



MINISTRY OF JUSTICE CONSULTATION ON

**Solving disputes in the county courts: creating a simpler,
quicker and more proportionate system
A consultation on reforming civil justice in England and Wales**

Consultation Paper CP6/2011

RESPONSE OF UNITE THE UNION

MINISTRY OF JUSTICE CONSULTATION ON

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

Consultation Paper CP6/2011

RESPONSE OF UNITE THE UNION

To: CivilTJ@justice.gsi.gov.uk

Introduction

This response is submitted by Unite the union. Unite is the UK's largest trade union with almost 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, food and agriculture, financial services, print, media, construction, transport, local government, education, health and not for profit sectors.

Responses to individual questions asked in the Consultation Paper

Chapter 2 Preventing Cost Escalation

Q1. Do you agree that the current RTA PI Scheme's financial limit of £10,000 should be extended?

No. Since the decision of the Government in July 2008 to introduce the "RTA PI Scheme" limited to £10,000 and the scheme going live on 30 April 2010 nothing has altered that would make extending the financial limit appropriate.

Among other things:

- There is very limited evidence about the cases in the fledgling PI scheme towards the higher end of the claims' value limit and only very few cases will have settled or been disposed of in Stage 3, if any, in the bracket of over £5,000
- The issues and work involved in cases in the bracket of £10,000 to £25,000 are proportionately much greater than in the bracket of £1,000 to £10,000
- The number of cases caught by extension militates against any extension at this time.

Q2. If your answer to Question 1 is yes, should the limit be extended to £25,000, £50,000 or another figure.

Not applicable.

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

No. The costs were fixed (by agreement of all the stakeholders) based on the work done in a large “basket” of RTA cases with a value up to £10,000. Most in the basket would be valued at the lower end of the range with a commensurately lower amount of work. The addition of cases with a value to £25,000 will inevitably bring in cases with more work required overall, when the medical issues, heads of damages, calculations and responsibility will all be greater and more complex than in the cases below £5,000 and in many cases those more than £5,000.

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

This depends on independently assessed empirical evidence and with the opportunity for stakeholders to reach agreement. Costs have not and should not be fixed without reference to that. Anything else is plucking figures from thin air.

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

A number of modifications will need to be put in place to accommodate such cases, if fixed costs are considered appropriate for higher value claims brought into the Scheme as a result of its extension. These modifications should be carefully considered and assessed in stakeholder workshops. Most modifications would be required to Stage 2 and in relation to the evidence in the light of experience at Stage 3.

Among other changes, there would need to be consideration of the section of the protocol and rules applying to the assumption of a £1,000 interim payment. This is fine in the context of an RTA up to £10,000 as it was intended, but wouldn't work in a scheme up to £25,000, nor in the context of a scheme covering employers' liability (EL), public liability (PL) or clinical negligence.

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

No. There are significant problems, including the time for admission in light of the power relationship in EL cases.

It is too soon to say that the RTA PI Scheme itself is a success. We understand that there are serious governance issues around funding and provision of management services, as well as practical issues even around the use of the “portal”. It is acknowledged that there is a view from all stakeholders that the signs are promising that there are significant benefits from the approach adopted in the RTA PI Scheme, including that: the scheme drives good behaviour by encouraging early admissions, it is reducing costs and it is providing claimants with their compensation earlier. That potential under a scheme like the RTA PI Scheme is in stark contrast to the results of the Jackson based reforms and

the effect of the Legal Aid, Sentencing and the Punishment of Offenders Bill, which will deliver more disputes, lower damages and fewer legitimate claims, whilst leaving the bulk of RTA cases unscathed.

In relation to Employers' Liability (EL) cases we note that the 2008 Government response to the consultation (which preceded the introduction of the RTA PI process) said this:

"The Government considers that EL cases in particular involve a different dynamic in terms of the economic and power relationship that exists between an injured employee making a personal injury claim against their employer, and two parties contesting a road traffic accident."

The relationship can impact on the claimant and his or her witnesses, who may be discouraged from pursuing or assisting with a claim (please see reference to one of many examples at Appendix 1). This discouragement has taken the form of threats and intimidation in some cases. Further, in an EL case there may be a legitimate need for the claimant's representative to seek preservation of the "locus in quo", or to arrange an early site inspection. Such considerations do not apply in the same way in RTA cases. In RTA cases the locus is a public place and the claimant often has a car available for inspection (even if efforts are made to repair the defendant's car).

Further, we note that the development of the Employers' Liability Tracing Office (ELTO), now being operated under the Motor Insurers' Bureau (MIB) umbrella is a relevant consideration, as it could be further developed to assist with the identification of EL insurers, particularly in the context of extending the Scheme and the Portal to EL cases. This must be used to cut the time otherwise available to insurers for admissions.

There is also the question of causation. Unlike the type of injuries which can be sustained in most road traffic accident, the injuries in EL cases are invariably much more complex and causation is often in dispute. The problem of raising causation at Stage 2 in the context of exiting the existing scheme is dealt with more below in relation to modifications required, but the problem is much worse in the context of the power imbalance referred to.

We understand that there is a consensus that any extension to EL cases ought generally to exclude claims arising from occupational diseases.

In relation to Public Liability (PL) cases, we note the particular features of PL cases, including the absence of compulsory liability insurance and the absence of an ELTO equivalent. We note also that the CJC facilitated process in about 2004 to fix recoverable success fee uplifts was unsuccessful in encouraging key stakeholders in PL cases to agree standard success fee uplifts.

We note that the MoJ impact assessment suggests that “Additional portal development costs are assumed to be negligible”, but we understand that this is certainly not the case and substantially underestimates the complexities involved.

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

For reasons expressed above there should in any event be no increase in the financial limit.

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

It is envisaged that there will be negotiations to look at the work required and the associated costs¹. We would support such an approach, which should follow a detailed consideration by the stakeholders together of the details of the proposed new scheme.

It is probably unlikely that there would be changes required at stage 3 of the process specifically to accommodate EL and/or PL cases, if the threshold for these claims was set at £10,000. However, there may be an opportunity to put in place any improvements that experience has indicated are required.

At Stage 2, there would appear to be few changes required, but we believe there will be more cases where causation is raised under any provision for EL and/or PL claims which would be equivalent to the present RTA Protocol at 7.32².

This is relevant to the issue of the economic and power imbalance in EL cases, as it is anticipated that proportionately more admissions could be withdrawn at a later stage in the procedure, when activity (by the claimant) to secure the liability issue would not have been pursued beyond the admission by the defendant/insurer.

Modifications in relation to the extension of the Scheme to EL and PL cases will be required in relation to Stage 1 (and to the associated CNF sent to the Portal). Again the detail of those changes should be considered further with stakeholders and the RTA Portal Co (which represents stakeholders and which is integral to the operation of the RTA Scheme in practice.)

¹ The Impact Assessment accompanying the Consultation Paper reads “2.19 Defendants might also directly incur increased operational costs from the way the new process operates. In particular there may be costs in negotiating the new fixed costs regime and in reviewing and updating it in future. These may be significant. There might also be one-off costs and ongoing costs associated with the operation of the new IT portal.”

² 7.32 The claim will no longer continue under this Protocol where the defendant gives notice to the claimant within the initial consideration period (or any extension agreed under paragraph 7.29) that the defendant—
(a) considers that, if proceedings were started, the small claims track would be the normal track for that claim; or
(b) withdraws the admission of causation.

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

No. Again we would like to think that our members could benefit from a scheme that produced early admissions and speedier settlements, in the event that they are the victim of a medical accident, but the complications in clinical negligence claims are such that mere extension of the RTA PI Scheme will not work.

There are two schemes now operating in Wales. The most recent started in April 2011. This "Redress" scheme should be assessed in due course to see to what extent it works or can be improved upon.

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

Again we say any scheme should be limited to £10,000.

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

The practical consequences will need to be discussed fully with relevant stakeholders.

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

No. Fixed costs encourage bad behaviour. Individual claimants will suffer, either as a result of their own lawyers cutting corners and under settling, or insurers out spending claimants.

However, with fixed costs set at a level that does not reduce quality of service, Unite will ensure that its' panel law firms maintain that quality. That would deal with claimant representatives cutting corners for our members, but for them and all other claimants, "escapes" from fixed costs in light of unnecessary defences to claims become crucial. Escapes should not apply only in "exceptional" cases, but as Lord Justice Jackson's fixed costs matrix (pages 538 & 539 of the final report and based on Professor Fenn's number crunching the data available to him) provides, when the reasonable and necessary costs incurred are more than 20% above the level of the fixed costs.

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

No. The reasons include that there has been no attempted independent consideration of empirical evidence or stakeholder engagement to consider the level at which they may be set in relation to suitably homogenous cases.

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

Not applicable.

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

No. If there are fixed costs in this context, “escapes” are still key in order to maintain any vestige of access to justice.

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

Definitely not as proposed, but Unite continues to maintain that problems with the current system are caused (in significant part) by the systemic failure to enforce and comply with pre-action protocols.

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

Not applicable.

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

We have nothing to add to the answer to Question 16.

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

Compulsory arbitration or mediation is not at all appropriate or effective.

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

No.

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

If fixed recoverable costs apply they should be related

- to the type of claim
- to the value
- to procedural stages.

Further, there must be appropriate “escapes”.

Q22. Do you agree that the behaviours detailed in the Pre-Action Protocol for Rent Arrears, and the Mortgage Pre-Action Protocol, could be made mandatory? If not please explain why.

No: for the reason that mandatory pre-action stages and actions as a bar to proceedings are wholly inappropriate.

Q23. If your answer to Q22 is yes, should there be different procedures depending on the type of case? Please explain how this should operate.

Not applicable.

Q24. What do you consider should be done to encourage more businesses, the legal profession and other organisations in particular to increase their use of electronic channels to issue claims?

Unite has nothing to say in answer to this question.

Q25. Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

No. Five thousand pounds is enough of a limit for consumer claims about white goods, holidays and even most cars that our members might have a dispute about. The union itself is content to pursue claims for breach of contract with the application of costs shifting.

Q26. If your answer to Q25 is yes, do you agree that the threshold should be increased to (i) £15,000 or (ii) some other figure (please state with reasons)?

Not applicable.

Chapter 3 – Alternative Dispute Resolution

Q31. Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

Unite has no comment.

Q32. If your answer to Q31 is no, what more should be done to regulate civil and commercial mediators?

Unite has no comment.

Q33. Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

Compulsion in relation to mediation does not work. Access to the courts is not a privilege but a fundamental right. Further, we recognise the success of the Small Claims Mediation Service in appropriate cases.

Q34. If the small claims financial threshold is raised (see Q25), do you consider that automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

No. Please see above.

Q35. How should small claims mediation be provided? Please explain with reasons.

Unite has no comment.

Q36. Do you consider that any cases should be exempt from the automatic referral to mediation process?

We repeat our answer to Question 33 above.

Q37. If your answer to Q36 is yes, what should those exemptions be and why?

See our answer to Q36 above.

Not applicable.

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

We repeat the concerns expressed above about compulsory provisions and in particular that access to the courts is not a privilege but a fundamental right and that blanket provisions give rise to the risk of an unnecessary layer of additional cost.

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

Not applicable.

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

Please see the answer to Question 39 above.

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

Not applicable.

Q43. Do you agree that the provisions required by EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

Yes.

Q44: If your answer to Q43 is yes, what provisions should be provided and why?

In general terms it is helpful to have consistency between EU law and the law of England and Wales in relation to disputes which may fall to be dealt with in this jurisdiction or, if the dispute is cross-

border, in a EU based jurisdiction. The three relevant provisions are: Article 6: the enforcement of mediated agreements, Article 7: the confidentiality of the mediation process, and Article 8: the effect of mediation on the limitation of actions. The first and third items are not matters of great importance, in the sense that problems in these areas do not appear to be significant. Given, however, the increasing importance of mediation and recent case law developments it is important to clarify, and perhaps develop, mediation confidentiality.

Chapter 4 - Debt recovery and enforcement

Unite has no comment in relation to questions 45 to 56.

Q57. Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order? If not, please explain why.

No. Unite opposes this proposal, because the private enforcement sector is not in a position to provide an adequate service and act as a replacement for county court judges, staff and bailiffs.

We understand that advice agencies deal daily with complaints about the private enforcement sector whether it be bailiffs enforcing council tax or High Court Enforcement Agents enforcing judgments transferred to the High Court. To remove the protection that the county court rules provide will have the opposite effect of the stated aim of these proposals to protect the vulnerable debtor and the “can’t pay” debtor,

Q58. How would you envisage the process working (in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities, etc)

The process would not work for the benefit of the majority of judgment debtors in the county courts where the main issue of concern is not that they are avoiding payment but that they are unable to pay.

Q59. Do you agree that all Part 4 enforcement should be administered in the county court? If not, please explain why.

Unite has no comment.

Chapter 5 Structural Reforms

Unite has no comment in relation to questions 60 to 69.

**Len McCluskey, Unite General Secretary
Unite, 128 Theobald’s Road
Holborn, London, WC1X 8TN**

Contact for further information: Howard Beckett, Director of Legal and Affiliated Services Howard.Beckett@unitetheunion.org

Appendix 1

Steven May's case

A case of contempt and judicial failure to respond appropriately

In this case, the claimant suffered a relatively minor injury to his foot in an accident at work on 17 October 2005. The only thing agreed before the commencement of the trial on 13 June 2007 was that damages should be £3,000.

The facts of the case as can be seen from the papers, such as the claimant's case summary, were relatively straightforward.

- The employers sought to bully the claimant into accepting £50 to withdraw his claim.
- When he did not accept the employer disciplined him and gave him a written warning
- After proceedings were commenced they wrote directly to the union – a copy of that letter is attached. In the letter the employer says that the accident was caused by his own negligence and that “He acknowledges that it was ‘just an accident’ and the company was not to blame”.

These actions amount to contempt of court. This is not an isolated incident. Indeed the same employer sought to pervert the course of justice in another case he described as “unjustifiable”. It is perhaps an relatively extreme case to demonstrate the feature of the employment relationship in connection with an EL case. There are many other instances of more subtle pressure being applied. This must be discouraged.

At trial the District Judge was obliged to apply the law – on the basis of strict liability under Regulation 4 of the Provision and Use of Work Equipment Regulations 1998 – and find for the claimant.

However, the Judge felt the need to add that: “the defendant may find this judgment harsh but I am obliged to apply the law”. The district judge then reduced the claim by 40% for contributory negligence.

The Claimant was awarded costs. Much more than should have been applicable, if the employer and the insurers had admitted liability as they should have. There was no criticism of the Defendants for arguing liability when the statutory duty was strict.

Much worse was that the Judge was dismissive of the claimant's complaint that he had been put under pressure by his employers and went so far as to say that she did not find the employers had acted improperly in any way. This is so in spite of the obvious contempt.

As the claimant's solicitor reported: "What do the employers have to do to get into trouble? Ultimately, this claimant should be praised of his resilience and courage in the face of the disgraceful conduct by the employer. My suspicion, and obviously I am not alone in this, is that there must be an enormous amount of claims which are not being converted for fear of reprisals from the employer or are being bought off by the employer/insurer. This claimant should be congratulated for having carried this one through to the end but he will be in a small minority."