



The Law Society

Extension of the RTA Scheme Call for Evidence

The Law Society's Response

25th May 2012



EXECUTIVE SUMMARY

The Law Society supports initiatives which improve efficiency and reduce costs, provided that such initiatives do not result in people who have suffered at the fault of others either being prevented from pursuing claims or from receiving the right amount and quality of advice and support that is necessary to pursue them.

Extension of the RTA Portal to EL and PL claims

In principle, we would support the vertical extension of the existing RTA portal and the horizontal extension of a portal type process to EL and PL claims, but we have strong concerns that, at present, the structure of the RTA portal may mean that these cannot be achieved properly and efficiently within the time envisaged by the Government. Certainly that applies to the EL and PL extension where substantial issues are involved and undue haste could lead to not insignificant problems as happened in the lead up to the current RTA portal.

Major changes to processes will be required and the amounts of fixed costs which are reasonable have yet to be fully considered. We understand that the Ministry of Justice has data which will assist this process, and possibly speed it up, which was prepared by Professor Paul Fenn, but they have so far refused to publish it. This does not help the stakeholders who wish to join in constructive debate with a view to assisting with the implementation of reforms which will work.

The cost of an RTA Portal claim

A survey of Law Society members has indicated that an average RTA portal claim involves approximately 10 hours of work and that, when applying a Grade D guideline hourly rate, the **base** cost is £886.33 including marketing costs. It should be noted that this is the cost price and not the selling price and is before any allowance is made to compensate the owners for the commercial return to cover the risk of running, or funding, as there would be in any business. It has long been accepted that guideline hourly rates for solicitors should be based on a profit margin of 33% and in order to achieve this a mark up on base costs of 50% has to be applied. This would equate to a selling price of £1329.50 without any compliance compulsory supervision or allowance for any work undertaken on a case by a fee earner above the level of Grade D.

The costs of extended portal claims

The survey also showed that the average hours which it would take to complete an RTA portal case with a value between £10,000 and £25,000 would be 24 hours and 27.2 hours for an EL/PL case with a value between £1,000 and £25,000.

Referral fees

The argument put forward by insurers that referral fees have led to an increase in legal costs and that prohibiting the payment of such fees in personal injury actions will result in an increase in profits for solicitors is false and mischievous. There is not only no empirical evidence to substantiate this argument but there is overwhelming evidence pointing to the opposite.

Compensation culture

Irrational expressions of concerns about a developing compensation culture, or the perception of one, in this country merely give grounds for both sides to continue with arguments for and against but which will not solve the problem. There is no evidence which supports claims of a compensation culture in this jurisdiction.

INTRODUCTION

In a letter dated 28th February 2012, the Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly M.P. raised a number of questions, the answers to which he considered would assist the Government with its plans to extend the current financial limit for RTA Portal claims (i.e. vertical extension) and to include employment and public liability claims in a similar process (i.e. horizontal extension).

He also stated: *“Because of the specialist nature of the information I am seeking, and because we have recently conducted a full consultation on some of these issues, I have decided not to conduct a full public consultation”*. Whilst we appreciate that the Government is attempting to work to a deadline to introduce these reforms we are very concerned that there have been no proper consultation or impact assessments regarding these reforms and we urge the Government to undertake the appropriate assessments as a matter of urgency. The Law Society is willing to advise and assist the Government in this respect. We believe that unless this is done correctly and the reforms, when introduced, are fit for purpose the civil justice system and the lower courts, as well as the Court of Appeal, will flounder. We also believe that this will have a serious implication for this country’s reputation as a model for civil justice and the jurisdiction of choice for many cross border and international claims.

The Law Society supports the intention to extend fixed costs to other areas of work and to streamline procedures, but this cannot and must not be to the detriment of those who have a valid legal right. Such reforms must also ensure that high quality legal advice and representation is available for those who require it and that the costs incurred in providing those legal services are the responsibility of the wrongdoer.

Referral fees, concerns about a compensation culture and rising motor insurance premiums appear to be the background to the Government’s current policy to reduce legal costs. Whilst it is a fact that motor insurance premiums have risen by many times the rate of inflation over the last few years, it is a widely held misconception that there is a compensation culture in this country and that referral fees are a cause of increased legal costs and, consequently, of rocketing insurance premiums. In fact, liability insurers themselves receive significant income from referral fees, and whilst the ABI has called for them to be banned, the resulting drop in income for insurers will mean that profits and shareholders’ dividends are reduced unless profits can be increased through other means. Insurers have therefore chosen to attack lawyers

and legal costs to reduce their outgoings and thereby maintain healthy profits. We remain deeply sceptical that the results of these proposals will result in any reduction in premiums, while the effect of the ability of people with legitimate claims to prosecute those may well be substantially restricted. The OFT decision to refer the RTA insurance industry to the competition commission suggests that there may be many other explanations for the rise in such premiums. The Law Society remains committed to maintaining access to justice and creating a level playing field for all those who may become involved in the litigation process.

Referral Fees

The Law Society supports the prohibition of the payment of referral fees because it believes that, ethically, they are unacceptable. However, it is important to remember that solicitors pay referral fees to insurers and claims management companies because it provides those who do with access to work and because, for them it is the most cost-effective way of doing so. As a result of the prohibition, the costs of paying referral fees will simply be replaced by the same or greater costs of using other marketing mechanisms to secure work.

Such methods are at least as expensive but without the guarantee of work that comes from arrangements with insurance and claims management companies.

Compensation Culture

There have been many references over the last few years about the development of a compensation culture in this country and this has led to much belittling of genuine accident victims and the solicitors who act for them. The fact is that any increase in claims is likely to be due to the increase in the public's awareness of their legal rights, their willingness to assert those rights and more widely available routes to achieve access to justice. If that is not accepted then proper empirical research needs to be undertaken to ascertain the reasons why. These are fundamental legal rights which the Law Society considers it has a duty to defend for the benefit of all consumers and the rule of law.

If there is evidence of substantial and widespread organised fraud causing an increase in claims then the Law Society is willing to work with insurers and the police in an effort to eradicate those unlawful activities.

Rising Insurance Premiums

Reforms to civil litigation funding which the Government plans to introduce in 2013 will result in many thousands of genuine accident victims having to pay out up to 25% of their damages in legal costs. Despite the Government agreeing, and stating in Parliament, that damages should be increased by 10% in order to assist accident victims, it has since admitted that it cannot enforce or police that policy. It is therefore likely that very many injured citizens will not receive the additional compensation which has been promised to the profit of insurers and the wrongdoers.

The RTA portal process was negotiated and agreed by stakeholders and, despite teething problems, has proved to be successful. It is estimated that the portal, already deals successfully with in excess of 600,000 cases each year (about 80% of all personal injury claims) and that has resulted in savings of well over £500 million for insurers since its inception in April 2010. The fixed costs which are payable were negotiated and agreed by stakeholders including the ABI. Despite this agreement, and the resulting massive savings in legal costs, there is no evidence that insurers have passed on these savings, despite promises made during the RTA Portal negotiations in 2009.

The same was true, following the predictable costs regime introduced in 2003. This new process was also a result of negotiations between the insurers, claimants' groups and the Law Society based on the assumption that the resulting costs savings would be passed onto consumers through reduced premiums and not to shareholders. Regrettably, despite the substantial reduction in legal costs rates and despite the fact that these new costs were fixed in 2003, and have remained at the same level (thereby resulting in even bigger savings because of inflation), there is no evidence that those savings have been passed on by insurers to consumers.

It is therefore not surprising that the Law Society has no confidence that these savings will be passed on and has considerable concerns that the result will be that claimants will face significant reduction in their damages and reduced access to advice and services to the further advantage of the insurance lobby.

Guideline Hourly Rates and Fixed Costs

Guideline hourly rates (GHRs) were first introduced with the aim that they should be used for the summary assessment of costs at the conclusion of fast track trials. However they are consistently referred to more widely than this, particularly in

detailed assessments and costs negotiations in all civil litigation work of whatever complexity or value. The rates are set by the Master of the Rolls on the advice of the Advisory Committee on Civil Court Costs (“ACCC”). Since 2000 GHRs have only risen in line with inflation and for no other reason. There has been no increase in these rates since January 2010, despite the recommendations of the ACCC.

The RTA Portal fixed costs which were negotiated by stakeholders and agreed by insurers were based upon the GHRs which were current at that time (i.e. 2009). The portal costs have not been reviewed since then. Because of inflation the value of those fixed costs has decreased in the last three years and this in itself would have resulted in real term savings for compensators but, again, such savings have not been passed on by insurers.

GHRs/Fixed Costs and Referral Fees

Insurers maintain that GHRs and fixed costs have to be reduced when referral fees are banned. However, this ignores two very crucial facts:

Referral fees were never built into the GHRs. The GHRs were introduced in 2000 and have only increased by inflation since then, whereas the Law Society only lifted its ban on the payment for referrals in 2005.

The objective of the stakeholder agreement which determined the RTA portal costs was to show a saving on the alternate CPR Predictable Costs Regime (PCR) rates and that was achieved as is shown when the pure pre and pure post figures are compared. However those PCR rates were determined many years before referral fees emerged.

Solicitors are in business too. They are entitled to market their practices by advertising for new business, the cost of which is a recognised business expense. They are entitled to recover those costs through the fees they charge. It is as absurd to suggest that these fees should not be included in any assessment of costs as it would be to exclude insurers’ marketing costs from the calculation of their premiums. Referral fees are a form of business marketing costs and that marketing cost need will not diminish just because referral fees are banned.

First Call for Evidence

The Law Society has concerns about the way in which the consultation of these fees is being carried out. The letter of 28th February contained five questions

There was some discussion of these at a roundtable meeting with stakeholders on 22nd March chaired by Mr Djanogly. That was too early for the Law Society to express more than preliminary views as it had not had sufficient opportunity to consider the issues fully or to seek to gather the appropriate evidence.

Second Call for Evidence

On the 1st May 2012 a further roundtable meeting of claimant stakeholders was convened at which the Law Society could, again, only answer in general principle terms for reasons stated above. The Law Society made it clear that these meetings were not proper consultation as required. A similar meeting was held for defendant representatives on 3rd May 2012.

The questions to be dealt with at those meetings were:

1. *The level of fixed recoverable costs you think would be appropriate at each stage of the process for RTA claims and those arising from employer and public liability accident claims and any evidence you can provide to support your views.*
2. *What, if any, modifications would need to be made to the pre-action protocol and the electronic portal for claims in value of between £10,000 and £25,000.*
3. *What, if any, modifications would need to be made to the pre-action protocol and the electronic portal to deal with employers' and public liability claims.*
4. *The reasons why, since the commencement of the RTA protocol, claims have exited the scheme and any ways this might be addressed.*
5. *The types of employers' and public liability claims that lend themselves to a standardised and streamlined process.*

Extension of RTA scheme

- 1. Where do claims currently fall out of the RTA Protocol and what are the primary reasons for this at each point?*
- 2. What time limits might need to be revised in light of the RTA extension to £25,000?*
- 3. Given the extension to £25,000, do RTA interim payments need to increase in value and frequency?*

Extension to employer and public liability

- 1. Are there types of EL and PL claims where liability is more readily admitted?*
- 2. If so;*
 - a) are the legal costs of such claims relatively similar to each other, and to those for RTA claims?*
 - b) what level of damages do such claims tend to be for?*
- 3. Would any time limits need to be altered for EL and PL claims – if so, which and why?*
- 4. Is the current RTA Protocol for obtaining medical reports appropriate for EL and PL claims? What proportion of RTA, EL and PL claims need more than two medical reports?*
- 5. What interim payment arrangements would be appropriate for EL and PL claims?*
- 6. In RTA claims, a 25% reduction in damages applies in cases where there has been a failure to wear a seatbelt. Are there similar, common, types of contributory negligence that apply in EL and/or PL claims which would enable a similar standardised approach?*
- 7. The EL/PL extension will apply to accident cases. Would it be possible also to include “short tail” disease such as tinnitus and vibration white finger? [It is not intended that this extension should cover “long tail” disease cases (e.g. mesothelioma and other respiratory complaints)]*

It should be noted that not all of the questions were addressed at both of the meetings due to insufficient time available.

There was no time limit given to respond to the second set of questions so we have therefore assumed that the Government's intention was that all questions should be answered in the one response despite, where questions are additional to the original request, a very short time in which to do so.

In the time available, we have sought to do our own research within the profession about the time and costs involved in undertaking such work. It proved difficult in the time and resources available to obtain figures that are reliable and, where we quote them in this report, it is on the basis that they are no more than informed estimates based on very limited research and discussion with the profession. We believe that changes to the fee rates for the RTA portal need to be based on a strong evidence base and that the research needs to be undertaken independently to inform discussions. It is a basic tenet of the rule of law that individuals should have access to legal advice and support of the quality that they need in order to bring a claim. It is a feature of our legal system that such claimants should not be out of pocket as a result of bringing a claim against a wrong doer. Those who will be supporting them need to be appropriately remunerated and there needs to be proper evidence to justify changes.

We are also concerned that Government may not be approaching this consultation with an open mind. Following the recent seminar with insurers, a statement was issued stating that Government would be reducing the fixed recoverable costs. We believe that such a statement was premature and not based on appropriate evidence.

Extension of the RTA Portal to EL and PL claims

The Law Society's view of the RTA portal remains unchanged from its response to the original proposal:-

"One of our aims is to ensure that those injured as a result of someone else's negligence get full and fair compensation as quickly as possible and that support for their rehabilitation is provided promptly."

The Law Society believes that the following key benefits must be embodied into any scheme:-

- fairness for the consumer, enabling those with valid claims to obtain independent legal advice and redress;*
- fairness for the compensator, enabling them to deal with claims in a cost effective and efficient way;*
- speed, both in securing redress and in facilitating rehabilitation;*
- reduced cost.*

We also believe that any new scheme should contain effective safeguards to protect the consumer and that speed, value for money and fairness could all be achieved in a new system but such a system must be built on the following principles:

- The injured person should have access to independent legal advice from a solicitor throughout the process.*
- The system should be designed so as to:*
 - i. avoid duplication of work;*
 - ii. be less complex;*
 - iii. incentivise efficient handling by solicitors by providing fixed recoverable costs, for claims settled without proceedings;*
 - iv. incentivise efficient handling by insurers by penalising them for failure to respond within agreed time limits;*
 - v. provide for the reasonable remuneration of solicitors which allows them to allocate a suitable fee earner/case worker to each stage of the process who is adequately supervised in accordance with the requirements of the SRA.”*

Effect on Public Funds

Whilst we appreciate that the Government is trying to reduce public and commercial sector expenditure on legal costs, the reforms which are to be introduced in April 2013 will, we believe, have a negative effect that to some extent will impact the public purse.

The reforms, in conjunction with changes to the scope of legal aid, will result in a decrease in legitimate accident claims. The Government will therefore lose out because there will be reduced recovery of state benefits and NHS medical costs, which, at present, are paid back to the DWP and NHS by insurers when a claimant

has made a successful claim. Many employers will also lose out because wages paid to an employee during any period of illness as a result of an accident will no longer be paid by insurers. Many serious accident victims also receive medical treatment and other medical services (e.g. rehabilitation services, physiotherapy etc.) from private sector providers, the cost of which is also currently paid by insurers when a claim is settled. If fewer victims make claims then the burden of providing this treatment will fall on the NHS and, therefore, the public purse.

THE LAW SOCIETY'S RESPONSE

First Call for Evidence

Question 1

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

Response

The level of fixed recoverable costs was set in 2009 following full negotiations with all the parties and based on significant and detailed evidence and consideration. There has been no increase since then.

The Law Society agrees that it is appropriate to review the level of fees to establish how the efficiencies expected have worked in practice and, generally, in the light of developments within firms. As explained above, it has not been easy to gather such evidence and we believe that Government should commission independent research to examine these questions.

We would however, make the following points.

Referral Fees

We cannot accept that the fixed fee can be reduced because of the prohibition on payment of referral fees. This is because, as stated above:

- referral fees are not, and never have been, built into the guideline hourly rates which were used to calculate the fixed costs and consequently they cannot be stripped out of them;
- Approximately 50% of claimant firms do not pay referral fees. There is no evidence to suggest that their profitability is any greater than those that do or that their overall costs are significantly different.

Recovery of Success Fees

The changes to the recoverability of solicitor success fees and ATE premiums which will be introduced in 2013 will immediately reduce costs payable in every RTA portal case by £150 because the current solicitor's success fee (12.5%) will not be paid by

the compensator but by the accident victim. The further saving in ATE premiums will vary from case to case but will be at least £ 100 per case.

Inflation

There has in fact already been a reduction in real term costs which has benefitted insurers. The GHRs which were used for the calculation of the fixed costs were last fixed in 2010 and have not been increased since then despite the recommendations in 2011 of the Advisory Committee on Civil Court Costs. We calculate that, in real terms, the GHRs have been reduced by 7% since 2010.

Portal costs

In our survey we asked firms for an estimate of how many hours a portal case typically required. The number of hours required varies widely depending on the issues involved however because much of the work is front loaded most firms considered at least 7 hours was required in the simplest cases although the median across all portal cases was 10 hours.

The survey showed that the actual **lowest** base cost of running an RTA portal case is currently £866.33, however, it should be noted that this figure is based upon the lowest grade of fee earner doing all of the work and **does not** include the following:-

- allowance for compliance dictated higher grade fee earner supervision or work on the file
- allowance for “profit” for the risk of running the business (commercial return)

Uplift on these base costs therefore needs to be applied to provide an incentive for individuals to run legal businesses. Table 1 below sets out a range of possible prices at grade D level which includes uplifts of 10%, 20% and 30% to take account of the need to factor in a profit incentive.

Table 1

30%	£1152.23
20%	£1063.60
10%	£974.96
Cost	£886.33

However, these figures do not reflect the actual profit margins. For example, 10% on the base cost of £886.33 only reflects a profit margin of 9% (i.e. if cost is 100 then a mark up of 10% produces 110 and $10/110 = 9\%$). So a 20% mark up produces a profit margin of 16% and a 30% mark up produces a profit margin of 23% - see Table 2 below.

Table 2

Profit Margin	Mark up	Amount
33%	50%	£1329.50
30%	44%	£1276.32
23%	30%	£1152.23
16%	20%	£1063.60
9%	10%	£974.96
	LOWEST BASE COST =	£886.33

An uplift of 10% of the grade D cost does not provide a sufficient incentive to firm owners. This is because it is unlikely to yield sufficient compensation for risk taking once account is taken for any work involved in the process (some of which is mandatory) which has to be carried out by one or more fee earners above Grade D. With this in mind it should be noted that the current fixed costs for stage 1 and stage 2 (£1,200) were originally based upon a mix of Grade B/C fee earners. Furthermore, the GHRs were originally based on a 33% profit margin and therefore 50% is the appropriate mark up to apply to the lowest base cost. We see no reason, therefore, to reduce the current levels of RTA portal fixed costs. There is in fact a case to argue for increasing the existing levels.

The amount of fixed costs in respect of RTA claims with a value between £10,000 and £25,000 will need to be calculated based upon what additional work will be involved. The original financial limit of £10,000 was considered to be the maximum value for claims where the injuries sustained could be classified as relatively minor and therefore expert evidence was limited and the victim's recovery prospects within a reasonable time were good. This in turn would mean that the vast majority of the cases could be resolved within a reasonable time and that hearings to assess quantum could be conducted by way of a paper exercise by the courts.

Consequently, these cases were to be the simplest of claims and without any major degree of complexity.

Increasing the limit from £10,000 to £25,000 will introduce many additional factors which will need to be taken into account as such claims will involve far more serious injuries than the existing scheme and which are likely to require additional expert evidence.

For example, the Judicial Studies Board guidelines¹ state that the appropriate range of damages for a minor head injury is £1,450 to £8,400. However, the range of damages for minor brain damage is £10,000 to £28,500. Whilst the former injury may, in most circumstances, only require one medical report someone suffering an injury which has caused brain damage may require medical reports from several different disciplines as well as rehabilitation, professional care and special needs.

Even orthopaedic injuries at this level are likely to require more than one report and/or more than one discipline. Prognosis may be unclear and the case take longer to conclude fairly. Clients still need to be kept informed and will update solicitors on changes whilst the matter remains open. This will involve more time and costs being incurred not less

An emphasis on pure quantum hides considerable differences between clients. An employed claimant might have significant loss of earnings, but make a relatively quick recovery. A claimant who is not employed (including children and the elderly) may have few financial losses, but very significant injuries where the general damages form most of the award. A pure 'swings and roundabouts' approach to fixed fees may mean that firms will be unwilling to take on the latter cases as the average fee will be far too low for the work required.

Our survey has indicated that our members currently spend an average of 24 hours on RTA claims with values ranging between £10,000 and £25,000. That is, however, based upon a process which has not been "streamlined" but where predictable costs apply in certain cases.

¹ Guidelines for the Assessment of General Damages in Personal Injury Cases – 10th Edition

It is difficult to assess what the proper base cost should be in either a vertically extended RTA portal to £25,000 or a horizontally extended portal process for EL and PL claims to £25,000 without further data. We understand that Professor Fenn has gathered such data and provided this to the MoJ but that so far it has not been published. This data should be provided to stakeholders so that they can make a proper assessment based upon empirical and independent evidence

Question 2

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

Response

The portal and protocol are not to be seen as the same. The protocol needs minor changes but the portal IT functionality will be materially affected and the April 2013 deadline will be difficult to achieve if anything more than simple value changes are needed.

Question 3

What, if any, modifications would need to be made to the pre-action protocol and the electronic portal to deal with employers' and public liability claims.

Response

We do not support this extension at the present time because of our concerns about the RTA portal structure.

Firstly, that structure is just about capable of dealing with the existing RTA claims load and its capacity will increase when the existing RTA financial limit is raised to £25,000. There can be no assurances that the portal will cope with an additional major increase in use if EL and PL claims have to be made through it. The existing structure was put together in a rush and, although its performance has improved considerably, we would not wish the same rush and risk occurring again.

Secondly, and more importantly, we have serious concerns about the lack of competition to provide the portal services. This, in our view, is a public service as it will be an essential requirement in the making of the vast majority of personal injury claims in England and Wales. Procedures for the conduct of the claims and the

behaviours of the parties are laid down in the Civil Procedure Rules which require the agreement of the Lord Chancellor and Parliament by way of secondary legislation.

Although the Board of Portal Co. has equal numbers of claimant and insurance representatives, with a highly effective independent chair, the fact is that it is currently financed by the insurance industry and run through the MIB, which is part of that industry. We believe that the funding of the portal needs to be put on a basis whereby its working is not, in practice, wholly at the mercy of the insurers and we understand that the MOJ may have agreed to redress that issue through a user pays system.

Secondly, we consider that increasing the capacity of the existing portal which is provided by a sole supplier without the formality of a fully public procurement process would be anti-competitive and wrong. Such a procurement process would not only guarantee “best value” but would also mean that there would be a second supplier which is able to supply, operate and maintain a portal system. This would clearly provide some protection from a complete meltdown of most of the civil justice system if one supplier for whatever reason had to suddenly withdraw its services.

Further, the changes needed to the Protocol will be extensive and should be the subject of a formal public consultation.

Question 4

The reasons why, since the commencement of the RTA protocol, claims have exited the scheme and any ways this might be addressed.

Response

We suspect that the main reason why claims exit the portal scheme is due to the inefficiency of some insurers in that they fail to deal with the claims within the required 15 days of receipt of the claim form.

During stakeholder negotiations regarding the process both claimant and defendant groups expressed their concerns that behaviour was a driver which increased costs. One of those behaviours was the failure to deal with a claim expeditiously by legal representatives and insurers. Much of the criticism in this respect was well founded and one of the crucial factors which the Ministry of Justice accepted was that a very strict time limit should be imposed for insurers to admit or deny liability. It was widely

accepted that in the majority of road traffic accidents liability was often quite clear from the outset and that 15 days was therefore a reasonable time.

The reasons for maintaining a short time limit in these cases still exist and consequently the 15 day time limit should remain. Insurers must therefore adapt their systems and claims management procedures accordingly. Failure to do so, as we have seen, can only result in claims exiting the portal scheme.

It should be remembered that in a proportion of cases, insurers will legitimately deny liability or seek a liability split. This is common for pedestrians, bus passengers (a third party vehicle often blamed), cyclists, motorcyclists and drivers in frontal or side collisions. Unless no fault liability for road accidents is introduced, there will always be a significant minority of cases that have to be dealt with outside the portal.

Question 5

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

Response

There are many specific types of personal injury claims and it is very difficult, if not impossible, to list all of those which could lend themselves to such a process. It is probably an easier and more beneficial task to list what claims **should not** be included. We have set out below those claims which we consider fall within the exclusion category although this list is not exhaustive. The best way to ascertain the answer would be by way of stakeholder negotiations when insurers, other compensators and solicitors who represent both claimants and defendants could share ideas and discuss, and where appropriate resolve, the many issues which may be governing factors. The Law Society would be happy to facilitate such a meeting in the event that the Civil Justice Council or the Ministry of Justice is unable to.

Exclusions

- where the claimant is not represented by a solicitor (i.e. Litigant in person);
- where one or more of the parties is not ordinarily resident within the jurisdiction;
- where the accident has happened abroad;
- claims involving children;

- where there is a damages claim in addition to personal injury (e.g. housing disrepair);
- personal injury actions against the police;
- all “disease” claims which can be defined as “*an illness physical or psychological, and disorder, affliction, complaint, malady or derangement other than a physical or psychological injury solely caused by an accident or other similar single event*”²;
- claims where the claimant is deceased;
- claims where the claimant is bankrupt;
- any claim where contributory negligence is alleged but disputed by the claimant;
- abuse cases;
- multi-defendant cases (e.g. where a highway authority blames a contractor; building site employment cases where various contractors blame each other and/or the claimant);
- where the Defendant is insolvent.

Call for evidence 2

Extension of RTA scheme

Question 1

Where do claims currently fall out of the RTA Protocol and what are the primary reasons for this at each point?

Response

See answer to Question 4 above.

Question 2

What time limits might need to be revised in light of the RTA extension to £25,000?

² This is the definition of a disease claim as referred to in the CPR disease pre action protocol.

Response

There is no reason why the existing time limit of 15 days for insurers to respond to a claim should be altered because of an increase in the financial limit. The increase to the limit has no bearing on the liability for the accident. However, the process will need to be amended to include multiple reports until the medical expert concludes prognosis is clear.

Question 3

Given the extension to £25,000, do RTA interim payments need to increase in value and frequency?

Response

The provisions for interim payments will need to be reviewed due to the higher value of the claims and the fact that claims of greater complexity are likely to take longer. As well as the frequency of such payments, the amounts will need to be increased in certain cases, particularly as claimants will now be self-funding disbursements more frequently due to the forthcoming changes to recoverability as ATE is unlikely to be an option for many.

Extension to employer and public liability**Question 1**

Are there types of EL and PL claims where liability is more readily admitted?

Response

No

Question 2

If so;

- a) are the legal costs of such claims relatively similar to each other, and to those for RTA claims?*
- b) what level of damages do such claims tend to be for?*

Response

- a) We believe the answer to this is likely to be that for cases where liability is admitted there is very little, if any, difference after that admittance because the issue is simply to quantifying the loss for each side. Any additional time is

likely to be spent on issues of liability and/or contributory negligence arguments and such claims will fall out of the portal.

b) All levels

Question 3

Would any time limits need to be altered for EL and PL claims – if so, which and why?

Response

The current RTA portal time limit of 15 days may be unworkable for EL and PL claims. However, there have always been serious concerns that any longer limit merely increases delays, especially as one of the principles behind any such scheme is that claims need to be dealt quicker so that victims receive their compensation sooner. Shorter time limits also promote good behaviors for those who are involved in the claims process.

Initial investigations and assessment of liability in EL and PL claims are likely to take longer for insurers to complete but this should not be a catalyst for delaying tactics. The EL/PL portal process will only be a success and of benefit to accident victims if time limits are reasonably short but practicable. We therefore suggest that insurers' time limit for responding to an EL or PL claim within the portal should be no more than 28 days. There should be scope for this to increase with the agreement of the parties but by no more than 14 days. Failure to comply with this response time limit would result in the case automatically "escaping" the portal and to be dealt with under existing non-fixed costs procedures.

Further in EL and PL cases there is a real risk of the witness trail going cold if a period of more than 15 days applies. If insurers' objective of more than 15 days is applied then fixed costs at Stage 1 will have to be increased because claimants' lawyers will have to obtain and secure witness evidence before the claim is submitted

Question 4

Is the current RTA Protocol for obtaining medical reports appropriate for EL and PL claims? What proportion of RTA, EL and PL claims need more than two medical reports?

Response

We consider that the current protocol is appropriate. The proportion of RTA, EL and PL claims that need more than two medical reports is unknown but significant.

Question 5

What interim payment arrangements would be appropriate for EL and PL claims?

Response

There should be no difference in principle to the revised interim payment arrangements which we have suggested above for RTA claims.

Question 6

In RTA claims, a 25% reduction in damages applies in cases where there has been a failure to wear a seatbelt. Are there similar, common, types of contributory negligence that apply in EL and/or PL claims which would enable a similar standardised approach?

Response

No. Nor do we consider that there can be a “rule of thumb” guide to standard levels of contributory negligence as this is a matter of judicial discretion after all of the evidence in each case has been considered. In fact, the automatic 25% contributory negligence deduction in non-seat belt wearing cases was a judicial decision which is now applied to all such cases.

If it is the Government’s intention to set standard levels in other cases then this should only be done after a review of all recently decided cases where the judiciary has assessed quantum and made a reduction for contributory negligence. This should also be done in conjunction with stakeholders and perhaps the Civil Justice Council could facilitate this work.

Question 7

The EL/PL extension will apply to accident cases. Would it be possible also to include “short tail” disease such as tinnitus and vibration white finger? [It is not intended that this extension should cover “long tail” disease cases (e.g. mesothelioma and other respiratory complaints)]

Response

No. All disease claims by their nature and definition are long tail and should fall outside the scope of any streamlined “portal” process. We believe that this is a widely held view by compensators and solicitors who represent both claimant and defendants in such cases.