Civil Court Structure Review
Consultation on Interim Report

A response by the Association of Personal Injury Lawyers
February 2016

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25-year history of working to help injured people gain access to justice they need and deserve. We have around 3,400 members, committed to supporting the association's aims and 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer
APIL
3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
Tel: 0115 9435428; Fax: 0115 958 0885
e-mail: alice.warren@apil.org.uk

Introduction

APIL welcomes Lord Justice Briggs' review of the civil court structure. A new approach to the resolution of (in particular, small) claims is welcomed, to address the delays and backlogs within the current civil courts. Lord Justice Briggs should be applauded in his aim to introduce a civil court system which provides affordable access to justice for all citizens of England and Wales. It is extremely important, however, that the online court is properly resourced, built and piloted before being rolled out nationwide, and that "case officers" are appropriately trained and have the requisite experience to carry out their role properly. Time needs to be spent making the new process workable and accessible. Rushing this project through will have disastrous consequences, and will exacerbate current issues within the court system. It should be openly accepted that a move to an Online Court with limitations upon access to legal representation will result in a shift from the adversarial approach to an inquisitorial approach where the judiciary (including "case officers") will need specific training in their role change, and be provided with adequate resources (including legal resources), for example access to research assistants, as judges will no longer be able to rely on lawyer advocates. We suggest that to provide access to justice to citizens that the review should also encompass tribunals which dispense civil justice in England and Wales.

Executive Summary

- An online court must be properly resourced and piloted, and must be sufficiently robust for mass public use.
- It must be recognised that an online court with limitations upon access to legal representation will result in a shift from the adversarial approach to an inquisitorial approach, with the judiciary and case offices requiring specific training on this change.
- An online court must not become a barrier to accessing justice. An assistance system must be properly funded, and there must be support available for vulnerable people and those without access to the internet in their own home.
- APIL welcomes that Lord Justice Briggs recognises that personal injury claims are not suitable for the online court, largely due to the "uneven playing field" between the parties. Fixed costs have been recognised as working well in fast track personal injury claims, and there is already an online solution for these cases in the form of the online Claims Portal.
- An "opt in" system, whereby the claimant could choose whether to use the online court or county court, could work for small claims personal injury (i.e. personal injury claims valued up to £1,000). Even if the claimant "opts in" to use the online court in a small claim, however, there must be provision for the claim to be transferred to the county court if there are elements of complexity, or issues with liability or causation.
- Case officers must be legally trained, knowledgeable and experienced, and there should be an opportunity for case officers to develop specialisms.
- The key to reviewing and improving civil courts is specialisation. Ticketing would allow judges with specialism in certain cases to hear those cases. With the help of digitalisation, even specialist courts could be established.
- We recommend that there should be a separate consultation on improving enforcement of judgments.

General comments

Before a nationwide roll-out of the online court, the system must be piloted to ensure that it is sufficiently robust for mass public use. Statistics indicate that members of the public may be reluctant to use an online system, and feedback from pilots would identify how to make the online court as user friendly as possible. Statistics from the ONS suggest that in 2015, the most common reason for using the internet to interact with public authorities or services was to obtain information from websites (33 per cent of adults), followed by submitting completed forms (30 per cent) and downloading official forms (24 per cent). It is evident that 44 per cent of the public did none of these things online with public authorities, and there is a risk that conducting a civil claim online could be similarly off putting.[1]

Further, the online process has to be properly resourced and developed so that any person on the street, in theory, could use it. This means a combination of IT helplines and face to face support for users. We query who is going to develop the IT system, and what enquiries the working group and Lord Justice Briggs have made to ensure that the system is properly developed and workable in practice.

As referred to in the report, support and assistance must be put in place for vulnerable users. While we welcome that Lord Justice Briggs has recognised the need to cater for Welsh speakers, there must also be consideration as to how an online court system would handle the application of the fact that increasingly in England and Wales, there are laws which apply only to England and laws which apply only to Wales.

The online court

1) Should the OC be a separate court with its own bespoke rules, or a branch of the County Court, governed by the CPR with appropriate amendments?

We agree with Lord Justice Briggs that in order to achieve the aim of creating a court that litigants are able to use without the need for lawyer representation, the OC must be a separate entity. Trying to fit a system designed to work without lawyers into a system that very much requires the use of lawyers – involving Civil Procedure Rules which are not designed for use by the lay public – would simply not work.

If there is a separate court with separate rules, however, there must be a well-thought out process of transferring claims from the online court to the county court, should the need arise. Entry in to the online court system needs to be carefully controlled for cases where the defendant will inevitably be represented due to insurance arrangements – either by a legal professional, insurer claims handler or loss adjuster – such as in personal injury claims.

Care must be taken to draft transitional provisions, so that if a case begins in the online court, but is then deemed too complex and "drops out" into the county court (similar to what happens currently when a case falls out of, for example the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents or the Pre-action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) Claims) this can be done smoothly. If a case begins in the online court, but then moves across to the county court, there will be a disparity between the "online" forms already completed by the litigant in

[1] http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2015/stb-ia-2015.html

person and more professionally completed forms and evidence provided by the defendant's legal representatives. This must be addressed and resolved so that the litigant is not disadvantaged, particularly if the system in the online court is inquisitorial rather than adversarial.

2) What types of claims should be included within, or be excluded from, the OC, assuming that £25,000 is used as the planned steady state value ceiling?

Value Limits

The online court will be most suited to small claims, so the upper value threshold should mirror this. Typical small claims, such as a claim for faulty goods simply requiring a description of how the goods are faulty, will work well in an online system. In fact, there are examples of online dispute resolution in these cases already operating well for companies such as eBay and Amazon. In any event, the IT system used must be properly resourced and robust enough to deal with claims which may not be altogether straight forward. The bottom line as to whether a case should be heard within the Online Court, should be complexity, and not value.

Types of case

We agree with Lord Justice Briggs' decision that personal injury claims outside of the small claims court should not be included within the online court. We are aware of the Government's proposals to remove the right to claim general damages for some claims, and raise the small claims limit for personal injury cases to £5,000. This paper is not the appropriate vehicle to raise arguments about the small claims limit, and APIL will be responding separately to the forthcoming consultation on this. References to "small claims" in this paper refer to the £1,000 limit for personal injury related actions. Even lower value personal injury claims can be very complex, for example there may be pre-existing conditions which have been exacerbated by the new injury, or there may be contributory negligence. An injury claim for £5,000 is often no less complex than a claim for £10-25,000. The Judicial Studies Board indicates that general damages for a severely dislocated thumb are calculated at £3,000 - £5,150, and there may be additional damages for lost income, medical expenses and travel expenses – all of which need to be evidenced. The injured person will need to obtain medical evidence, and file a schedule of financial losses in order to claim. Many people would simply not know where to begin and would risk being under-compensated if left to claim via an online dispute system that would be primarily geared up for "faulty goods" claims.

We welcome that the report acknowledges that personal injury claimants face an "uneven playing field" as they will be up against a large insurance company with experience of handling claims. Insurers are likely to take advantage of an unrepresented person and make them a pre-medical offer to settle, at a time when in many cases both the extent of the effects of the injury and the financial consequences of the accident would not be clear. Research conducted by APIL in 2012 indicated that in road traffic accident claims, the final settlement for the claimant was, on average, £47,643 - more than ten times the original offer made by the insurer before a solicitor was involved.[2] Some injured people may accept this

[2] http://www.apil.org.uk/files/campaigns/the-whiplash-report-2012.pdf

initial settlement as an easy way out, rather than take on a daunting online process alone. APIL's 2012 research also found that 70 per cent of people would not want to pursue a whiplash claim without a solicitor[3] Personal injury claims are simply not suitable for the system being proposed.

Further, we question the need for a system which removes lawyers from the personal injury claims process when it has been acknowledged by Lord Justice Jackson in his recent speech "Fixed costs – the time has come" that fixed costs in the fast track for personal injury cases have led to the resolution of hundreds of thousands of personal injury cases per year at a proportionate cost[4]. With the above evidence indicating that lawyers play a vital role in personal injury cases, and acknowledgement that this can be achieved at a proportionate cost, it is clear that personal injury claims are not appropriate for the online court. In addition, these cases already have their own web based solution in the form of the portal.

Noise Induced Hearing Loss claims

The report, at paragraph 6.48, states that a large number of industrial deafness cases fall within the "£5,000 or less" bracket and so should be handled in the online court where liability is admitted, as these cases incur the most disproportionate costs. The Civil Justice Council has already asked a working group to examine the possibility of introducing a fixed costs process for Noise Induced Hearing Loss claims, which will allow these cases to be settled in a proportionate manner. This process will cater for the complex nature of these claims, which are not suited to an online resolution procedure. We suggest, in any event, that most noise induced hearing loss cases are not liability admitted, and when they are not, they become much more complex and much more evidence is required. There may be complicating issues of limitation, dates of guilty knowledge, causation, apportionment between defendants, and quantum in dispute (including de minimis arguments, hearing aid issues (including cost and the extent to which their need is noise-related) and the treatment of tinnitus); these issues are routinely raised in deafness cases. It must also be recognised that hearing loss is a debilitating condition, causing communication problems and social isolation. These claims illustrate that "value" in crude terms should not be the arbiter of whether a case merits inclusion in a legal system without lawyers – complexity, and the importance of the case to the claimant must be primary considerations.

Small claims

We would suggest that the online court should only encompass small claims personal injury cases where the claimant has "opted in" to the process. Any case that has been "opted in" by the claimant should then be removed to the fast track where there are elements of complexity, if liability or causation remains in dispute, or where one party fails to co-operate. Part 26 CPR already provides for small claims personal injury cases to be transferred to the fast track for various reasons, and we suggest that this framework could be adapted to be more "user friendly" in an online court setting. There needs to be careful thought to the rules that govern the transition between the county court and the online court.

We are concerned that Briggs LJ has suggested that claimants can use the OC for PI claims up to the general OC limit if they wish to do so. As above, we do not believe that fast track

[3] http://www.apil.org.uk/files/campaigns/the-whiplash-report-2012.pdf
[4] https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf

personal injury claims are suitable for the online court, or that there is a need for these cases to be included within the online court as a costs saving measure. There would also be a risk of unintended consequences, with defendants refusing to pay costs outside of the online court, maintaining that for a particular dispute, the claimant should have used the online court.

The role of case officers in the online court

The online court needs knowledgeable and legally trained case officers to operate efficiently. Case officers will be integral to the system, as lay people will up-load their information and then obtain advice as to how to proceed from their case officer. We assume that the case officer will talk the person through the process, including the information they need to obtain to be able to prove their case. It would be extremely helpful, therefore, if case officers were specialised in different areas of the law. We agree that specialisation may not be possible immediately, but should be an aim for the future. As part of a wider digitalisation of the court process, an online court will help to remove geographical boundaries and foster specialism.

We envisage that a further role for case officers will be to decide whether or not a case is too complex to be dealt with in the online court (as above, we recommend that the main factor as to whether a case is suitable should be the complexity, and not the value, of the case at hand). Case officers must, therefore, have enough experience and training to make the judgment call as to whether a case is too complex to be dealt with in the online court. Further detail as to how we envisage case officers should be trained and prepared for their role within the online court and county courts is detailed at in answer to question 9.

3) How much and what types of assistance with IT will court users require?

The report ties in the question of whether the court should be compulsory with the need to provide an Assisted Digital Service. This must be the correct approach, and we suggest that whilst a long term aim of the court service may be to make the online court compulsory (for the reasons set out in the report, namely to avoid a well-resourced party taking advantage of a litigant in person by insisting the case goes through the county court rather than the online court), efforts and resources must first be put in place to ensure that the system is workable and accessible by all, and that the right support is in place to help those in need. In small claims personal injury cases (being the only type of personal injury case that the online court should apply to), we suggest that the online court should not be compulsory, but that the claimant should always have the choice as to whether to pursue their claim in the county court, or through the online court, and the defendant – who, as the report acknowledges, will be well-resourced and experienced in dealing with claims – will have to accept the choice made by the claimant.

A main concern is that an online court presupposes that everyone who requires access to the court will have access to the internet, and in reality this is not currently the case.

In 2015, 14 per cent of households in Great Britain had no internet access (this figure was 22 per cent in Wales). Lowest usage is for those aged 65 and over, with only 45 per cent of that age group using the internet. Further, even where people have internet access, this may be slow or inadequate for them to complete the online court process. In December 2014, OFCOM reported that three per cent of premises in the UK still receive internet speeds of

less than 2Mbps, while 15 per cent have speeds no higher than 10 Mbps.[5] It should also be noted that a significant proportion of the population do not have a smartphone – according to the ONS, in the first quarter of 2015, a third of households did not have a smartphone.[6] These statistics highlight issues in relation to Article 6 European Convention on Human Rights (the right to a fair trial) and Art 47 Charter of Fundamental Rights of the European Union (the right to an effective remedy and to a fair trial).

The online court should not become a barrier to accessing justice. An assistance system must be properly funded, and there must be support available for vulnerable people and those without access to the internet in their own home. If someone does not have access to the internet in their home, there need to be facilities and support available in an alternative location, perhaps at the local library or citizens' advice bureau, and at that access point, there should be someone available who understands how the system works, to guide the user through the process. We would however, be concerned with data protection issues where members of the public are using shared technology in public spaces to provide perhaps sensitive information relating to their court case. This must be addressed. We agree that there should be a telephone helpline particularly for vulnerable people, such as the elderly or those for whom English (or Welsh) is not their first language. We also suggest there should remain an alternative way to proceed with a small claim – through a physical court, with face to face contact, to ensure that no one is excluded from obtaining access to justice through lack of individual resource or geographical limitations.

While there is recognition from Lord Justice Briggs that Welsh language must be considered ("consideration will also need to be given to the question how to integrate the Welsh language into digitised systems, both in the OC and elsewhere"), there is no acknowledgement that, increasingly, there are distinct laws affecting England and distinct laws affecting Wales. How will the online court cater for this?

4) How much if at all should one side's costs be paid by the other side? Should the generally limited scope for costs shifting be subject to a conduct exception?

In an online system designed to be accessible without the need for lawyers, costs shifting in respect of legal fees should not be required. There should be some limited costs shifting in respect of court fees and other expenses, but as a deterrent of bad behaviour, there should be a system whereby – for example – penalty interest is paid on damages and other expenses in the event of a lack of cooperation or delays.

5) Would any other route of appeal than to a Circuit Judge be appropriate?

It is unclear from the report, but we assume that cases will be heard afresh, as would be the case with an appeal from the small claims court. If this is the case, the appeal route should mirror that of the small claims court, from a District Judge to a Circuit Judge.

6) Open Justice

[5] http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2015/stb-ia-2015.html
[6] http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/UK_0.pdf

The common law justice system requires precedents, so decisions from the online court will need to be made public. We suggest that the case can remain confidential up until the mediation/conciliation stage. If the case does not settle at mediation and goes to trial, the details of the case can then be made public with the judgment available online.

Case Officers

7) Should conciliation offered by Case Officers be based on simple telephone mediation, or written early neutral evaluation, or a mixture of the two?

Conciliation should be a mixture of mediation and, provided that the Case Officers are suitably experienced, qualified and trained (see below), early neutral evaluation.

8) How can a practicable but flexible line be drawn between routine case management, suitable for case officers, and the more discretionary type calling for judicial expertise and authority?

We welcome that case officers will not have authority to determine the litigants' substantive rights. Even dealing with routine "box work" such as sending standard directions will still ultimately affect the substantive rights of the litigant. It is vital, therefore, that case officers are appropriately qualified and experienced to carry out their role competently.

We agree with page 125 of the report that states that the line drawn will be a matter of sensible working practices. It would be very difficult to make a rule on the remit of the case officer's work and it will ultimately depend on the competence, experience and specialism of the case officer in question. The bottom line is that case officers must be capable of carrying out the role that is assigned to them in a competent manner. Their function is to reduce delays and free up judicial time, but this will not occur if they are either assigned the wrong tasks or not suitably qualified for the role at hand, which will lead to appeals.

9) What should be the specialisation, qualification, training and experience of Case Officers?

It appears that it has yet to be decided what the exact remit of the case officer's role will be. Ultimately, the case officer must have the required qualifications, experience and training to allow them to carry out their role competently. Once the case reaches stage two of the online court, the case officer must be suitably knowledgeable and trained to identify if the case in question is too complex for the online court and thus must be transferred to the county court.

Specialism will be key in ensuring that case officers are effective – both in the county court and also in the Online Court. We agree that while at the beginning it may be difficult to have specialist case officers; this should be something that the court services aspire to introduce. As case officers' work will largely be online, it will be relatively easy to create routes for specialisation, as they will not be tied to one geographical area. A case in one area can be dealt with by a specialist case officer at the other end of the country. As above, if a person using the online court needs help in a specific area, the case officer will have to guide them through the information they have got to give and what they will have to prove in order to

make their case, and this will require specialist knowledge in whichever area the dispute has arisen.

Another reason why case officers need to be properly trained is that we are concerned that by using more case officers rather than recruiting more District Judges, there will be a succession issue in the future. The long term effect would be a decline in the numbers who are appointed to judicial office, leading to a reduction in the quality of justice available to the public. We expect our judges to have a good knowledge for the law and firm practical experience. If case officers are properly trained, experienced and specialised however, we suggest that they could eventually be trained as judges, provided that they have served the required period as a case officer. The position of case officer would effectively become one entry point to a judicial career. This might resolve the succession issue. We suggest that input from universities is obtained as to the possibility of directing law graduates towards a career as a case officer, and ultimately, a district judge.

10) What should be the nature of the right to have a Case Officer's decision reconsidered by a judge?

We agree that a right of review is too limited and that a right to appeal would be inappropriate because it would require written reasons to be given for why each decision was made. The judge's consideration of the case officer's decision should be a full rehearing with the judge asked to make a decision in the place of the case officer, without reference to any decision they may have made. The rehearing would be completely within the judge's remit and control.

<u>Number of courts</u>

11) How can more of the High Court's workload be directed towards the County Court by changing the current value limits and thresholds?

It is clear that a number of county courts are currently suffering delays and backlogs. The report itself acknowledges at 5.17 that there is a long standing perception among London litigating solicitors that the Central London County Court remains, even after its recent move to the Royal Courts of Justice, dogged by a poor administrative reputation. It is not sufficient, therefore, to simply transfer some of the High Court's workload to the county court.

We believe that the key is specialisation, and the introduction of specialist courts, alongside the use of the online court. Ticketing should be introduced, to allow judges with specialism in certain cases hearing those cases. Specialism could go further than this, and there could even be specialist courts for specialist cases – such as a dedicated personal injury court, as has been established and received well in Scotland. A digitalised court system would make specialisation even more achievable, as it would remove geographical boundaries. Video hearings could replace physical hearings where appropriate, which would remove the need to travel to a physical court, and it would therefore not matter where the "specialist" court that you were required to attend was located.

12) How can more of the High Court's workload be directed towards the County Court by changing the current value limits and thresholds?

High Court judges would be best placed to answer this question.

13) What structural means would reinforce the principle that no case is too big to be resolved in the regions?

14) How can the growth of regional centres of civil specialist excellence be fostered, to avoid the current tendency of regional cases to be issued in, or transferred to, London.

The biggest driver to ensure that cases are not concentrated only in London will be specialism of judges/case officers. As above, we suggest that there should be different specialist courts, and these could be located across the regions.

The online court, and greater digitisation in the court process generally, for example through increased use of video hearings, will provide greater geographic freedom which will allow for specialisations to be developed. There should also be a commitment that when there is a need for a face to face hearing, that the judge will travel to meet the needs of the parties, rather than the parties meeting the needs of the judges. There must be greater flexibility built into the system as a whole, to take advantage of the benefits that the online court system and wider digitisation will provide in terms of removing geographical constraints.

15) How can the current systems for the transfer out of London of cases more appropriately managed and tried in the regions be improved?

As above, greater digitisation will mean that cases will not be necessarily focused in London. If a face to face hearing is required, the court/judges should come to the parties, rather than the other way round. A more flexible approach needs to be adopted in the spaces being used for court hearings. Other buildings within the community not originally designed as court houses could be used.

17) Should the number of District Registries be reduced further or the concept be replaced altogether?

We agree that District Registries should be replaced altogether.

<u>Appeals</u>

One way to reduce the workload of the Court of Appeal is to reduce the number of appeals from the lower courts. In a system as envisaged in the report, where an online court takes the lower value workload from the county court, if there are well trained legal professionals lower down the court system, and if people have access to the support and assistance they require, the likelihood of an appeal is reduced. If not implemented properly, an online court with unsupported litigants in person, and ill-trained lay case officers will inevitably lead to more appeals, longer waiting times for appeal dates and more work defending or launching appeals at a time when the courts would like to cut the number of appeals going through the court.

The route of appeal from a circuit judge in the county court could first be to the High Court, rather than the Court of Appeal.

18) When permission to appeal has been refused on the documents, there is a right to renew it orally. How valuable is this?

A right to renew an application to appeal orally is very valuable at present. Anecdotally, the number of applications which are refused on written application and granted on the subsequent oral renewal are substantial in our view. This suggests to us that the written procedure does not work very well. If oral renewals are abolished, then more time will need to be spent on reviewing and considering the written application to appeal.

19) Would a substantial increase in the use of deputies in the Court of Appeal, or the use of two judge courts in place of the current three, reduce the actual or perceived quality of the decision making?

In principle there is no issue with using two judges – the number of judges hearing a case in the Court of Appeal is already reduced or increased depending on the complexity of the issues at hand. In practice, though, difficulties will arise if the two judges do not agree. The best option would be to increase the use of deputies. This would also aid in succession planning, as more deputies will mean that there will be an established pool to appoint more full appeal judges in the future.

20) Should the thresholds for obtaining permission to appeal be raised, and if so by reference to what criteria?

We suggest that the thresholds for obtaining permission to appeal are already sufficiently high. Rather than raising hurdles to appeal, the way to reduce appeals is to ensure that the system is fair and accessible to all, including litigants in person. If, as in the case of the online court, lawyers are removed from the process, the system must work properly to ensure that the unrepresented lay individual feels treated fairly and that they are able to exercise their rights.

21) Should the focus of the Court of Appeal be directed mainly to second appeals?

We do not have a problem with this, and would be happy with a system where a final order in the County Court would go on appeal to a High Court judge. There would need to be more High Court judges, however.

<u>Enforcement</u>

22) Should the enforcement of judgments become a unified service for all the civil courts?

23) Which features of the current County Court and High Court enforcement procedures should be replicated or developed in a unified service?

24) Will digitisation and automation enable better enforcement?

We agree that unification, and digitisation, of enforcement would be sensible and effective. Anecdotally, we believe that the High Court enforcement procedure works better than the procedure in the county court and a unified service should be modelled on this. Enforcement has, however, regrettably been a neglected area in reforms that date back to the Woolf reforms in 1999, and it should now be addressed as a priority. Improving enforcement should be the subject of a separate, dedicated consultation.