Briefing paper

Argument to postpone implementation of reforms to PI/RTA procedures

Introduction

Under the provisions of the Civil Liability Act, the Government is planning to introduce reforms to claims for personal injury (PI) arising from road traffic accidents (RTAs) – 'whiplash' claims. The threshold for small claims will rise from £1,000 to £5,000, relating to the 'value' of the pain and suffering, which means that claimants will not be able to recover legal costs in these cases (unlike other personal injury claims). In contrast, defendants are almost always insured, and are usually represented in the small claims track.

Simultaneously, provisions in the Act for fixed tariff compensation will dramatically reduce the level of damages that can be claimed for pain and suffering resulting from whiplash injuries in road traffic accidents.

These changes mean that many more injured people will be unable to recover their legal costs, and damages will be reduced to such a low level that the costs of legal advice are likely to be prohibitive. This will mean a significant increase in the number of people representing themselves for such claims. The MOJ estimates that the number of claimants in this area without legal representation could be around 150,000 per year[1].

To help injured people navigate the system, the Ministry of Justice (MOJ) has commissioned the Motor Insurers' Bureau (MIB) to build an IT platform ('the portal') which claimants will be required to use. (The MIB created a business-to-business portal which is currently used successfully by lawyers and insurers to manage claims, but its existing form is not suitable for litigants in person (LiPs)).

There are serious concerns that the new system will be too complex for injured people to use without support, as well as concerns (even within Government) that people who do not have access to, or experience with, IT may be excluded from making legitimate claims. A telephone helpline and last-resort paper option are to be offered, but have not yet been thought through.

The Justice Select Committee has been told more than once that Government expects the third sector to help manage this new demand[2].

[1] *Ministry of Justice consultation: Future Provision of Medical Reports In Road Traffic Accident Related Personal Injury Claims*, page 16, paragraph 45

[2] Representations from David Gaulke, Lord Keen and Rory Stewart, including *House of Commons Justice Committee inquiry: Small claims limit for personal injury; oral evidence session 3, 16 January 2018*

Comment

Road traffic accidents can have potentially long-term impacts on the lives of people affected, and an injury which may at first seem minor can often turn out to be much more serious, which is partly why personal injury is such a complex area of law. The proposal to provide a self-help tool for litigants in person is flawed in that it assumes a level of capability that is not supported by empirical evidence. It is optimistic (at best), to expect that litigants in person will be able to a) argue the complexities of liability; or to b) fully evaluate the losses they will be entitled to claim; and c) recognise the potential long-term impact of what may initially appear to be a minor accident.

There is a real risk of serious inequality of arms: it is not hard to envisage a situation where an uninformed LiP could accept an apparently generous settlement offer from an insurer, with very little idea of the potential value of the claim they could have submitted with help from an experienced lawyer.

Margaret was injured in an RTA, and underwent examination for the injury. She was reassured that the damage was minor and short-term. She therefore made no claim at the time. Some two years later, however, she experienced headaches and back pain, and on inspection, it was found that the original examination had missed vital medical information, and the impact of the accident had affected a vertebra lower in her spine, which was now causing the pain. When she was told that she could possibly be in a wheelchair at 60, Margaret realised the accident had caused significantly more damage than had first appeared, and she was very frightened about her future. She spoke to a lawyer, who confirmed that she could still submit a claim. The insurers' initial offer was minimal, and only with the lawyer's help did Margaret finally receive appropriate compensation, which helped to cover life-long physiotherapy. As a litigant in person, it is most unlikely that she would have achieved this outcome, and could have been left with long-term pain and serious detriment, as opposed to the full working career that she still enjoys today.

Furthermore, it is a standard view in medical circles that recovery from brain injury (even minor injury) is most effective if the patient is focussed on recovery, rather than distracted by further anxieties - such as trying to manage their own personal injury claim.

We therefore deeply regret this decision in principle. We are particularly concerned at present, however, that the current deadlines are unrealistic, and the expectation that the advice and third sector will – yet again - fill the gap has not been addressed in any viable way. Relevant agencies should be engaged in contributing to the design of the procedure, and discussions should be started urgently on how such provision will be funded, followed by a period of planning to put suitable support in place.

Advice and Third Sector

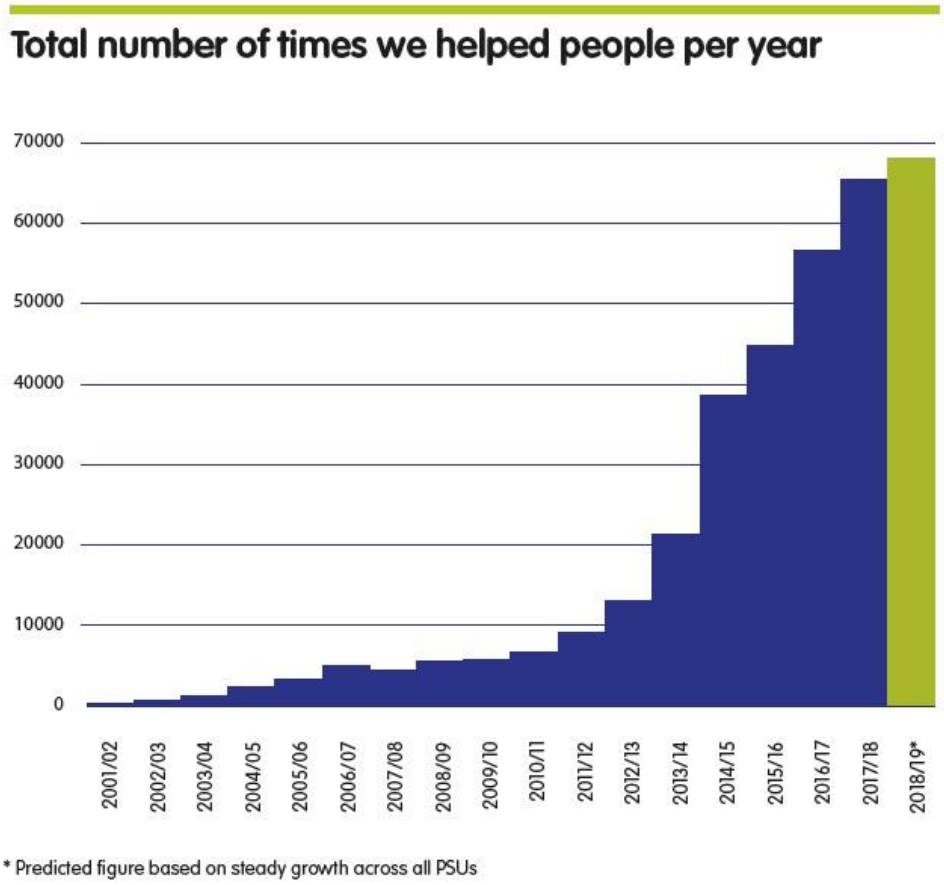
As far as we are aware, no conversations have yet started with relevant third sector organisations, and therefore no attempt has been made to estimate the possible resource costs of this provision, let alone the processes by which it might be delivered.

Since the cuts to legal aid implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), together with government spending cuts in other areas, charities in the legal and advice sector have been determinedly managing near-overwhelming demand from the thousands of

people forced to navigate the court system as litigants in person (LiPs). There are insufficient resources in this sector and not-for-profit legal advice has been badly affected by repeated cuts.

Records at the Personal Support Unit (PSU) show that the workload in the first 10 years of the service rose steadily to just over 10,000 contacts per year, whereas since LASPO, contact figures have risen *by* an average of c. 10,000 per year, reaching a new peak of 75,432 in 2018/9 (see below).

If, as estimated, there are likely to be some 150,000 unrepresented people per year trying to manage personal injury claims without the support of lawyers, the third sector will need considerable extra resource to manage this demand: the PSU's 75,432 figure includes several repeat clients; even if the 150,000 each visited a PSU once, for basic guidance, this could triple the demand for our service in one year – an impossible equation on current resources.



Experience from The Good Things Foundation has indicated that their model of simply providing support with IT is not effective in the legal context, where LiPs need guidance through legal procedures as well as IT support.

Law Centres, Citizens Advice services and AdviceUK (with 660 member-centres providing advice) will be among the frontline sources of help. These agencies have not traditionally provided advice and guidance on personal injury compensation issues (although some specialist organisations do - eg Headway), and there are currently very few Public Legal Education resources on these matters. Access to independent legal advice regarding medical evidence may also be unavailable, leaving some injured people potentially under-compensated. It will clearly take time for such agencies to build capacity to be effective in helping people through this process.

Arguments to postpone implementation dates

Quite apart from engagement with the advice and third sector, it seems that there are a number of conversations yet to be held with key stakeholders – in some cases, still to *begin* discussions which are likely to involve detailed and time-consuming negotiations.

Regulators

We understand that MOJ intends to establish a tailored service of so-called 'One Way Adjudication', which will provide a professional and independent view of any offer made to a claimant. We welcome this as a protection for LiPs. We note, however, that it is expressly not intended to replace legal advice – and yet for LiPs, it will inevitably become a default substitute.

There are a number of important details of the scheme still to be confirmed – such as whether insurers may opt out; exactly how it would be binding on insurers; what sanctions would be applied for failure to comply; what impact this might have on the insured party; whether it could lead to unintended consequences around the setting of insurance premiums; and whether the details are disclosed if the case proceeds to court.

Regulation of the claims management sector has recently moved from the MOJ to the Financial Conduct Authority (FCA) and we understand that no conversations have started with the FCA. We would like to see the MOJ engage with the FCA over this specific plan for One Way Adjudication, as well as an appropriate regulatory risk assessment of potential detriment to consumers arising in relation to claims going through the portal (such as claims management activity).

Civil Procedure Rules Committee

The Civil Procedure Rules Committee (CPRC) have yet to draft a new Pre-action Protocol (PaP), let alone any rules to underpin the process delivered by the new system. The experience of work on the new Online Money Claims (OCMC) system has shown that creating such rules is intensive and time-consuming, and requires the utmost rigour. The OCMC work has been conducted by members of the CPRC alongside their routine work, and has proved to be highly resource-heavy, involving people who are already very busy.

There is a further issue in how a PaP and rules for the new whiplash system would relate to rules for online money claims, since there is an inevitable link between whiplash claims and the small claims process.

Legislation currently going through Parliament includes a measure to introduce a new Online Procedure Rules Committee for Online Courts. It therefore seems premature to burden the existing CPRC with the task of creating rules for an online system when a new body is planned for this specific function.

Progress on building the portal

The MOJ believes in iterative development, and plans to launch a 'minimum viable product' with further processes added over time. This has worked with OCMC, but the cases involved are significantly more straightforward. Also, learning from the Money Claims Online (MCOL) process was directly transferable to OCMC, whereas the business-to-business model of the existing MIB portal is not transferable to a system for litigants in person.

It is vital that time is spent ensuring the portal is fit for purpose, and is thoroughly tested before going live. The project has been under way since before the last general election of June 2017, and

considerable work is still needed to scrutinise the online screens in detail, to ensure even the minimum viable product.

If the process is to be iterative, there is also a question mark around which elements of a complex claim will be handled by the early version of the portal, and therefore how effective it can be from the outset (for example, the new whiplash tariffs are based on a requirement for the claimant to have sought treatment for rehabilitation before submitting the claim, and this feature is not yet included in the portal design [3]).

A 'minimum viable product' is also a far cry from the pledge made by Justice Secretary, David Gaulke, to the Justice Select Committee in August 2018, when he promised "the best possible IT solution".

Details of Client Journey

As the specification for the 'One Way Adjudication' is being developed, it is becoming increasingly clear that there could be a number of steps which an LiP is expected to follow before making the decision to take the matter to court.

There has not yet been enough attention given to the timescales involved in these processes and how they will dovetail with existing timings for court proceedings; nor how far such steps will be fully covered by the IT system; nor how the journey will be designed beyond the portal, if needed. It is not clear, for example, how this work will integrate with existing small claims procedures, either online or through paper channels.

Conclusion

We are extremely concerned that the proposed timescale of testing in October 2019, followed by implementation in April 2020, is unrealistic, given the number of stakeholders, the details yet to be agreed, and the significant lack of preparation put in place to support LiPs managing these complex and potentially life-changing situations.

We ask that the timeline is reconsidered as a matter of urgency, and suggest the target dates are postponed by at least one year.

We also consider it vital that the policy is kept under review in light of potential lack of access to justice for injured people.

Eileen Pereira, CEO	**Chilli Reid**	**Ruth Daniel, CEO**	**Martin Barnes**
Lizzie Iron, Head of Service	**Executive Director**	**Access to Justice**	**Chief Executive**
The Personal Support Unit	**AdviceUK**	**Foundation**	**LawWorks**

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[3] 3 Damages for whiplash injuries
(1)This section applies in relation to the determination by a court of damages for pain, suffering and loss of amenity in a case where—
(a)a person ("the claimant") suffers a whiplash injury because of driver negligence, and
(b)the duration of the whiplash injury or any of the whiplash injuries suffered on that occasion—
(i)does not exceed, or is not likely to exceed, two years, or
(ii)would not have exceeded, or would not be likely to exceed, two years **but for the claimant's failure to take reasonable steps to mitigate its effect.**