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# Reform to the personal injury compensation system: a panacea in sight?

*Hugh Price*

## Summary


- The Government has been under strong political pressure to amend the personal injury claims and compensation system. A consultation paper by the Ministry of Justice published in early 2007 proposed major reforms, attracting over 300 responses from insurers, claims managers, solicitors, medical professionals and the consumer groups.
- Stakeholders are now eagerly awaiting a feedback statement from the Ministry which is now over six months overdue and is expected soon.
- Some of the changes proposed in the Ministry's consultation such as revisions to the Fast track limit were long expected following the Lord Woolf report a decade ago.
- However details around fixed costs recoverable, time limits, penalties for non-compliance as well as implementation period remain very controversial. For example, time limit changes will place pressure on insurers to rework their claims management systems. Meanwhile the proposals particularly fixed cost recoverable and after-the-event insurance present major challenges for solicitors.


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***CII Introduction: Reform to the personal injury compensation system has been a hotly debated topic that has affected insurance, legal, and medical practitioners as much as it has the public. This debate has reached a head in the last year following the Government's controversial consultation paper, and its long-awaited feedback statement of next steps will be published soon. In this second article in the CII's new ThinkPiece series, accomplished personal injury expert and law firm partner Hugh Price summarises the issues and takes a critical view of the next steps in this key debate.***

The Government has been under strong political pressure to amend the personal injury claims system. The process has been reviewed before, the last occasion in 1996 following the publication of Lord Woolf's report which resulted in the new Civil Procedure Rules.

The more radical rules now being proposed are aimed at further streamlining the case tracks and claims process. In April 2007 the then Department of Constitutional Affairs, published a consultation paper which closed last July. Over 300 responses were received by the Ministry of Justice (MoJ), as the department is now named. Almost a year later the MoJ response is still awaited by all stakeholders, in what could prove to be a very controversial and topical issue for the Insurance industry.

## Background

A little over 10 years ago Lord Woolf was asked to look at the procedures for bringing claims through the civil Courts. He went to considerable lengths to consult and canvass the views of all stakeholders, including the Judiciary, lawyers, insurers and banks - all those who use the civil Court system on a regular basis.

Lord Woolf concluded that the judicial system was too slow, too expensive, too complex, too uncertain and too adversarial. In other words, it was a mess.

The Civil Procedure Rules that emanated from the Woolf report contained (in my view) four very significant reforms, namely:

- A requirement for 'proportionality'
- Pre-action Protocols
- Part 36 Offers
- Case management by the Courts

All four have had a profound effect on the way that civil justice is now practised in England and Wales.

However, while 'peace was breaking out' in one area of the forest a conflagration was starting in another that would have a damaging effect on Lord Woolf's aim to reduce cost, time, complexity, uncertainty and the adversarial nature of the law.

The fire was lit by the withdrawal of legal aid from personal injury cases and its replacement with a new 'hybrid': conditional fee agreements (better known as 'no win, no fee' arrangements). These allowed claimant lawyers to seek 'success fees' of up to 100% while at the same time retaining the principle that 'loser pays all', again generating another new need: After the Event insurance (AEI).

I suspect the legislators failed to realise the consequences of their action because within months a new 'animal' had arrived on the scene: the claims farmer. This developed into the Claims Direct/TAG problem and the need for Regulation of Claims Management companies. This is a demonstration of how poorly thought out changes can generate unanticipated problems.

While Lord Woolf's changes have generally benefitted litigants the failure to resolve the costs issue once and for all has been disappointing.

On the whole legal costs have risen with additional success fees and ATE premiums (ignoring the cost of satellite litigation) making them disproportionate to the damages paid. To some extent the Predictive Costs (for motor claims) have alleviated the position, but there is still a tendency for some claimant lawyers to issue proceedings with undue haste, thereby increasing the costs further.

## The Ministry of Justice 2007 Proposals

In early 2007, the Ministry of Justice tabled proposals to create a more efficient and open system. Specific measures include:

- Fast track level increased from £15,000 - £25,000
- Claimant lawyer has 5 working days to notify defendant/insurer of claim
- No investigation : preventing front loading and duplication costs
- Insurer to respond on liability in depending on the type of claim:
  - 15 working days if motor claim; or
  - 30 days for employer/public liability claim
- Simplified special damage process
- Quicker settlement offer procedures including:
  - 15 day settlement pack
  - 10 or 20 days for counter offers
- Rehabilitation procedures included
- Fixed 'procedural' costs (levels not published - failure to comply with timetable negates fixed costs)

- If liability denial not accepted then fixed costs do not apply
- No AEI premium recoverable where liability is admitted *or* claim less than £2,500

A number of important issues remain to be resolved, including the amount of fixed costs recoverable at the various stages, penalties for failure to comply with time limits and the rules generally and the speed with which lawyers and insurers alike will have to adopt the changes.

Unfortunately the proposals do not address a major problem with personal injury claims, namely the lack of trust between claimant lawyers and insurers. The insurance, legal and national press regularly publish stories (not all apocryphal) illustrating cases where either insurers have initially offered woefully inadequate sums which are increased significantly when the claimant obtains independent legal advice or where an insurer can demonstrate that solicitors have deliberately costs churned often to the detriment of the client.

Generally the MoJ proposals have been well received, but as is often the case, the devil is in the detail.

The claimant lobby points out that 'policing' the 5 day from instruction to letter of claim will be difficult and what will the sanction be (if any is proposed) for exceeding the time limit where no prejudice is caused to the insurer?

On the other hand Insurers say that 30 days is insufficient for them to process liability (i.e. non motor) claims or motor claims that are over 6 months old. The ABI suggests 45 working days (allowing for fraud investigation) which is a significant move from its earlier position of 3 months for liability investigation and a further 3 months to make offers. This is indicative that insurers are prepared to adjust their position to bring about a better claims system.

Insurers also contend that strict timetables could affect insurers' discretion to make offers. They say it would be better for all stakeholders to agree what is and what is not acceptable conduct.

Some insurers argue that the Small Claims limit for personal injury claims (currently £1,000) should be raised to £2,500 or £5,000. Claimant lawyers disagree, pointing out that this would be disadvantageous for those who cannot afford to take legal advice. A less well publicised fact is that this would significantly affect the referral fee revenue received by trade unions, BTE legal expense providers and claims management companies.

## What effect will these changes have?

The changes to the time limits will put insurers under a great deal of pressure as many already struggle to comply with the current personal injury protocol time limit of three months (without having to fully investigate in many cases). The new regime will mean either increased claims staff for insurers, re-worked claims management systems or greater reliance on outsourcing or possibly a combination of all three. Only time will tell, but I doubt many claimant lawyers will allow a great deal of latitude, for fairly obvious reasons.

As claimant solicitors will not be required to investigate the claims at the outset (they will not be paid for doing so if liability is admitted) it will lead to an increase in unmeritorious/vexatious claims which insurers will have to investigate. The current system at least requires the claimant lawyers to 'filter' out those cases which are not sustainable: why should they take on cases for which they will not be paid? The new rules would remove this filter and so the number of claims notified is likely to increase. These will need investigation from scratch without knowing the exact allegations of fact, negligence or statutory breach, again adding to the burden on insurance claims departments.

The change to the fast track limit (from £15,000 to £25,000) is unlikely to have a material effect as many District Judges already put straightforward personal injury cases (often up to £50,000 in value) into the fast track. The proposal is both logical and beneficial for both sides.

However, for reasons I have already touched upon, raising the limit for costs recoverability from £1,000 to £2,500 or £5,000 will benefit liability insurers (as adverse costs orders will be removed) but it could have a de-stabilising effect elsewhere. No doubt the MoJ is giving this greater thought, particularly in view of the political implications.

I cannot comment in detail on the fixed cost proposals as they have not been published at the time of writing. However the MoJ will need to exercise some caution here because any provision that the ability to generate referral fees is likely to affect the revenue of some trade unions. I cannot comment with authority on this subject, but it is an area that needs consideration. Some argue that the current position is unsustainable while others say that those law firms that have invested in case management systems should be able to benefit from their investment – if that enables them to pay others to refer cases to them then so be it…

The final issue that justifies comment is AEI. The contest between insurers and AEI providers has been hard fought involving allegations of disproportionality, champerty and breach of the Law Society Costs Indemnity rules.

As Senior Costs Judge Hurst put it when giving his judgment in the Pursuit (First Assist/R&SA) cases, it was "a battle" between liability insurers and AEI providers; and "an honest attempt by an honourable insurer to fill a gap". The premiums claimed ranged from £115,000 (damages £250,000: premium allowed £41,000) to £9,000 (damages £1250: allowed £750) - not inconsiderable sums when compared with the damages.

In the other leading case of Rogers v Merthyr Tydfil BC (DAS), Judge Hurst considered premiums involving the three steps or stages, the third being trial costs where AEI premium calculations and the prospects for recoverability become uncertain. Lady Justice Smith's observation in the Court of Appeal gives some food for thought:

*"I do not think it was the intention of Parliament that would-be claimants should be able to litigate cases without any risk whatsoever to themselves. The [AEI] system does not provide any incentive for the claimant's side to have a more rigorous look at the merits."*

Market research has revealed that many of the 'easier' claims are not covered by AEI. Estimates suggest that while motor claims represent more than 70% of claims by volume only 15% are AEI insured, no doubt the result of a combination of no insurance and the increasing availability of low cost BTE cover.

The insurance market is remarkably resilient and I am confident it will adjust. While the volume 'soft' premium policies may be lost the result will be some 'hardening' and therefore higher premiums for those cases that are covered.

AEI insurers will have to look very closely at the prospects of success in each case. The quality of claims will be the key. Underwriters will apply stricter selection criteria and increased premiums to the pool of business that remains.

AEI is a niche area. Given its complexity, relative immaturity and current uncertainty I do not anticipate a flood of insurers or underwriters rushing to write this business. Insurers who are already in this market will grow their market share while others might prefer to walk away. The pool of claimant solicitors with whom AEI insurers work is likely to reduce as service level agreements and key performance indicators proliferate. Over time a more bespoke relationship and sense of mutual trust should develop between the law firms and AEI underwriters.

In the short term the number of pre-action disclosure applications may increase while insurers come to terms with the new timescales. This could encourage some costs 'churning' while helping AEI insurers to assess early the prospects of succeeding with claims.

The worst case scenario is claims progressing without AEI cover or claims not being pursued through the lack of availability of AEI cover.

## Will the new procedures deal with the twin evils of delay and cost?

The Government's feedback statement will attempt to reconcile these divergent views around the details. Politically, Labour no doubt finds itself in a bind between the trade unions, solicitors, medical profession and the financial services industry, all with unique perspectives and influences. A decision will have to be made.

Whatever the decision, sides will have to recognise the Government's genuine attempt to tackle costs and delay. Appropriate investments will ne needed in terms both people and case management systems. The alternative for those who fail to gear up will be far from a panacea – a turkey shoot, perhaps.

***If you have any questions or comments about this publication, please contact the CII Policy & Public Affairs team on:***

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