisations; they may be a social services department which placed children in care, or failed to protect children from being abused at home. In such circumstances defendants will need to be contacted and insurance details requested and we fail to see how this can work through an electronic portal.

Limitation

For a claim to continue in the streamlined claims process envisaged, liability will be admitted. However in child abuse claims there are often other issues of contention between the parties even where there is a primary admission on liability, and limitation is one of them. Limitation issues are common in historical cases and defendants often argue that a claimant is out of time. We would suggest that it would be extremely difficult to resolve such issues within a portal environment.

Evidence

There can often be lengthy legal arguments about the admissibility of evidence in these cases too. Such evidence may be needed at the outset to properly frame the claimant's allegations to the defendant, and enable the parties to consider liability in the first place. Even if a claimant is no longer concerned in obtaining evidence on liability because of an admission which keeps the case within the claims process, documents may be required to assist with issues of causation. Defendants often seek to argue to restrict the amount of evidence that is admissible by a claimant in a given case. In claims against public authorities such as social services departments the

defendant often claims public interest immunity to limit the amount of evidence that is discloseable to the claimant. Access to family court proceedings files is heavily restricted. Disclosure of documents generally is difficult in these cases and currently often an application for pre-action or specific disclosure has to be made to ensure that the claimant has the relevant documents available. Again such issues will be difficult to address in a streamlined environment.

Victims of child abuse are often inhibited in the disclosure they give to their own lawyers about the extent and severity of the abuse they suffered. Claimant's solicitors specialising in this area often describe an ongoing process of disclosure from their clients, and as such it is difficult at the outset of a case to put all the allegations relied upon to a defendant, as would be required within a streamlined claims process which relies on early notification of the totality of the claimant's claim.

If all these issues were resolved and a new streamlined processes developed for EL and PL claims, the additional lessons that can be learned from the RTA claims process must also be addressed; see 'Background to the claims process section' annex A.

Occupiers' liability

Our members report that there are very often difficulties tracing insurers in these cases. Defendants often do not have appropriate insurance (which is not compulsory). There may also be difficulty in tracing the owner of a property or land and determining who is at fault for the accident on private property. The question in many of these cases is "who was the occupier?" – for example, it maybe the owner, or landlord, or tenant, or maybe a contractor doing work at the property. Again, complications such as those outlined above arise in occupiers' liability claims which will not lend themselves to a streamlined process.

Other considerations

The complexities and difficulties with employers' liability and public liability cases identified above make it difficult to see how such claims could be run through a simplified process similar to the RTA process. If such a process could be devised we anticipate that of the small number of cases as compared with the RTA cases, very few would remain in such a process, because of issues arising over liability, causation, apportionment of liability and evidence. The effort and costs of setting up and running a process EL or PL cases is likely to provide little benefit or cost saving and the costs would be disproportionate to any achievable practical benefit.

A variation of the RTA claims process for EL or PL cases would only be possible if the foundations highlighted above are put in place and the issues identified during the development and implementation of the RTA claims process are addressed first. Development of such a process must take into account the following steps:

1. Setting of the foundations including the need for compulsory insurance, a database akin to askMID, and a direct right of action against the insurer;
2. Mapping out of a process;
3. Development of the rules to reflect the process;
4. Building of the IT solution ;
5. Testing of the IT system;
6. A pilot of the process.

APIL has supported fixed costs where there is a fixed and predictable process. A scheme where liability is admitted early and an injured person's case is dealt with efficiently must be in their interests. Any fixed costs regime in our view must have clear exit points in order to drive behaviours. It is equally important that the Bar is not excluded from the process as barristers provide essential advice and advocacy in EL and PL claims.

That said, the RTA claims process and portal cannot simply be replicated for employers' and/or public liability cases. As detailed in the background section of this response[5], when the process was developed for RTA claims each element of the process for dealing with those types of claims was considered, for example taking instructions, considering funding options, conducting checks (money laundering, askMID, conflict, fraud), writing to the client, intimating a claim etc. If a process with similar objectives, namely to fix the process and therefore trying to drive the correct behaviour on the part of both claimant and defendant representatives, was to be developed a separate process would need to be developed for EL cases and then a separate process for PL cases taking into consideration the lessons learned from the RTA process.

The RTA process was delivered under too many time restrictions, meaning that the appropriate infrastructure was not put in place before the scheme was finalised. The process would need to be fixed first followed by the costs, the rules written and the necessary business infrastructure and governance agreed.

A one size fits all approach would not work for EL and PL cases. Separate processes would need to be developed for each. We therefore question whether developing a streamlined process and portal for EL and PL claims is proportionate. The current RTA PI scheme is designed to deal with straightforward road traffic claims where liability is admitted quickly. The circumstances of the accident in a road traffic claim can almost always be simply described and understood. The admission of liability required for an RTA case to stay within the RTA PI scheme is one that admits that an injury has been sustained by the claimant, albeit that the nature and extent of the injury has yet to be determined and described in a medico-legal report. Features such as these coupled with the volume of RTA cases make the process possible. As at 31 May 2011, 696,355 cases have been commenced through the portal. EL and PL cases have nowhere near

[5] Annex A

the same volume. The number of employers liability claims notified to the Compensation Recovery Unit for 2010/2011 was 81,470 for PL 94,872. This compares to 790,999 motor claims for the same period.

The RTA scheme is currently paid for by the insurers who essentially pay a levy to the MIB for every claim submitted through the portal. The numbers of RTA claims are far greater than EL, PL and clinical negligence cases, therefore we have to question what the actual cost per claim will be for those put through a portal if this scheme is extended and who will be responsible for the cost of that.

Q7: If your answer to Q6 is yes, should the limit for that scheme be set at (i) £10,000, (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reasons)?

If a scheme for EL and PL cases is developed it should not be set any higher than that initially adopted for the RTA claims process. Cases above £10,000 will invariably require more than one medical report and involve complexities and variations that cannot be adequately dealt with through a computerised procedure.

Q8: What modifications, if any, do you consider would be necessary for the process to accommodate employers' and public liability claims?

The RTA claims process and portal cannot and must not be replicated for employers' and public liability cases. If a scheme is to be developed for these cases we must start from scratch with a bespoke scheme and bespoke portal. Even within categories of case ("EL" and "PL") we have illustrated above that a one size fits all approach cannot be adopted; tripping claims would need a completely different model to child abuse claims for example.

As detailed in the background section of this response[6], when the process was developed for RTA claims each element of the process for dealing with those types of claim was considered. The same would need to be done here. We must also learn from the mistakes with the RTA scheme before extension is contemplated.

EXTENSION TO CLINICAL NEGLIGENCE CLAIMS

Q9: Do you agree that a variation of the RTA PI scheme should be introduced for lower value clinical negligence claims? If not, please explain why.

There is merit in exploring a streamlined process for clinical negligence cases. Our paper "Improving the process for dealing with clinical negligence claims" (November 2010) presented to the MoJ last year, set out such a suggestion. We have already agreed to discuss the merits of such a scheme for claims in England which fall within the scope of the Clinical Negligence Scheme for Trusts. Such a scheme could provide access to compensation for legitimate claimants who would not otherwise have brought claims. It also has the potential to speed up settlements and reduce legal costs.

There is currently limited access to justice for lower value clinical negligence cases, as the Legal Services Commission funding criteria denies funding to claims where the value of damages is less than £10,000. The result is that those with meritorious but lower value claims are denied access to justice as they are deemed uneconomical to run.

We believe that such a scheme should be limited to liability admitted cases, where injuries have resolved in a relatively short period of time. It is also important that if such a scheme is developed by the NHSLA with input from other key stakeholders that

[6] Annex A

there is a fair governance structure, much the same way as that which the claimant group is trying to achieve through Portal Co.

Q10: If your answer to Q9 is yes, should the limit for the new scheme be set at (i) £10,000, (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reasons)?

A streamlined scheme for clinical negligence cases should be defined by the time it takes the individual to recover from the injury and not by reference to value. This will ensure that the more complex cases are not subject to such a scheme.

Q11: What modifications, if any, do you consider would be necessary to the process to accommodate clinical negligence claims?

The RTA claims process and portal cannot simply be replicated for clinical negligence cases. The NHSLA in its proposal has started from scratch, considering the key elements of clinical negligence claims and looking at ways to improve the process and time for dealing with such claims. Whilst APIL does not agree with the process mapped out by the NHSLA in its entirety, there is the opportunity to explore a process suitable for clinical negligence claims. Adopting the RTA scheme or portal is not an option.

FIXED COSTS

Q12: Do you agree that a system of fixed recoverable costs should be implemented, similar to that proposed by Lord Justice Jackson in his *Review of Civil Litigation Costs: Final Report* for all fast track personal injury claims that are not covered by any extension of the RTA PI process? If not, please explain why.

Q13: Do you consider that a system of fixed recoverable costs could be applied to other fast track claims? If not, please explain why?

Q14: If your answer to Q13 is yes, to which other claims should the system apply, and why?

Q15: Do you agree that for all other fast track claims there should be a limit to the pre-trial costs that may be recovered? Please give reasons.

We do not believe that a fixed cost matrix is the solution to managing costs in the fast track; such steps will simply prevent claimants from being able to successfully bring difficult but meritorious cases. Where the costs are fixed but the process is not refined, the only cost savings are those that are driven by the claimant lawyers in an attempt to remain profitable. Without ensuring that fixed costs are linked to the process the system is open to defendant abuse. We believe that the incentive on the defendant to narrow the issues in the case is lost where claimant costs are fixed. Compliance with the protocol is already a problem; however, if fixed costs were introduced there would be less of an incentive for defendant insurers to comply.

Our position remains that extending fixed costs throughout the fast track whilst the process remains unpredictable will cause the injured person to suffer. There already exists an inequality of arms between the corporate insurer and individual injured person. This will only deepen if fixed costs are extended throughout the fast track. Insurers are already able to choose to undertake an unlimited amount of work to defend a claim on a point of principle. There can be genuine cases where there are exceptional difficulties on liability, and the case is of modest value, but if the issues arise and the claimant is successful in arguing their position then the costs have to be paid for. By fixing costs a claimant representative would simply not get paid for doing such work, no matter how necessary or fair it may be. This will cause access to justice issues where difficult cases are simply not run because of the cost constraints.

Fixing costs does not fix the amount of work involved. All litigation is different; no one case is the same. Cases can involve disputes on liability, causation and quantum. They can also involve complex special damages, foreign speaking clients, multiple defendants, children and patients, multiple experts, multiple injuries, multiple witnesses and inquests. These issues aside, a case must be proved and this involves time and cost.

The amount of work involved also often depends on matters put at issue by the defendant. There can be complex liability arguments in all types of case including the lower value claims. If a defendant makes an issue of liability and he is proven wrong then the cost of the claimant lawyer in dealing with that issue must be met by them.

APIL's concern is that if costs are fixed and the process is uncertain and unpredictable; there is a danger that the injured person will suffer as access to justice could be compromised. If a solicitor is restricted in the amount of work that he can do in order to prove the claimant's case a claimant will not necessarily get the rehabilitation or compensation he is entitled to. There is a danger with fixing costs and not fixing the process that the commercial incentive for insurers to admit claims and narrow issues is lost.

There is a general view amongst defendants that it is the lower value personal injury claims that are not in their words 'value for money'. Discussions around costs always focus on those of the claimant. It must not be forgotten that defendants drive behaviours and the claims process was developed with this in mind. Simply fixing the amount of costs for defendants too would not produce a level playing field. A more appropriate method of dealing with costs outside of a streamlined process would be for judicial cost management of cases, something akin to the pilot in the Mercantile and Construction courts, but suitably adapted for personal injury cases.

The relationship between the fixed cost matrix and claims process

The matrices appended to Lord Justice Jackson's final report[7] were developed in isolation from the claims process. Bolting a fixed cost matrix on top of the claims process does not manage costs in the same way as the claims process seeks to do. The claims process manages and drives claimant and defendant behaviours, paying fixed costs in the fixed process where appropriate behaviours are conducted. Currently where the defendant acts unreasonably, for example by failing to respond to liability within a set time frame, they are penalised by coming out of the process and into hourly rates where a judge will determine the appropriate level of costs on conclusion of a case.

It is essential when considering reform that the bigger picture is examined. It is simply inappropriate to look at matters in isolation. There already exists the anomaly with RTA claims under £10,000 that where a case comes out of the claims process there is the potential for the case to be dealt with in the predictable cost regime until the case is issued. The approach taken when fixing predictable costs was a swings and roundabouts approach looking at a basket of cases. This approach is also inconsistent with that adopted for the claims process.

Fixing costs also needs to be considered in light of Jackson LJ's recommendations for cost management and cost budgeting[8]. By cost management we mean judicial consideration of detailed cost estimates prepared by the parties that then allows the judge to consider the cost of specific procedural steps. We would not agree with Jackson LJ that the cost capping practice direction should be amended to remove 'exceptional circumstances'[9]. We would agree with the comments of District Judge

[7] Review of Civil Litigation Costs: Final Report
[8] Ibid chapter 40 Costs management.
[9] Section 23A.1 of the Costs PD

Lethem and District Judge Middleton in their article for the Journal of Personal Injury Law[10] where they suggest that cost management should not equate to cost capping.

In our view cost management where the judiciary promotes effective case handling at proportionate cost fits more comfortably with the objectives of the claims process than simple fixed costs.

If cost management is to find support amongst the judiciary and thus be rolled out into all areas of civil litigation; then the need for fixed costs in the fast track becomes redundant.

The Jackson/Fenn matrices

APIL was provided with copies of the data from Professor Fenn as a stakeholder in the fixed costs negotiations. Our comments on this data are as follows.

Road traffic accident data

The data produced by Professor Fenn at the RTA discussions was accepted as a reasonable sample size for claims up to £10,000. APIL expressed at the time that the matrices being developed would be unrepresentative given the claims process reforms that were pending at that time.

Through the work led by the MoJ, the less complex RTAs which represent the majority of personal injury claims were hived off into the streamlined system which was costed with this in mind. The cases that fall outside of this process are therefore by their very nature, complex. They will involve cases where liability is in dispute and where there are complex arguments on causation.

We believe that the modelling work undertaken by Professor Fenn will have been substantially affected by these reforms and therefore the existing data sets are not a

[10] Journal of Personal Injury Law. Edition 2 June 2011

representative sample. It is probable that a high percentage of the cases included in the data set are liability admitted RTA claims with a value of £1,000 to £10,000. Pre issue data could include high volumes of cases settled under the predictable cost regime. We would argue that these cases do not give a true indication of the amount of work actually undertaken to successfully conclude a claim.

In addition to these concerns we are also sceptical about the amount of data for RTA claims valued between £10,000 and £25,000. Claims between £15,000 and £25,000 have only recently been included in an extended fast track[11] and accordingly there is a significant lack of costs data at this value. If the data set is unrepresentative then fixing costs throughout the fast track is simply unreasonable.

Employers' liability disease data

Our original concerns around the data produced for fixing costs for disease cases were that the defendant data obtained needed further analysis and interpretation before being applied to the matrix. Firstly the data set did not take into account apportionment between insurers. Many of these cases involve multiple defendants/insurers. The data provided would therefore only provide costs from one indemnifier. Additionally, the data included pleural plaques which are no longer compensatable following the decision in *Johnston v NEI International Combustion Ltd*[12]. To continue to include data from these cases will of course skew the figures.

Public liability data

The amount of data is limited to two providers, a defendant insurer and a defendant costs negotiator; we understand the claimant data collected from one firm was only used for comparison purposes. Additionally there was insufficient information on the nature of the cases included in the data set. Public liability (PL) claims include slips and trips; cases involving animals; product liability claims; holiday/travel claims; occupiers'

[11] 4 April 2009
[12] [2007] UKHL 39

liability, environmental disease claims and child abuse claims, amongst others. The breadth of this type of claim needs to be carefully considered when data is being collected. It was unknown from the data collected whether the insurer responsible for providing data had a general PL "book". In addition it was not clear from the data whether the cases captured included cases where liability for the accident had been shared between two defendants. Further there was the added complexity with this data that success fees in PL cases have not been fixed by industry agreements. The RTA data considered had allowed a deduction for success fees (which are fixed). For the data produced for PL claims it was not clear what percentage of the cost claimed amounted to the success fees, as these are not fixed and the data collected did not stipulate the level of success fee recovered. It would therefore be necessary to give this issue additional consideration if fixed costs are to be developed further.

MANDATORY PRE-ACTION DIRECTIONS

Q16: Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

Q17: If your answer to Q16 is yes, should mandatory pre-action directions apply to all claims with a value up to (i) £100,000 or (ii) some other figure (please state with reasons)?

Q18: Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not, please explain why.

Q19: If your answer to Q18 is yes, should a prescribed ADR process be specified? If so, what should that be?

Q20: Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If not, please explain why.

Q21: Do you consider that fixed recoverable costs should be (i) for different types of dispute or (ii) based on the monetary value of the claim? If not, how should this operate?

We do not agree that mandatory pre-action directions should be developed. There already exist pre-action protocols for dealing with personal injury, disease and clinical negligence cases. These protocols give directions to the parties on the way in which claims should be handled. Evidence from the report prepared by the University of Lincoln[13] suggests that defendant delay has an average cost six times higher than the average cost of other causes of delay, with the potential to significantly increase costs the longer the delay continues. It also states that in cases where there is defendant delay, such that settlement cannot be achieved and court action is taken to resolve a case, claimant solicitors win at court in 90 per cent or higher of these cases. This indicates that defendant delay is a factor in increased court fees and the time taken to resolve cases. All these costs could be saved by defendants admitting liability early and agreeing to pay reasonable damages. In cases where the defendants believe that they are not negligent, they should narrow the issues early and if a party fails to assess the risk in the case accurately, then they are penalised in costs.

FAST TRACK

Q29: Do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why.

Q30: If your answer to Q29 is yes, what should the new threshold be? Please give your reasons.

We do not agree that the fast track financial threshold should be increased for personal injury claims. The Civil Procedure Rules 1998, following Lord Woolf's report

[13] *Excessive & Disproportionate Costs in Litigation, Research Report* – February 2011 Peysner and Flynn

"Access to Justice"[14], introduced three tracks for dealing with claims. They were devised to ensure that the appropriate level of judicial resource is allocated to a particular case. The fast track is designed for more straightforward legal cases where issues in a case can be tried in one day or less and where oral witness evidence is unlikely, this cannot be gauged solely by the level of claim.

The fast track financial threshold was only recently increased in 2009 to £25,000. Damages are not rising anywhere near the same rate as the previous increase in the fast track limit from £15,000 to £25,000. If the Government is minded to increase the threshold for civil litigation generally then we would argue that there is justification for personal injury to be an exception, as with the small claims limit, due to the complexities that arise in these cases.

There are many disease cases where the value is below the current fast track limit but which are routinely allocated to the multi-track because there are issues of limitation, the defendant requires their own medical evidence or there may be the need for one or two liability experts. Accident claims over £25,000 will routinely require more than one medical expert. There will be lay witness evidence to be heard and quantum evidence to be determined by the court. Such cases will inevitably take longer than one day for the court to determine.

COMPULSORY MEDIATION INFORMATION SESSIONS

Q39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

[14] *Access to Justice*, The Right Honourable the Lord Woolf, Master of the Rolls, Final Report to the Lord Chancellor on the civil justice system in England and Wales, July 1996

Q40: If your answer to Q39 is yes, please state what might be covered in these sessions, and how they might be delivered (for example by electronic means)?

Q41: Do you consider that there should be exemptions from the compulsory mediation information sessions?

Q42: If your answer to Q41 is yes, what should those exemptions be and why?

Mediation is one of a number of forms of alternative dispute resolution (ADR). ADR is already a routine part of handling of claims. ADR does not just include mediation, but includes negotiation and discussion with opponents throughout the life of the case in an attempt to define and narrow the issues involved. More formal 'round table' conferences, early neutral evaluation and arbitration are also included in this definition. Effective use of Part 36 is also a key tool for resolving issues within a case and achieving settlement. The cost penalties associated with a Part 36 offer help focus the minds of the receiving party effectively.

ADR is a more cost effective process that all skilled solicitors adopt in every case, allowing them the freedom to decide which method of resolving the issues within a case is most appropriate for their client. The object with ADR is to try to reduce the number of cases settled 'at the door of the court', which are wasteful both of costs and judicial time.

Whilst formal mediation conducted by trained mediators is an essential part of every personal injury practitioner's 'toolkit', it should not become compulsory. APIL has an ongoing commitment to ensuring claimant solicitors are aware of mediation and how it may be used to benefit injured people. It can however be expensive, and under no circumstances should it be forced upon unwilling parties by the courts.

The introduction of compulsory mediation information and assessment sessions is not in our view the means of achieving the routine consideration of alternative dispute resolution.

Information from the practical experience of our members conducting High Court claims is that there is support for Master Yoxall's standard directions[15] for alternative dispute resolution in clinical negligence cases. The directions are not onerous on the parties but do ensure that full consideration is given to settling a claim before the trial date. We have previously suggested to Lord Justice Jackson that these directions become standard in all High Court personal injury cases.

STRUCTURAL REFORMS

Q62: Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low? If not, please explain why.

Q63: If your answer to Q62 is yes, do you consider that the financial limit (other than personal injury claims) should be increased to (i) £100,000 or (ii) some other figure (please state with reasons)?

We welcome the Government's recognition that personal injury claims above £50,000 involve a level of complexity that makes them appropriate for hearing at High Court level.

Q67: Do you agree that where a High Court Judge has jurisdiction to sit as a Judge of the county court, the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor, should be removed? If not, please explain why.

[15] Annex B

Q68: Do you agree that a general provision enabling a High Court Judge to sit as a Judge of the county court as the requirement of business demands, should be introduced? If not, please explain why.

Given that every High Court judge has the jurisdiction to sit as a county court judge if necessary then we do not believe that this should require the added bureaucracy of authorisation by the Lord Chancellor.

Q69: Do you agree that a single county court should be established? If not, please explain why.

All county courts can already deal with any claim in tort. The suggestion therefore for a centralised processing model would in our view be simpler and are far more efficient than the current model. We would not object to a single designated court rather than multiple courts; providing that a claimant still has the right to have their claim heard in their local court.

ANNEX A

Background to the claims process

The RTA claims process was developed by fixing the process for dealing with liability admitted RTA cases. Once the process had been fixed it was costed from the bottom up: namely the average amount of time reasonably taken to deal with each element of the fixed process was costed according to the appropriate level of fee earner needed to conduct the work. The hourly rates for the appropriate level of fee earner was then averaged out and applied to the amount of work involved. The rates applicable at the time of the exercise were applied, namely the rates for 2009. Additional time was then built in for supervision by an appropriate level of fee earner, and this was costed in the same way according to the applicable hourly rate.

The claimant figures were then cross referenced by a full and detailed manual examination of 50 detailed bills of costs in RTA matters, where the general damages were under £10,000 and where liability was admitted or agreed on a contributory basis but damages could not be agreed, meaning that the matters were ultimately outside the provisions of CPR45 Section II. None of the cases examined proceeded to a final hearing and all litigation costs (the issuing of proceedings, attendance at court, with counsel and with the client in respect of the same) were discounted from the calculations. Bills were selected from large/medium sized solicitor firms which operated systemised processes but which did not record time generically. The claimant representatives' figures and those submitted by the defendant insurers were then mediated and the figures in CPR 45.29 were announced by the MoJ, including fixed success fees. In hindsight, to fix the costs at this stage was too premature. When the process was drafted and costed it was envisaged that a notification form, the level of detail of which would be akin to a letter of claim, would be submitted to insurers to intimate the claim. This developed into a lengthy claim notification form which was not fully costed.

Following this work the MoJ announced an implementation date of April 2010, which meant that the task of developing the IT portal and writing the protocol and the amendments and additions to the Civil Procedure Rules had to be run in tandem.

The tender for the IT solution went to a company that already had a solution capable of being adapted for the RTA claims process within a short period. In hindsight a bespoke IT solution would have been more sensible and delivered a system that would not have required substantial changes within the first two years post implementation. All changes to the IT solution to reflect the CPR will incur additional costs.

Post implementation, a behavioural committee has been set up to police claimant and defendant practices. The committee can only issue guidance and lacks teeth, as decisions of the committee are not binding.

Lessons have been learned on both sides of the industry about the difficulties in doing this work in this manner.

ANNEX B

Master Yoxall's standard directions for clinical negligence High Court cases.

Alternative Dispute Resolution

The parties shall by ****** [*a date usually about 3 months before the trial window opens*] consider whether the case is capable of resolution by ADR (including mediation or a roundtable meeting of the parties' representatives). If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the trial judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

Such means of ADR as shall be adopted shall be concluded not less than 35 days prior to the trial.

The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the Court a Witness Statement, without prejudice save as to costs, giving the reasons upon which they rely for saying that the case was unsuitable. The Witness Statement shall not be disclosed to the trial Judge until the conclusion of the case.

[*'ADR' includes 'round table' conferences, at which the parties attempt to define and narrow the issues in the case, including those to which expert evidence is directed; early neutral evaluation; mediation; and arbitration. The object is to try to reduce the number of cases settled 'at the door of the Court', which are wasteful both of costs and judicial time.*]