MINISTRY OF JUSTICE (MoJ)

Formerly the Department for Constitutional Affairs (DCA)

CASE TRACK LIMITS AND THE CLAIMS PROCESS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

July 2007

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) 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.

APIL's executive committee would like to thank all those members who have contributed to discussions about this consultation. Our thanks in particular goes to a number of past presidents, including Patrick Allen, Colin Ettinger, Allan Gore QC, Richard Langton, David Marshall and Frances McCarthy.

In preparing this response, APIL President Martin Bare and other executive committee members attended dedicated meetings in London, Bristol, Leeds, Liverpool, Manchester and Newcastle to discuss the proposals for change. Members have also had the opportunity to discuss the paper at our regular special interest and regional group meetings.

In addition, we have had over one hundred e-mails and posts on our website's forum from members expressing their views.

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

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Executive Summary

1. APIL's primary concern is for people who have been injured as a result of another person's negligence. The current system could be improved for the benefit of claimants, by making the claims process faster and making rehabilitation more readily available.

2. We stress that when considering reform, the Government must remember that the basis for every personal injury claim is that an individual has been hurt as a result of somebody else's negligence. We also urge that any new process must be sustainable and introduce certainty.

3. We welcome the Government's proposal to leave the small claims limit for personal injury cases at £1,000, as we do not believe that the small claims procedure is appropriate for personal injury claims.

4. We do not agree with the proposal to increase the fast track limit to £25,000. We are concerned that this increase would result in many cases being allocated to the fast track when they are not suitable for that procedure as there is no consistency in the approach district judges take to allocation across the country. If the limit is increased, we therefore urge the Government to introduce a practice direction stating that there is a presumption that cases of a complex nature should be allocated to the multi track.

5. Claimants would benefit from a quicker process in which defendants admit liability early, make offers of rehabilitation early, and where there is a strict timetable in place for determination of quantum. A streamlined procedure similar to that outlined is suitable for those road traffic accident cases where liability is patent, where only one medical report is needed and which have a value of under £2,500. This would mean a significant proportion of all cases

come within the new system. These are also the cases that are cited regularly by defendant and insurer representatives as the cases for which a new process is needed.

6. The success of the new system depends on all parties complying with the time limits and we therefore believe the set time limits need to be strictly enforced. In particular, on expiry of the time limit for the defendant to respond on liability, if a full admission has not been made, the claimant must be allowed to investigate. This is because the burden to prove his case rests with the claimant.

7. Returning injured people to health should be considered to be a critically important part of the claims process and we therefore believe that there should be a statutory requirement to offer rehabilitation to injured people on admission of liability.

8. Binding admissions mean they can be relied upon, so there is no need for claimant solicitors to consider investigating claims. This proposal is critical to the new system working.

9. We support the proposal that claimant solicitors should continue to obtain the medical report about the claimant's injury. It is the claimant who needs to prove the existence and extent of his injury and it is right that he or his representative be allowed to request the medical report in order to do this. We are concerned, though, about the risk of medical reporting becoming too standardised and believe that the use of templates and placing a cap on the maximum recoverable fee for the medical report will reduce the quality of medical reporting.

10. We believe that it is crucial that every injured person knows that he can receive independent legal advice throughout his claim. It is also important for him to know that this legal advice may be available at no cost to him. Furthermore, it is not appropriate for the option of paper hearings to be offered to claimants in person.

11. We welcome the proposal to set limits, below which claims for special damages will not need to be proven (but a claimant who can prove he lost more than the amount set must be able to recover the higher amount in full) and the introduction of standard rates for care

12. We strongly believe that a computerised assessment tool for general damages should not be introduced, as this is inflexible. Injuries affect different people in different ways and an assessment tool can not properly reflect this.

13. We believe that defendants who lose personal injury cases should be required to meet the claimant's reasonable legal costs of pursuing the claim against them. We therefore support the introduction of fixed costs only where the amount of work to be done is also fixed. The level of any fixed costs must be thoroughly researched and regularly reviewed.

14. We welcome the proposal that claimants in low value straightforward cases will not require after the event (ATE) insurance policies. We are however extremely concerned about the knock on effect of these proposals on claimants with higher value, more complex claims. We believe that the proposals will either result in a significant increase in premiums in those cases that still require ATE or that there will be no suitable policies available. The proposals will also affect membership organisations and before the event (BTE) insurance funding.

15. We believe it is the Government's job to facilitate workable funding mechanisms so that people can have access to justice and legal representation to help enforce their rights.

16. APIL does not agree that the new claims process should apply to all claims for personal injury, except clinical negligence, with a value of less than the fast track limit. Each injured person is an individual and different types of case need to be approached in different ways. Whilst this system is suitable in genuinely straightforward, low value, road traffic accident cases, it is not suitable in other types of case. Claims with complicating factors such as several defendants should also be removed from the process.

Introduction

17. APIL welcomes the Government's consultation on case track limits and the claims process for personal injury claims. We recognise the time that the Government has spent in trying to address this issue and are grateful for the opportunity to have been involved in discussions preceding the consultation paper about the way in which the claims process operates.

18. APIL's primary concern is for people who have been injured as a result of another person's negligence, and in low value cases the current system is not serving injured people as well as it should: it can be too slow, and injured people may not receive the rehabilitation they need. Costs can seem disproportionate to the compensation that injured people receive, which leaves the system open to criticism. This in turn can mean that people are deterred from claiming compensation that they are entitled to. We therefore welcome the impetus for reform.

19. Much of the consultation paper can be seen as doing nothing to improve the current system for accident victims but instead is dedicated to trying to cut costs. Paragraph 51 of the paper sets out the reason for change: "the processes and costs involved in making a claim for personal injury are often perceived as being disproportionately high, particularly in lower value claims".

20. APIL does not support those proposals that erode claimants' rights. We believe, however, that some of the proposals could benefit claimants and genuinely speed up the process. The proposal to make admissions binding is one example of this. We also believe that additional changes to the system could be made to improve the process for claimants, such as early rehabilitation and early interim payments of agreed items of special damages.

21. Crucially, any new process must adhere to the principle that people injured as a result of a negligent act or omission are entitled to receive compensation that puts them back (in so far as possible) in the position they would have been if the negligence had not occurred. To achieve this, claimants must be able to recover the full costs of obtaining their compensation.

22. The current position is that most personal injury claims which are brought in England and Wales are funded either by a pre-existing legal expenses policy (known as 'before the event insurance'), by conditional fee agreements (which, depending on the circumstances, may be backed up by an 'after the event' insurance policy) or through membership organisations such as trade unions. Making a personal injury claim therefore usually comes at no net cost to the injured person. This enables a person to pursue his right to be compensated for the loss incurred as a result of someone else's negligence irrespective of their financial means.

23. The drive to cut costs which is behind these proposals does not therefore come on behalf of the injured people, who are able to keep 100 per cent of their damages. The drive comes from those having to pay the costs: usually defendants' liability insurers whose primary duty is to their shareholders. The insurers' aim to make profits naturally conflicts with the aim of ensuring that injured people are properly compensated for their losses. The insurers therefore argue that the legal costs they have to pay are disproportionate compared to the amount of damages injured people receive.

24. The picture of disproportionate costs has emerged despite the fact that in each individual case, the costs are either agreed between the parties or assessed by the court as being reasonable in the circumstances. The circumstances include the process that must be followed in order to claim compensation and the way that the defendant has conducted the case, as

well as the costs associated with the funding systems envisaged by the Government and allowed for by the rules.

25. It will not surprise the Government to hear that APIL has a different perspective on disproportionate costs from liability insurers. Firstly, our view is that costs would not seem so disproportionate if general damages had been increased in line with the Law Commission's recommendations[1]. Secondly, costs would not be so high in many cases if liability insurers were to comply with time limits set out in current protocols, respond to correspondence and pay damages and costs cheques on time rather than apparently obfuscating whenever the opportunity arises. Defendants have the ability to save costs by using the existing rules, including part 36 of the civil procedure rules, which can be used to make realistic offers to settle.

26. We should also point out that we understand that district judges often report that costs in personal injury cases are disproportionate (although it is they who assess them as reasonable), but many judges only see the cases that reach trial, which are logically the most disputed and therefore costly.

27. We welcome the drive to reform the claims process as we hope that this will lead to improvements in the system for claimants, despite the fact that we disagree with others' perspectives of the current system. In considering the proposed reforms, however, the Government must remember that the basis for every personal injury claim is that an individual has been hurt as result of somebody else's negligence.

28. To consistently deliver justice, any system must be sustainable and introduce certainty. We are extremely concerned that if the proposed changes to the claims process are brought in, this will lead to significant

[1] Law Commission Report 257 "Damages for Personal Injury: Non-Pecuniary Loss"

amounts of satellite litigation. The current procedure is only eight years old, having been introduced in 1999. In addition, some parts of the present procedure, such as the predictable costs regime in road traffic claims and fixed success fees, are more recent. Although the Civil Procedure Rules and personal injury protocol have resulted in more cases settling earlier, the period has also been characterised by satellite litigation over the interpretation of the rules and recoverable costs. Injured people cannot have confidence in a system which seems in such disarray. Some reforms are therefore necessary but must introduce certainty and not create confusion.

Case track limits

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

29. We have consistently argued against any increase in the small claims limit as we do not believe that the small claims procedure is appropriate for personal injury claims. We therefore welcome the Government's proposal to leave the small claims limit for personal injury cases at £1,000.

30. The consultation paper recognises that personal injury claims are complex and that because of this, claimants need independent legal advice to ensure their claim is properly made. This is a view with which we agree, and which we have advocated, because a personal injury case requires the claimant to not only argue the facts of his case, but prove that the defendant owed him a duty of care, that duty was breached, and that the breach of duty caused his injury. The claimant then has to be able to understand a medical report, put a monetary value on his injuries and assess his financial losses.

Furthermore, a claimant is unlikely to know about the rehabilitation that may be available to him.

31. The paper also acknowledges that claimants in person could accept offers of settlement that do not adequately compensate them for their injury. Claimants will often simply not know what their injury is ‘worth’. The consultation paper refers to the increases in defendants’ first and final offers being as much as 50 per cent. Research of our members carried out in 2005 shows that such a high increase does not just happen occasionally. In fact, 53.14 per cent was the average increase from the defendants’ first offer to the final settlement[2]. Furthermore, members have told us of other cases where the defendants’ first offer and the final settlement have differed dramatically. One such example is of a first offer to the claimant being £2,000, and the final settlement was £125,000.

32. We agree that if claimants do not have an independent solicitor this can lead to an inequality of arms between the claimant and defendant, who is likely to have the backing of an insurance company. Even a relatively junior insurance company’s claims handler is familiar with the personal injury process, having dealt with many other cases, and has the time to deal with cases as doing this is his job. Contrast this with an injured person, who has probably never been through this process before, and who may have to deal with the claim in his spare time, and the disparities become clear. Add to this the fact that claims handlers have the support of more experienced colleagues, and that an insurance company can afford high level legal representation if it chooses to do so (irrespective of whether the costs of this may be recovered) and the need for the injured claimant to have legal representation in order to have a fair chance of taking his case against an insurer-backed defendant is obvious.

[2] APIL membership research, analysis of responses published March 2005

33. We also support the view in the paper that potential claimants would be put off by the work involved and the thought of having to 'take on' a large defendant or insurer, and would not bring a claim. A 2005 MORI poll showed that 64 per cent of those surveyed would be unlikely to pursue a claim for personal injury without the help of an independent solicitor[3].

34. Pursuing a personal injury case through the small claims court system can be particularly difficult for a claimant if English is not his first language, if he is illiterate, or if he is not well-educated enough to be able to understand the small claims system. Injured people should be fairly compensated irrespective of their ability to bring a claim: for this to achieved, legal representation must be available to everyone.

35. Furthermore, a case with an apparent value of £1,000 or £2,000 should not be assumed to be straightforward or insignificant. The complexity of a case cannot necessarily be determined by its apparent value or the manner in which the injury was caused. Disease cases such as vibration white finger, which are referred to in the consultation paper, are a prime example of relatively low value cases which are never-the-less complex. Furthermore, a relatively small sum of money can represent a significant amount of money to many people. A worker earning the minimum wage of £5.35 per hour would have to work ten 35 hour weeks to earn £2,000: this sum cannot be said to insignificant in this context.

36. We think the arguments that unrepresented claimants will be helped by district judges and can get guidance from the advice sector are unfounded. The advice sector does not have the capacity to cope with the influx of claims that an increase in the small claims limit would bring and many cases do not reach court, so there is no opportunity for district judges to offer guidance. For the small claims that do reach court (and there would be far

[3] MORI poll commissioned by APIL and carried out in February 2005

more of these if the limit were to be increased) district judges simply do not have the time to spend guiding a claimant through a small claims case, and it is not their job to do so. Claimants need advice and guidance throughout a case from an independent legal adviser, not just at court from a person whose job it is to arbitrate on the outcome of the case. Furthermore, research carried out in Scotland showed that sheriffs were reluctant to take an interventionist approach in small claims where one party was legally represented, as defendants usually are in personal injury cases[4].

37. "Before the event" insurance can not be relied upon to pay for legal advice for personal injury victims in every case. Not everybody has legal expenses insurance. Those who do have a policy may not want to use it because it places unfair restrictions on their choice of solicitor or the way in which their case can be conducted. Other legal expenses insurance policies which could provide funding for claimants may be unsuitable because of conflicts of interest, such as those that arise between a passenger in a vehicle and the driver, whose negligence may have caused his passenger's injuries.

38. Finally, the argument that court leaflets and literature can be made available to guide personal injury victims through the small claims procedure assumes that such literature could include guidance on what to do in each case. This would not be possible, as every case is different. The complexities referred to above cannot be addressed in a court leaflet. Furthermore, those who find it difficult to read English would again be disadvantaged by this approach.

[4] "In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation" Elaine Samuels, 1998

5. Do you agree that the fast track limit should be increased to £25,000? If not, please set out your reasons why and state what you consider the appropriate level would be.

39. The consultation paper clearly recognises that whilst some personal injury cases with a value of between £15,000 and £25,000 are suitable for the fast track, others are not. This is a view with which APIL agrees.

40. We do not, however, agree with the proposal to increase the fast track limit to £25,000. We are concerned that this increase would result in many cases that should follow the multi track procedure being allocated to the fast track.

41. In order for an injured person's case to be properly heard, the dominant factor in deciding whether a case should be allocated to the fast or multi track must be complexity, not value. Our members have told us that some judges seem reluctant to use the discretion that the Civil Procedure Rules allow them in transferring cases to a track other than the one into which they would normally fall by virtue of their value. In London, for example, disease cases are almost invariably transferred to the multi track, whereas in Bristol, this can be a rare occurrence. We are aware of other members who try to get applications listed at their local courts on certain days because they know what particular judges are likely to order. There is no consistency across the country, or even within court centres.

42. The problem of allocating cases to a track on the basis of the value alone, rather than considering whether the multi track procedure is more suitable, will only be exacerbated by increasing the fast track limit.

43. The reason the fast track procedure can be unsuitable in complex cases is that it restricts a claimant's ability to prove his case to the court, by placing restrictions on the length of the hearing and the amount of evidence that can be put before the court. More than one expert may be needed to establish the full extent and consequential affects of the claimant's injury, or there may be an element of future loss that is disputed and for which lengthy arguments need to be had.

44. Increasing the fast track limit will inevitably affect those claimants with the lowest incomes and pensioners the most as, although their injury may be significant, they may not have a substantial loss of future earnings claim. Increasing the fast track limit would therefore deny people on the lowest incomes, and older people, access to a comprehensive court procedure which gives them the opportunity to properly present their case.

45. Leaving the limit at £15,000 does not prevent those cases which are valued above this, but that are suitable for the fast track procedure because they are not necessarily complex, being heard there. Cases can be transferred to the fast track if the parties agree. Furthermore, judges can give fast track type directions in multi track cases meaning that where a simple procedure is suitable, this can be applied.

46. In addition, we do not believe an increase as significant as £10,000 can be justified. As the consultation paper recognises, damages have not increased significantly since the fast track limit was brought in, and types of injury which were not intended to be covered by fast track procedure will now be bought in to this track.

47. The value of a case alone is not necessarily an indication of its complexity, and therefore should not determine the track it is allocated to. It is because of this that, if the Ministry of Justice does decide to increase the fast track

limit to £25,000, we would at the very least urge that it considers increasing the amount of guidance available to district judges on the types of case that may not be suitable for the fast track. This would go some way to introducing consistency across the country, which is lacking at the moment.

48. Case management decisions affect a claimant's ability to prove a claim and a defendant's ability to defend it. They restrict the amount of evidence that can be produced. Allocation to the fast or multi track procedures can therefore be a significant factor in a case, and the decision to allocate to a particular track can not be appealed. In these circumstances, and as district judges all have varying levels of experience in personal injury cases, it would be sensible to provide guidance as to type of complicating factors that may necessitate a case being moved in to the multi track.

49. We believe that this guidance should come in the form of a practice direction, stating there is a rebuttable presumption that certain types of case should follow the multi track procedure. The practice direction should give a non-exhaustive list of cases which are not suitable for the fast track. We believe that the types of case to be included in this list should be the subject of discussions among stakeholders.

50. On a practical note, fast track trial costs for advocates will have to be considered again if higher value cases are considered within the fast track procedure. A number of additional bands will need to be introduced.

51. For higher value claims, the attendance of a solicitor at court should no longer be only possible in exceptional circumstances. A solicitor who has had conduct of a case from the beginning, and who is familiar with the file, can be a valuable resource to a claimant at trial. The cost of his attendance may be considered disproportionate if the potential damages may only be, say £5,000, but cannot be said to be so if the case is worth up to £25,000.

52. Many claimants are upset and disappointed that the current fast track trial costs system is designed effectively to preclude the attendance of the person with whom they have dealt throughout the case. This undermines confidence in the system.

Claims process

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

53. Claimants would benefit from a quicker process in which defendants admit liability early, make offers of rehabilitation early, and where there is a strict timetable in place for determination of quantum. A streamlined procedure similar to that outlined is suitable for those low value road traffic accident (RTA) cases where liability is patent and where only one medical report is needed. Our answers to the questions below are subject to this view, which is explained more fully in answer to question 21.

54. We note the Government's key aims are to encourage early reporting of claims, early admissions and to avoid duplication of work. We support these aims, although there is a possibility that we differ from the Government on the definition of duplication of work. We do not believe, for example, that a claimant or his lawyer investigating a claim is the same as the defendant or insurer investigating a claim: the two have completely opposite aims.

Early notification

55. As liability is eventually admitted by the defendant in the vast majority of personal injury claims, we support the proposal to provide the defendant (and therefore the insurer) with early notification of claims, providing an early opportunity to admit liability.

56. There are, however, several practical points of concern which we think need to be addressed before this process will work. Those concerns which relate to timing and to the content of the forms are addressed below.

Set period of time for defendant/insurer to respond to the claim

57. We support the proposal to give the defendant and his insurers a set period of time to respond to the claim, before the claimant incurs significant costs through taking out after the event insurance, and as a result of his solicitor investigating the claim. Encouraging the defendant to investigate early, whilst memories are still fresh, will lead to earlier admissions of liability.

58. We strongly believe, however, that once the set time limit is up, the claimant should be able to take steps to protect his position and to investigate his claim. In introducing the proposed system, the Government must ensure that it fits with part one of the Civil Procedure Rules, which require the courts to deal with cases justly, which includes ensuring that the parties are on an equal footing[5].

59. The longer a claimant is not allowed to investigate a claim, the more prejudiced his position may become, and the more difficult it may be for him to prove his claim to the court. Memories may fade day by day and evidence may be lost.

[5] Part 1.1 (2)(a), Civil Procedure Rules

60. The proposed reforms move the ability to investigate the claim to the defendant/insurer; the burden of proof is not similarly reversed. What is being proposed is not an inquisitorial process, whereby an independent person investigates the cause of the injury: the defendant has a vested interest in defeating legitimate claims. The claimant still has to prove his claim (even if liability is admitted the claimant has to prove loss and damage). The new procedure must therefore allow the claimant to investigate his claim as soon as the new time limits expire.

61. The consultation paper makes it clear that a claimant will not recover the cost of work carried out during the set period that the defendant is given to investigate the claim. What is not as clear is what will happen if a defendant fails to tell the claimant of the decision on liability within the specified time limits.

62. The paper says a defendant may be required to give an explanation of the particular points causing difficulty and be encouraged to narrow the issues: we believe these requirements are too vague to be effective, and will act as an invitation to defendants to send out standard letters requesting more time to investigate.

63. We therefore believe that if the defendant does not respond with a full admission of liability (please see below) within the time limit, the case should come out of the new streamlined system, and the claimant should be allowed to instruct his solicitors to take his case forward. If the defendant cannot respond within the proposed time limits, the case is clearly not a straightforward one, and falls outside the scope of cases that this streamlined system was designed for.

64. An injured person cannot be expected to wait indefinitely to hear from a defendant on the issue of liability, whilst all the time the chances of proving

his case are worsening. Claimants should be entitled to protect their position as soon as the time limit is up by taking out after the event insurance policies so they are not exposed to paying the defendant's costs and their own disbursements, and start gathering the evidence that they will need to prove they suffered injury, and the losses that arose from that.

65. The burden of proof in a personal injury case rests on the claimant. Every curtailment of the claimant's right to investigate the claim impedes on the claimant's ability to present his case to the court. Claimants must have the ability (and the funding) to be able to investigate their claims when the time limit for the defendant to respond with a decision has expired.

66. It may be unfortunate for the defendant's insurer if it is in a position to admit liability a week later, as it will have to bear the costs of the claimant's insurance premium and pay for any work already done, but this is the only consequence of not complying with the time limits which will provide the incentive for defendants to do so. Current protocol time limits (including the three months that defendants have to make a decision on liability) are routinely flouted, because, in our view, of the lack of sanctions for non compliance.

67. In order for claimants to have certainty and for satellite litigation to be avoided, there needs to be a clear and unambiguous way of determining whether a claim is to be removed from the new system. There also needs to be a formal procedure if, in the exceptional circumstances envisaged by the consultation paper, the claimant's solicitor does need to carry out investigations during the period in which he should not be carrying out any work.

Rehabilitation

68. The consultation paper states that where a claimant’s needs have not already been met, and where it is appropriate, an offer of rehabilitation should be made. This offer should come at the same time as the defendant informs the claimant of his decision on liability.

69. Returning injured people to health, in so far is as possible, should be considered to be a critically important part of the claims process. We therefore believe that there should be a statutory requirement to offer rehabilitation to injured people on admission of liability.

70. In lower value cases in particular, the cost of rehabilitation is likely to be reasonable, but can significantly reduce the recovery time of the injured person. This benefits both the injured person who can return to a fuller life and the defendant/insurer, who is likely to benefit from having to pay the claimant lower damages.

71. Proposing that offers of rehabilitation should be made is a step in the right direction and may benefit some injured people. Whilst offers only “should be” rather than “must be” be made it will, however, be difficult to ensure compliance.

Binding admissions

72. We welcome the proposal to make admissions binding. If this is implemented, it will remove many of the uncertainties that currently exist, because an admission is presently capable of being withdrawn. Binding admissions mean they can be relied upon, so there is no need for claimant solicitors to consider investigating claims.

73. We believe that the new procedure must make it clear that an admission of liability means an admission of the existence of a duty of care, the fact of its breach, and the fact that that breach caused injury. This is because breach of duty is often admitted, only to be followed by a subsequent dispute on causation. If causation is disputed, the claimant has to prove this. Many issues which relate to liability need to be considered when establishing causation, such as the speed of the impact in a road accident. It would be therefore unfair to the claimant for his case to be part of any new procedure which limits his ability to properly fund, investigate and prove his claim if causation is not admitted by the defendants within the admission of liability.

74. In addition, if an admission has been made, the defendant must not be allowed to raise issues of contributory negligence at a later date. At present it is common for defendants to raise no issues of contributory negligence when admitting primary liability, but to do so later. The consequences of defendants raising contributory negligence after making seemingly a full admission has the same effect in practice as withdrawing an admission: claimants involved in such cases have to investigate liability again. As much evidence is required, and therefore cost may be incurred, to investigate allegations of contributory negligence, as if the claim was denied in full.

75. Arguments about causation and contributory negligence can be protracted, technical and expert opinions may be required before they can be resolved. These cases are no more suitable for the new streamlined system than cases where primary liability is denied, as the claimant still has to investigate and prove at least some aspects of liability.

76. The new procedure should also make clear that the claimant is entitled to proceed with investigating his claim not only when liability is denied but when liability is not admitted. The distinction is subtle but important.

There may be cases where the defendant has not responded at all within the time limit, or has made no comment on liability. In those cases the claimant should again be able start investigating his case, with all the cost consequences which come with that.

77. To make the proposal that admissions are binding watertight, and to try to avoid arguments about what constituted an admission and what did not, we propose that the new procedure should require defendants/insurers to make reference to the particular rule on admissions when making one. The new rule should set out that an admission is one of full liability, that once an admission has been made it is binding, and issues of causation and contributory negligence cannot be raised at a later date. If a full admission is not made within the set time limits the case should not be in the new system.

78. There is one caveat to our view above. We recognise that there is a risk of potential prejudice to some people, particularly those injured in the course of their employment and where others are also injured. The risk is best illustrated by use of an example.

79. A bus driver may have driven a bus which crashed, injuring himself and his passengers. The bus company may admit liability for the accident and pay compensation to the passengers. This might be because the company misunderstands the facts or because it makes a commercial decision to settle the claims. The bus driver may come to make his own claim, perhaps against the driver of a car that caused the accident. The bus company's admission in the passengers' case is binding and the defendant car driver may try to use this binding admission in his defence, denying the bus driver the ability to pursue his legitimate claim.

80. Binding admissions are necessary for any streamlined system to work properly. But, as in the example, this should not affect genuine claims from being brought. Relevant rules must be introduced to protect injured people who are at risk of their claims being prejudiced. We propose, therefore, that any new rule in relation to this issue would make admissions binding only as between the claimant and defendant.

Interim payments

81. Where liability is admitted, defendants should make an immediate interim payment of undisputed items of special damage such as policy excess and for damaged personal belongings. Claimants get frustrated about having to wait for prolonged periods before receiving damages for undisputed items. Interim payments will give claimants a sense of real progress and allow them to have confidence in the new system.

Settlement Pack

82. We have no objections in principle to the claimant sending a settlement pack to the defendant, although introducing a requirement for claimant solicitors to make the first offer to settle on their client's behalf will require a sea change in the way a significant number of practitioners work.

83. We note that the consultation paper makes provision for cases where more time is needed before a final prognosis can be reached. We believe that defendants should not be able to put pressure on claimants to settle their cases before a prognosis can be reached, or before the claimant has made the recovery the expert anticipates in his report.

84. This will not be a problem in many cases, because claimants often do not make a claim until after they have recovered from their injuries. In those cases where there is an ongoing injury but where the claimant is expected to recover, it can not be considered just to require a claimant's solicitor to send out a settlement pack before the injured person has recovered.

85. In the vast majority of whiplash type injuries sustained in RTAs, for example, an early medical opinion may predict that symptoms will resolve after, say, a period of six months. It is, however, recognised in medical literature that a small percentage of people with such an injury will not recover and may develop a chronic condition. The claimant should have the right, without fear of costs or other penalty, to wait and see if he recovers as predicted or not.

86. In practical terms, a claimant or his solicitor may not have all the information needed to make an offer. Claimants frequently rely on current or past employers (who are often the defendants) to provide them with pay information, and these can be slow to arrive. In these cases, it will be impossible to draft the schedule of special damages which is crucial to formulating an offer to settle.

Claimants in Person

87. We believe that it is crucial that every injured person knows that he can receive independent legal advice, throughout his claim. It is also important for him to know that this legal advice may be available at no ultimate cost to him.

88. It should be mandatory for every communication from a defendant/insurer to an unrepresented claimant to include a recommendation that the injured person take independent legal advice.

89. As the Government is aware, APIL is extremely concerned about the practice of insurance companies capturing the claims of people injured by their policy holders. Liability insurers obtain the details of the injured people through their insured, make direct contact and either try to settle the claim straight away, or, if this fails, refer them to a solicitor on the insurance company's panel. Injured people whose claims are successfully captured are often persuaded not to seek independent legal advice because of promises of up front payments, or misleading statements that solicitors will take part of their damages.

90. Worryingly, this practice seems increasingly common and many claims handling companies and insurers have set up specialist units to deal with captured claims. One claims handling company says on its website that is "has a specialised Third Party Unit to handle all aspects of these claims. The key objective is to reduce the quantum of the claim against clients and/or insurer."[6]

91. We believe that this 'reduction' not only includes savings on legal fees, but savings in damages paid to injured people. The only reliable data we have in relation to the amount of damages received by unrepresented or represented claimants shows that the latter receive higher damages awards[7]. Unrepresented claimants may under-settle their claims either because they do not know what their claim is worth, or because they are pressured into settling their case by the defendant or claims handler. Many of our members have also acted for claimants after they have been made offers by insurance companies when unrepresented, and then obtained very significantly increased settlements.

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[6] http://www.call24-7.co.uk/tp_capture.html as at 27.6.07

[7] Hansard, column 1845W on 20 June 2007. In a written answer to a parliamentary question, Justice Minister Harriet Harman listed the damages awards made to represented and unrepresented claimants in the small claims track over the last ten years. On average, represented claimants received damages that were 20.79% higher than those awarded to unrepresented claimants.

92. To offer some, albeit limited, protection to injured people, we believe that if a claimant is acting in person, there should not be an option for a paper hearing. As said elsewhere in this paper, we can not think of any benefits for a claimant in having a paper hearing: the benefit is to the defendant, in costs savings. Paper hearings may be especially detrimental if the defendant puts written submissions to the court on general damages, whilst the claimant does not do this. If the parties are present, the district judge may receive submissions from the claimant by asking him questions pertinent to the extent of the injury, for example, whilst this would not be possible in paper hearings.

93. If a claimant in person does not know how to properly present his case by way of a paper hearing, and ensure all the relevant paperwork is properly completed and filed with the court, it can not possibly be fair to allow a paper hearing.

94. In addition, claimants in person might prefer to present their arguments to the judge but defendants could persuade unrepresented claimants into agreeing to a paper hearing, or let them believe that that is the normal procedure.

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

95. APIL is concerned that sending completed notification forms, as drafted, to defendants who are not covered or aware of the Data Protection Act will lead to identity theft.

96. We are particularly worried about the inclusion of the injured person's national insurance number, date of birth and home address.

97. Members are not concerned about sending this information to defendants which are large businesses, or to insurers, who deal with the information received in light of the Data Protection Act. What worries us is the thought of having to send this to an individual, with whom the claimant has only come in to contact because that individual drove in to the back of him, or to a small business which is in effect unknown to the claimant.

98. We recall that this issue was raised when the template for the protocol letter of claim was drafted, and included the claimant's national insurance number. This was removed before the template was finalised because of the very same fears of identity theft.

Appendix 1

99. We believe that consideration should be given to including the following on the form:
   - whether the claimant has fully comprehensive or third party, fire and theft insurance cover
   - the cost of the policy excess
   - whether the claimant needs a replacement vehicle and the details needed for the defendant to facilitate this
   - whether the vehicle has commercial use (e.g. a taxi)
   - scope for the accident to have happened at a junction, by allowing space for more than one street to be included

Appendix 3

100. The comments in relation to appendix one, above, also apply to this form.

101. We also reiterate that all communications, including the notification forms, which are sent by or on behalf of a defendant/insurer to an unrepresented claimant, must include a recommendation to seek independent legal advice.

102. In addition, whilst we welcome the introductory paragraphs designed to help claimants in person, we would wish to see the booklet which accompanies the form before commenting on whether these paragraphs need to be amended in any way.

Appendix 4

103. Likewise, we would wish to see the advisory booklet for non-RTA claims before commenting on this appendix.

Appendix 5

104. Our members are concerned that injured people will not be able to prove their cases if claimants' solicitors are required to give witness details to the defendants. Claimants have to prove their case, but disclosing witness details allows the defendant to speak to the witness about the case. Members have told us that, in their experience, it is common for an employer to try to dissuade a witness from giving evidence against it. As noted earlier, this process is an adversarial one where the defendant has a vested financial interest in the outcome.

105. Furthermore, whilst the procedure requires claimants to tell defendants the basis of their case and allows for sources of evidence to be disclosed, this is not a reciprocal requirement. Consideration should be given to the introduction of an extra form, which sets out the defendant's response on liability, and, if this is not admitted in full, sets out the reasons why and the evidence that shows this.

106. The question on contributory negligence should be removed as the claimant has had no opportunity to investigate the case before notifying the defendant of his potential claim.

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

5 days

107. The proposal that claimant solicitors notify the defendants of a potential claim within 5 days of taking instructions would lead to a number of practical difficulties.

108. Firstly, a solicitor must check the identity of every client to ensure compliance with the money laundering regulations. Failure to comply with the regulations is a criminal offence. Being able to check the client's identity relies on the client finding the right documentation and giving this to his solicitor. In most cases, this may not be a problem, and clients may bring their ID to the first interview with the solicitor as requested. This, however, does not happen in all cases, and the new process cannot impose an obligation for the solicitor to carry out work when doing so would put him in breach of the money laundering regulations.

109. Secondly, a solicitor is required by the Solicitors' Code of Conduct to carry out a number of checks for alternative funding before signing a client up to a private retainer. The claimant has a duty to mitigate his losses and is not considered to have done so if he chooses to sign up to a more expensive private retainer rather using cheaper pre existing funding, unless there is a good reason for doing so. These checks for before the event or union funding take time. Often, clients do not know whether they have any legal expenses insurance, because of the way these are tagged on to household

or car insurance policies. The policy documents may have to be found and checks with providers may have to be made. If the client does have legal expenses insurance, the solicitor may have to write to the provider to obtain permission to act. Members often report that these providers do not respond to such requests, or take weeks to do so.

110. We propose that the five day time limit should not start running until all a solicitor's professional requirements have been complied with and a retainer has been agreed by the client. This is particularly important if satellite litigation is to be avoided. Defendants and insurers have spent the last few years trying to avoid paying costs because of technical challenges to the solicitor/client retainer. Allowing for professional requirements to be complied with and funding to be put in place before time starts to run will make the five day time limit infinitely more realistic, which it needs to be to ensure compliance.

111. The Government should also be aware that some cases which would not, under the present system, be taken on by solicitors will be notified to defendants as potential claims. At present, when considering whether to take on a case on a no win, no fee basis, solicitors carry out a risk assessment and initial investigations, such as obtaining medical records. It is only once he has done this that the solicitor can identify whether a case is likely to be successful, and can discontinue those cases which are not likely to succeed. These early investigations "weed out" claims which do not have a good prospect of success at an early stage, before potential defendants are notified of these claims. The fact that there is no opportunity to carry out such investigations within the five day time limit will mean that there will be an increase in the number of claims that are notified to defendants which have a low prospect of success.

15/30 working days

112. There is considerable scepticism among members that defendants will be able to respond with a decision on liability within the time frame. In most cases, defendants do not comply with current, more generous time limits in the pre action protocol. Despite this scepticism, as we have said above, we think that defendants should be given an early opportunity to investigate claims and admit liability before substantial costs are incurred.

113. It is crucial, however, that these time limits are as short as is necessary to enable the defendant to investigate the claim, so that the right balance is struck between giving the defendant a chance to admit liability in straightforward claims and the rights of the claimants to investigate to be able to gather the evidence necessary to prove their claim.

114. In road traffic accident (RTA) cases, the defendant has knowledge of the accident prior to the claim and the defendant and insurer should therefore be able to establish liability within a very short time frame, of ten working days. We would therefore prefer a ten working day time limit. We recognise, however, that the proposed time frame of 15 working days is not significantly longer than this and note that the Association of British Insurers has said that it would prefer a 15 working day time frame. As we want the time limits to be realistic in order to ensure compliance and the detriment to claimants of extending their period of non investigation of the accident to three weeks is minimal, we accept a time limit of 15 working days for the defendant/insurer to make a decision on liability.

115. In most employers' liability (EL) cases the defendant also has, or should have, knowledge of the accident before notice of the claim is received. The defendant and his insurer should not therefore need up to six weeks to

investigate the accident. The proposed time limits for these cases are therefore too long.

116. The exceptions, in RTA and EL cases, to the general rule above are where the defendant is the Motor Insurers' Bureau (MIB) and cases where claimants are making claims against former employers, where the injury was caused a long time ago. Defendants in public liability cases are also likely to have no prior knowledge of the accident. We understand that it may be difficult for the defendants to comply with the time limits in these cases.

117. Once the time limits have been set, it is crucial that they are strictly enforced. The new proposals give defendants the opportunity to save on legal costs by admitting liability early, but this opportunity cannot be open ended. Once the set period of time for the defendant to investigate a case has expired, the claimant must be able to do take steps to investigate the cause of his injury, in order to prove his case to the court, and the costs of this investigation must be recoverable if the claimant wins his case.

118. The success of the new system depends on all parties complying with the time limits. Defendants frequently fail to comply with current time limits in the pre action protocol, for a number of reasons, ranging from the fact that they are waiting for police reports, to the claims handler being on holiday.

119. No such excuses should be allowed within the new system. It needs to be cut and dried to provide defendants with incentives to comply and avoid satellite litigation. There is a real danger that if there is any discretion over the time limit for admitting claims in particular, a raft of satellite litigation will ensue. There will be disputes about whether conditional fee agreements should have been entered in to after the time limit had expired without an admission from the defendant; whether the accompanying ATE insurance

should have been taken out; whether, as the defendant admitted liability two days after the time limit and after the claimant had already taken albeit expensive steps to protect his position, the claimant is entitled to recover the costs of this.

120. The consequence of non-compliance with these time limits needs to be that the claimant is entitled to take steps to investigate his claim immediately. It is still open to a defendant to admit liability after the time limit has expired and, if this is binding, the claimant can stop his investigations and the legal costs he is incurring as a result.

Public liability claims

121. The consultation paper seeks views on whether longer periods of time should be allowed for decisions to be made in public liability cases.

122. Whilst we believe that asking a claimant not to investigate a case for six weeks is long enough, and that any extension of that period may further harm a claimant's ability to prove his case, we do have some sympathy with defendants in public liability cases.

123. We believe that there is a distinction between public liability cases, and claims that arise as a result of road traffic accidents and at work. We draw this distinction because in RTA and EL cases, defendants either know or should know about the accident prior to the claim being made. This is frequently not the case in public liability cases. The first public liability defendants may know of a potential claim may therefore be the notification form from the solicitors. Defendants must then start their investigations: in cases where the defendant has prior knowledge of the incident that caused the injury, he has at least got the basis details of the incident to hand, either in his memory or for example in an accident book.

Set time limit for obtaining medical report

124. We do not believe it is appropriate to set a time limit within which a medical report should be obtained. Different medical experts have different waiting periods depending on their own workload. A time limit can not take these waiting periods in to account. More experienced and competent experts may be busier and have longer waiting lists. It would be unjust to limit injured people to obtaining reports from the less busy and perhaps less experienced experts, and may harm their ability to demonstrate the full extent of their injury. Furthermore, there may be disparities in waiting times for different experts around the country.

Time limits for settlement pack

125. The consultation paper also asks whether claimants should have longer to send off their settlement pack, the higher the value of the claim. In higher value cases, there may be more heads of damage and the information may take longer to obtain. The value of the claim does not, however, necessarily determine how long it takes to calculate special damages: the availability of the information needed to carry out the calculation is the deciding factor.

126. In cases where there is ongoing loss, it can take time to work out the future care and treatment required and to calculate the cost of this. The vast majority of cases which involve ongoing loss are, however, complex and should not be in the fast track in any event.

127. On balance, therefore, although differential time limits based on the value of a claim may be beneficial in certain cases, the limits would have to be entirely arbitrary and would not necessarily reflect the time spent in calculating special damages. To properly reflect the time needed to calculate special damages, time limits would have to be based on

availability of all the information required to carry out the required calculations.

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

128. We agree with the proposals for straight forward quantum trials in low value cases, with the possibility of more evidence being allowed where required.

129. Whilst we can see the benefit of paper only hearings for defendant insurers, which process hundreds of thousands of claims, we can not see the benefit for claimants. For defendants and insurers, attending a quantum trial may just be a costly inconvenience. The insurer will have done this many times before and will have to do this many times again; he knows he will be paying compensation; he knows roughly how much; and the difference between the higher and lower amounts that he may be liable to pay may well be considerably exceeded by having to pay a representative to attend court.

130. For the vast majority of claimants, however, having to go to court to ask a judge to decide the amount of compensation he should be awarded for his injuries is a significant event. It is a personal matter, not a business one, and it is important the claimant should be able to see justice being done.

131. It is important therefore that paper hearings really are only an option, and that claimants should not be penalised in costs for choosing to attend court, rather than having a judge decide their application by post.

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

132. Cases that follow the streamlined procedure to start with, and then are removed from the system because, for example, liability is not admitted, will not fit neatly on to the front of the protocol. It is incongruous to have to send a letter of claim to the defendants after they have admitted liability. The whole pre-action protocol will have to be reconsidered for these cases.

133. In addition, the following changes to existing procedures would improve the claims process for those injured people whose cases do not ultimately fall within the streamlined system:

- A priority system within courts for pre-action disclosure orders to be considered more readily, to avoid the need to issue proceedings just in order to obtain disclosure within a reasonable time period
- Binding admissions (this should apply even to those cases which do not come within the new process for whatever reason as well as those that do)
- Interim payments to be made more readily available, without the need for cases to be issued. In order to facilitate this, there should be an interim payment only procedure introduced under part eight of the Civil Procedure Rules.
- Clearer time frames for payment of agreed damages and costs
- Properly enforced sanctions for non compliance with the protocol, in order to ensure it is effective

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

134. We support the proposal that claimants or their solicitors should continue to obtain the medical report about the claimant's injury. It is the claimant who needs to prove the existence and extent of his injury and it is right that he or his representative be allowed to request the medical report in order to do this.

135. It is important that the claimant should be able to see the medical report before it is sent to the defendants, to be able to check for factual errors. Ensuring the report is factually correct is of benefit to the defendant as well as the claimant: incorrect reports lead to unnecessary confusion and subsequent expense.

136. As we said in answer to question nine above, we agree with the proposal to make provision within the system for a final prognosis to be reached in each case before quantum can be addressed. If a prognosis is guarded, there can be no certainty as to how the injury will develop or heal. It is impossible to determine the appropriate level of damages until the full effects of the injury are known.

137. It is crucial that the medical report remains a privileged document, unless and until the claimant waives that privilege. If the report is not privileged, there is a risk that the defendant will put pressure on the claimant to settle the case in advance of the full effects of the injury being known.

138. The template for the medical report must allow for a range of opinion to be expressed by the expert.

139. The template for the medical report asks the practitioner to state whether a further medical report is needed. If a further report is needed, the case should come out of the new system. Cases where medical evidence is more complicated and where second or subsequent reports are needed are not suitable for this streamlined procedure.

140. Further correspondence, subsequent medical attention for the client, and consideration of the subsequent reports all make the streamlined system inappropriate in cases where more than one medical report is needed, both in terms of timing, and in terms of the proposed fixed costs regime.

141. Whilst we think it is useful to include a question to the medical expert, to ask whether a further report is needed, there is a significant risk that by using a template at all, medical reporting will become too standardised. Seeking to cut corners with medical evidence is particularly dangerous as more serious injuries may be missed by the expert.

142. We believe that placing a cap on the maximum recoverable fee for the medical report may limit the quality of medical reporting and those qualified, competent and experienced doctors who currently provide medical reports will be lost from the system. Furthermore, it should not be assumed that the cost of obtaining medical reports in pre-issue road traffic accident cases, which are valued at less than £10,000 and for which predictable costs are currently recoverable, is the same as the cost of obtaining a medical report as part of this new procedure.

143. Placing a cap on medical fees is adopting a “one size fits all” approach, which is not appropriate. It is proposed that if there must be any cap on the medical report fee, then different specialities should have different maximum fees. If this process is to apply to cases with a value of up to £25,000 claimants may have many different types of injury. The identity of the

medical expert who is asked to carry out the report will depend on the nature of the injury, and different specialist charge different fees. A psychiatrist's report is significantly more expensive than an accident and emergency consultant's report, for example.

144. We think that before any medical fees can be set, and the standard medical template introduced, the views of the British Medical Association and other parties with more knowledge in this particular area than the likely respondents to this consultation should be sought.

145. Finally, the medical template envisages injured people providing photographic identification to the medical expert. Hundreds of thousands of people in England & Wales do not have photographic identification, and provision should be made for this.

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

146. We agree that regional hourly rates should be set in straightforward cases, provided the rates reflect commercial reality. Current disputes over the most appropriate rates can be protracted but are often over very small amounts of money.

147. The rates should be regularly reviewed to take in to account the relevant index of nurses' earnings and any other relevant factors.

148. We think it would therefore be appropriate to use the British Nursing Association (BNA) rates. We believe, however, that these rates should be adopted in full, and that the new procedure should set out the requirement for the latest BNA rates to be used, rather than listing current rates in the

rules. This will allow for the necessary review, as the BNA reassess their rates periodically.

149. We also welcome the setting of limits, below which claims for special damages will not need to be proven. This change is necessary to enable claimant solicitors to comply with the proposed time limit for compiling the settlement packs.

150. It must be made clear, however, that if claimants can prove they lost more than the amounts set, these higher figures remain recoverable.

151. We are also concerned that the recovery of special damages is said to be subject to the appropriate audit and would ask the Ministry of Justice to clarify how this is to be carried out.

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

152. We note that it is not the Government's intention to develop an assessment tool for general damages at this stage, but rather to have further discussions on the matter. We would welcome the opportunity to be involved in those discussions, as we have strong views on this matter.

153. Tariff systems are inflexible and will not benefit the injured claimant, who, in each case, is an individual who suffered losses which are not directly comparable with losses suffered by other claimants. It is impossible for an assessment tool to cater for every type of injury and the effects every different the injury on every different claimant.

154. The purpose of general damages is to compensate injured people for their pain, suffering and loss of amenity. This is entirely subjective. No tool or

table will be able to properly assess the affect of the loss on each individual. In addition, many of our members have told us that the court has never awarded a lower amount than defendants have offered on the basis of calculations carried out by, for example, Colossus.

155. We do not object to the introduction of technology where practitioners find this helpful. Indeed, many of the sources that are currently used to calculate general damages such as Kemp and Kemp, and the Judicial Studies Board's Guidelines are currently available in a digital format.

156. We firmly believe the proposal to introduce a computerised assessment tool is a defendant-driven attempt to save costs rather than a proposal to ensure injure people receive the appropriate level of damages.

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

157. We agree that there is little scope for standardising contributory negligence within the proposed scheme.

158. As we said above, if contributory negligence is raised as an issue in a case, investigating the circumstances of the incident to assess whether the allegations of contributory negligence are founded can involve the same procedures, and therefore can take the same amount of time and incur the same costs, as if primary liability had been denied.

159. If there is a dispute about contributory negligence, by definition liability is not straightforward. Cases where contributory negligence is disputed must therefore be removed from the proposed streamlined system.

160. We also refer to our answer to question nine, in relation to binding admissions, where we set out our belief that if liability is not admitted in full within the time limits set for the defendant to investigate the incident, the case must be removed from the system at that stage.

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

Fixed costs

161. We support the introduction of sensible and sustainable fixed costs only in so far as the work to be carried out is also fixed. If a case is more complex and therefore requires more work to be carried out than the fixed costs allow for, it should be removed from the fixed costs system.

162. For any system of fixed costs to work in practice, the indemnity principle must be abolished (in relation to that system). If it is not, issues such as those raised in Nizami v. Butt[8] would once again need to be resolved and satellite litigation could ensue.

163. We believe that defendants who lose personal injury cases should be required to meet the claimant's reasonable legal costs of pursuing the claim against them. We recognise that fixed costs can be designed to do this whilst building an element of predictability in to the system. Whether the fixed costs that will apply to this system meet the claimant's reasonable costs depend on the level at which these are set.

164. If injured people are to continue to have access to independent legal advice irrespective of their means, any fixed costs must be set only after extensive research and stakeholder input. Independent studies must be carried out to

[8] [2006] EWHC 159 (QB)

calculate the cost of providing advice to claimants under the new system. The fixed costs system must be sustainable and ensure that lawyers are paid for the work they carry out (including work done to comply with the Solicitors' Code of Conduct and client care obligations). If this does not happen, lawyers will no longer choose to work in the field of personal injury law.

165. This will mean that people who need access to personal injury advice will find it harder to get this from a qualified lawyer and seek advice elsewhere, including from claims management companies with unqualified staff who may charge contingency fees. Alternatively, claimant solicitors may be required to cover the shortfall from the claimant, which will effectively reduce injured people's damages.

166. Fixed costs must also be set at a level which does not envisage unqualified staff working on the claim throughout the course of this. Whilst we accept that a lot of the work on low value cases may be carried out by more junior staff, more experienced staff will be needed to properly advise clients on some aspects of their claim. Claimants will not be served well if the person who is dealing with their case throughout is unqualified and has no experience.

167. Similarly, success fees must be set at such a level which allow claimant lawyers to take on cases that include a degree of risk, otherwise injured people whose cases involve a degree of risk will not be able to find a solicitor willing to represent them, and only the cases that are more certain to be successful will be taken on.

168. If injured people are still going to be able to find solicitors who are willing to represent them on a "no win, no fee" basis, the success fee regime must be a viable one. Success fees within the newly proposed scheme must also

reflect the fact that some cases may be discontinued at an early stage, once very little work has been carried out (at little cost to the claimant's representatives), or lost at trial once a significant amount of work has been done (at considerable cost to the claimant's representatives).

169. Previous research commissioned by the Ministry of Justice (and its predecessors) regarding success fees and predictable fees in road traffic accident cases can not be used to set fixed fees for the proposed system. The procedure required is different to that under the predictable fees regime. Success fees are based on the claimant solicitor's view of the case at the beginning, rather than once a decision on liability has been made.

170. Once liability has been denied the claim will come out of the newly proposed system and the claimant can enter into a CFA with his solicitor. The success fee will inevitable be a higher percentage than it would if the defendant's decision on liability not already had been made.

171. We note that the fixed costs will not include the cost of referral fees and comment that referral fees have never been recoverable between the parties. Referral fees are an overhead and a cost of acquiring business. The vast majority of businesses have to incur cost to attract custom: Yellow Pages and media advertising, and payment of commission are examples of this.

172. There is a concern that fixed costs lead to defendant apathy about the handling of cases, as there is no cost incentive to settle cases early. This, however, may be overcome if fixed costs only exist whilst defendants comply with the newly proposed system. If non compliance means solicitors are paid for the work done on an hourly rate once the case has come out of the newly proposed system, this should provide an incentive for defendants to deal with cases quickly.

173. Finally, any fixed costs also need to be regularly reviewed. The cost of providing a service does not stay the same from year to year. Inflation constantly contributes to rising costs of salaries, commercial rent, travel and other expenses. Technology may change the way people work which in turn may have a consequential effect on overheads. Professional indemnity insurance costs change as the risk of the market being covered increases or decreases: this is particularly relevant given that no one yet knows what the risk of professional negligence under the new system may be. There are so many variables that not to build a regular review of fixed costs in to the system would risk fixed costs being wildly disparate from the costs of providing the service they pay for within a very short period of time.

Variable hearing costs

174. The consultation paper asks for views on whether fixed hearing costs should be based on length of hearing or value of claim.

175. We believe that they should be based on the value of a claim. It is difficult to estimate the length of a hearing. Knowledge of potential costs exposure helps parties calculate the risk of litigating and can encourage earlier settlement.

176. Furthermore, basing fixed costs on the length of a hearing would provide a disincentive to legal advisers to narrow the issues of dispute in a case. The more issues that are in dispute, the longer the hearing will be, and the adviser will therefore receive increased fees.

Claimant not entitled to hearing costs if they do not beat their client's part 36 offer

177. Introducing this proposal would be a mistake. It is wrong in principle and would cause two significant practical problems. The current position is that a claimant can recover his costs if he beats the defendant's part 36 offer; introducing this new proposal would be a considerable change to the existing position and make the costs regime in personal injury unique amongst litigated cases in England and Wales.

178. The first problem is that the new proposal provides no incentive at all for a defendant to make a reasonable offer to settle. Whether the defendant has to pay the costs of the hearing is not at all connected to its offer, so this could be pitched far below what the claim is worth without the defendant suffering any adverse consequences at all.

179. The second difficulty is the conflict of interests that the provision would create between the injured claimant and the solicitor. The conflict arises as, under the new proposals, the claimant can only recover the costs of having legal representation at the hearing if the court decides that the claimant is entitled to more compensation than the claimant has said that he will accept. In other words, a claimant's representative will only be paid if he puts forward an offer on behalf of his client, which he think is less than the sum the judge will award. The claimant's interest in getting the highest award possible is put in direct conflict with the solicitor's interest in being paid.

180. As a result of this conflict, claimants could be under compensated for their losses as, in order to be sure that he is paid, a solicitor may be tempted to recommend that his client puts in a lower offer than his case is really worth. These offers might then be accepted by defendants before the case goes to

trial, meaning that claimants are left with lower settlements than they are entitled to.

181. Finally, there is a longstanding principle that the loser pays the winner's costs. This principle exists because the loser is considered to have acted unreasonably in not having made an offer which the court thinks is sufficient to meet the claim that is being brought (or alternatively, if the claimant loses, that the claim should not have been brought). The proposal that a claimant must beat their own offer rides roughshod over this principle.

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

182. We agree with the view expressed in the consultation paper that an after the event (ATE) insurance premium can be a significant disbursement. At present it is one that is necessary to protect the injured person from having to pay the other party's costs and his own disbursements if he loses and this protection is necessary if people of little or no means are to have access to justice.

183. We therefore welcome the proposal that injured people with a claim valued under £2,500 will not have to pay the defendant's costs, if liability is admitted. This is good news for injured people whose cases fall in to this category.

184. We agree that once liability has been admitted (and this is binding), and the case has a value that is clearly less than £2,500 (so the claimant can not be liable for the defendant's costs and his disbursements will be paid by the defendant in any event) there is no risk to insure and ATE insurance cannot therefore be justified.

185. At the beginning of a case however, there is always a risk that liability may not be admitted. As a rule, obtaining insurance at the beginning of a case is cheaper than obtaining it later, especially as by delaying until after the defendant's decision is made on liability makes the case riskier. So there is a risk at the beginning of the case that a claimant is leaving himself open to having to pay a higher insurance premium at a later date.

186. There is also a risk if the case initially appears to fall below the £2,500 (and so no insurance is taken out) but then the losses increase unexpectedly (the injury may worsen, for example), so the claim is suddenly worth more than £2,500 and the claimant may be liable to paying the defendant's costs.

187. A possible alternative would be to allow insurance policies to be taken out at the start of all cases, with the premiums being deferred or staged. If the case did then fall in to the category of claims where liability is admitted, and was less than £2,500 in value, then only a fraction of the premium would become payable.

188. We support the proposal that claimants in low value straightforward cases should not be at risk of paying the defendants' costs if they lose. If an injured person is not exposed to this risk and there is no need for an insurance policy, the process will be simpler and could be quicker. We are not convinced, however, that there is absolutely no risk. We are also extremely concerned about the knock on effect of these proposals on claimants with higher value, more complex claims, or upon all non-admitted cases, which we explain below.

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

189. We have serious concerns about the affect of the proposals on the ATE insurance market and other forms of funding and the consequences that this will have on the ability of people with personal injury claims to bring claim, which has a value of above £2,500, or where liability will not be admitted.

190. The proposals will mean that the cost of ATE insurance premiums will not be recoverable from the defendant in cases with a value of under £2,500, and where the liability is admitted within the time limit.

191. If the system works as intended, this will be a significant proportion of cases. The fact that they are low value and liability is a straightforward issue also means that these cases were the most likely types of cases to be won in any event.

192. The cases in which ATE insurance premiums may be recoverable under the new system are: those worth over £2,500, where liability has been admitted but where there is a dispute over quantum; those where liability is not admitted within the time limit and those that do not fall within the scope of the new proposals.

193. These cases are more costly to insure because they are more complex or more costly than the cases which will not need ATE insurance as a result of the proposals. One of the most difficult situations to obtain insurance cover for in the current market is where liability has been resolved, there is a dispute over quantum, and where both sides have made offers to settle. If the new process only allows for premiums to be recovered once offers to settle have been made, as opposed to after the time limit for admitting liability has expired, then cover may well be impossible to obtain.

194. Under the proposed system, where cases are worth below £2,500, no insurance can be obtained before a decision on liability has been made, because if liability is admitted, the premium will not be recoverable. If liability is not admitted, the case has suddenly become riskier in the ATE insurers' eyes, and will be more expensive to insure.

195. We are not insurance specialists, nor is there any past experience on which to base our views of the affect of the proposals. Our members have, however, told us that as a general rule, the later in a case that insurance in sought, the more expensive and difficult to obtain it is likely to be. The proposals seek to remove a number of low value, straightforward cases from the market, which up until now have been subsidising premiums in higher value, more complex cases. They also seek to postpone the time that the insurance should be taken out in low value cases, until a time when they become more difficult and costly to insure.

196. It is undisputed that the ATE market is going to have to change. The best case scenario seems to be that ATE insurance premiums for those cases that still need to be insured will go up very dramatically indeed. The worse case scenario is that the ATE market will not survive in the long term, meaning that claimants who need protection from paying defendants' costs in high value, complex or denied personal injury cases can not obtain this, and are unable to bring their cases as a result.

197. If ATE insurance premiums go up as a result of these changes, these premiums must be recoverable from losing defendants, even if they seem excessive. The injured person who takes out the ATE insurance policy is responsible for paying the premium. If the full cost of this is not recoverable from losing defendants, claimants will have to pay for the balance, which will reduce the value of their damages. It would be grossly unfair for injured

people to receive lower compensation for their losses because a change in the system of funding for lower value cases was introduced.

198. If, however, the changes result in the ATE insurance market declining to the point where no insurance is available for the majority of claims, the Government must be able to put contingency plans in place. It would be unconscionable if the changes to part of the system to make it quicker for all and cheaper for the liability insurance industry meant that people with serious injuries were unable to pursue their right to compensation because they can not afford to protect themselves against the defendant's costs in the event that they lose.

199. The proposals will also affect other forms of funding, including that provided for by membership organisations. This includes, but is not limited to, trade unions. Sports associations which offer protection for legal costs are also affected by this, and, if they do not receive funding from smaller cases, may find it impossible to indemnify larger cases.

200. These organisations work in a similar way to ATE insurers, collecting notional premiums[9] for providing cover in low risk cases which subsidises the provision of cover in high risk cases. Without such a subsidy these organisations will not be able to continue to provide their members with the protection of not having to pay the defendants costs in the event they lose their case.

201. If people are not able to protect themselves against paying the defendant's costs in the event they lose their case, through insurance or with the help of a membership organisation, they will be deterred from making a claim. Only people who have no assets to lose may be persuaded to pursue

[9] Allowed for by section 30 of the Access to Justice Act 1999

compensation for their losses. If costs protection is not available, access to justice will be seriously impeded.

202. All these concerns about the future availability of funding for personal injury claims are heightened by the fact that the proposals for change will not just affect after the event funding, but that they will also have a significant impact on BTE insurance.

203. The reality at the moment is that referral fees are paid by some solicitors. The consultation paper has stated that the fixed fees payable to the claimant's solicitor will not include the cost of referral fees. The Government should be aware that this will have a consequential affect on the BTE market. BTE policy holders are often charged only a nominal amount or nothing at all, for their BTE insurance policies. This is because the cost of underwriting the policy is paid for out of referral fees. If referral fees are no longer to be paid, this will mean that BTE policies will have to be paid for by realistic premiums, policies will become significantly more expensive and as a result less people will choose to buy them.

204. If the number of people with BTE insurance is to decline as well as the ATE market (and therefore conditional fee agreements) there must be alternative funding mechanisms in place to ensure injured people can have access to a solicitor and therefore to justice.

205. Cutting down on referral fees will also affect the way that claims management companies work. We are concerned that this will lead to an increase in unqualified staff running claims and negotiate settlements themselves, and charging contingency fees for doing so. As claims management companies do not have the right to litigate, they will not be able to issue proceedings if a defendant's offer is too low, and may just advise the injured person to settle for this amount, because they will not be

able to take the case to court. These concerns are heightened by the fact that claims management companies are not required to have professional indemnity insurance. The claims management regulator must take steps to ensure that claims management companies do not give legal advice.

206. It is the Government's job to facilitate workable funding mechanisms so that people can have access to justice and legal representation to help enforce their rights. Government decided that it should allow additional liabilities (insurance premiums) to be recoverable, which gave costs protection to those pursuing cases through membership organisation funding or through instructing a solicitor on a conditional fee agreement. This allowed for the preservation of access to justice without legal aid. The Government must not now destroy this system without putting a workable structure in its place.

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

207. No. APIL does not agree that the new claims process should apply to all claims for personal injury, except clinical negligence, with a value of less than the fast track limit.

208. The process can only apply to straightforward claims because particularly complex claims have distinguishing factors that take extra time and cost to resolve.

209. APIL believes that the proposed process is suitable only for genuinely straightforward RTA claims, where only one medical report is needed to determine the extent of the claimant's injury and which has a value of under

£2,500. This will never-the-less mean that the new process applies to a significant number of cases.

210. 73 per cent of all claims last year were made as a result of motor accidents[10]. It is generally accepted that the vast majority of these are relatively low value claims. These are also the cases that are cited regularly by defendant and insurer representatives as the 'problem cases'.

211. We believe that the Ministry of Justice must take a balanced approach to making changes to the way that personal injury cases are conducted. It must ensure claimants' rights are protected whilst it is considering the issue of cost. To throw out the existing system brought in by the Woolf reforms for all fast track cases to replace it by an untested system risks undermining injured people's rights to claim compensation from those who caused their injuries.

212. Not all RTAs are straightforward. An RTA can be identified as genuinely straightforward by asking a series of questions such as the number of defendants and capacity of the parties. We believe the process of determining whether a case stays in the new process throughout should therefore be simple. The flowchart at appendix 1 illustrates the sort of process that we believe should be followed to determine whether cases should stay within the new system throughout.

213. If more than one medical report is needed, the case is not a straightforward one and is therefore entirely unsuited to this process. If a second medical report is needed, this will involve more work, more time, and more expense.

[10] Compensation Recovery Unit statistics show that from 1 April 2006 to 31 March 2007, a total of 710,784 claims were registered. Of these 518,821 were motor claims.

214. We do not believe that the process should apply to all fast track claims. The new process places serious restrictions on a claimant's ability to prove his case. The consultation paper recognises that personal injury law has distinctive features which mean that claimants need particular protection, and yet to apply the proposed process to all claims within the fast track is to give personal injury claimants fewer rights than any other claimant using the fast track.

215. The process is designed to deal with low value cases which incur what are seen as disproportionate costs. We therefore think the process should be limited to those cases which are perceived as the most problematic: the RTA claims under £2,500.

216. The reasons we think that the other main types of case (employer, public and occupier liability) are not suitable for proposed streamlined system are set out below.

Employers' liability

217. The relationship between an employer and employee is unique. An employer has power over his employees: he pays wages, controls workloads and has the ability to discipline workers. If an employee has a potential claim against his employer, the dynamics of this imbalanced relationship are likely to influence the way in which the claim is conducted.

218. The proposed new system would allow an employer six weeks to investigate a claim, during which time the claimant could do nothing to advance his case. It is likely that the witnesses would be approached, by their employer or perhaps the insurer's claims handler, at their place of work. This could be intimidating for the injured person's colleagues who may have concerns about the stability of their own employment. The employer or insurer, who

have a vested interest in the outcome of the case, are likely to ask questions in a manner most beneficial to them: as a result, the answers may not be accurate. Claimants will then have to deal with the results of a denial of liability based on incorrect evidence. The injured person's colleagues may then face further questions from both the parties' representatives, putting the colleagues under more pressure and driving up costs of investigating the claim.

219. In addition to the potential for employers to pressurise witnesses, they may also pressurise claimants who are still working for them in to relinquishing their claim or dealing directly with the employer's insurers. One member has told us about a current case in which the defendant employer and his managerial staff visited the claimant in hospital, where he is awaiting a foot operation to deal with a fracture and other injuries. The aim of the visits was to try to get a statement from the claimant before he contacted solicitors. In this case, the claimant's solicitors have been able to stop this pressure being applied by telephoning and faxing the employer. If the new proposals were introduced for this type of case, the implication is that this practice would be allowed. This puts claimants under undue and unfair pressure and could lead to injured people being under compensated for their losses.

220. The scope for the defendant to unduly influence the claimant does not exist in other types of case such as those which arise as a result of RTAs or a slip or trip on a public highway.

221. Furthermore, many employer liability cases involve allegations of breach of statutory duty, rather than negligence.

222. Currently, a claimant's solicitor sets out any alleged breaches of statutory duty in the letter of claim, enabling the defendant to look at the specific details of the allegations and admit of deny breaching these. It is important

that these allegations are clearly explained to the defendant, so that the decision the defendant makes is an informed one.

223. The notification form does not provide for allegations for breach of statutory duty to be set out. It can not be assumed that defendants or insurers' claims handlers have the necessary knowledge of the statutory requirements to allow them to know whether they should properly admit or deny a case.

224. If employers' liability cases caused by one-off incidents are included in the new process, insurers will be put in a position whereby their policy holders are denying cases which they should be admitting. This will result in the case having to come out of the new process, and the claimant having to put funding in place and investigate the claim. The claimant's case may have been prejudiced by having to wait six weeks from notifying the defendant of the claim. In any event, the case will be delayed and more expensive to bring, because any after the event insurance that has to be taken out will be done so on the basis that the defendant has already denied liability, and therefore become considerably more risky to insure.

225. Furthermore, it is not always easy to identify who the employer is, especially in an environment where there are likely to be main and sub contractors, or where agencies are involved.

226. Finally, it should be remembered that litigation assists with the implementation of health and safety laws. It should not be a policy of this Government to make it cheaper for employers to injure their staff.

Disease cases

227. The new process is entirely unsuitable for claimants in disease cases. In a long tail disease case the employer must be found. If defunct, it may have to be restored before the claimant can proceed with a case. Insurers must also be found.

228. There may be multiple defendants; even if there is only one defendant, there may be multiple insurers; and even if there is only one defendant and one insurer it will often take more than the proposed five days to discover that, let alone be economical to carry out such necessary work under a fixed costs regime.

229. There are often issues of limitation that do not arise as a result of injury caused by a single event.

230. Furthermore, issues such as apportionment between defendants, reductions for negligent defendants for non-negligent exposure and (cumulative) causation issues may all arise.

231. There is a separate protocol and a higher success fee for disease cases, which shows that they are already recognised as potentially complex.

Public & occupier's liability

232. In many of these cases claimants' solicitors would need more than five days to send off the notification form. This is because the identity of the defendant is not always clear. In a tripping accident on a tow path, for example, the defendant might be the local authority or it could be British Waterways. Furthermore, the work required to establish the defendant's

identity may make such cases unattractive to solicitors, depending on the level of fees.

233. In addition, public authorities have a statutory obligation to repair a highway if they know of a defect. Early notification of potential claims will oblige defendants to repair the defect before the claimant has had the opportunity to collect evidence of it. This makes the claimant entirely dependant on the defendant preserving and producing documents to prove his claim. Such records can not be relied upon as being as detailed as they need to in order for the claimant to prove his claim. Even if properly kept, the records might, for example, record that a paving stone was repaired on a certain date on "the High Street". They are unlikely to record the exact location of the defect, and they certainly will not be as detailed as the evidence currently gathered by claimants. This evidence 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.

234. We also believe that defendants will find it very difficult, if not impossible, to carry out their investigations within any reasonable time limit which may be set. This is because, as mentioned above, the defendants in these cases have no prior knowledge of the potential claim.

Appendix 1 - Illustration of new claims process