



**A call for further evidence from the Ministry of Justice on personal injury  
claims arising from package holidays and related matters**

**A response by  
The Chartered Institute of Legal Executives**

**January 2018**



| <b>Contents</b>                                                                                                                      | <b>Page</b> |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Introduction                                                                                                                         | 3           |
| <b>General Points</b>                                                                                                                | 4           |
| The apparent increase in the number of law value personal injury (PI) claims for Gastric Illness (GI) arising from package holidays. | 4           |
| Extending the use of Fixed Recoverable Costs (FRCs) to claims of GI arising from package holidays.                                   | 4           |
| <b>Responses to questions</b>                                                                                                        | 6           |
| What critical factual information is required from the claimant in the letter of claim to facilitate prompt investigation?           | 6           |
| Perceptions of the processes to be followed in the investigation / formulation of GI claims.                                         | 7           |
| Perceptions of processes to be followed in response to such claims                                                                   | 7           |

## **1. Introduction**

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes:
  - 1.1.1. Approximately 7,500 fully qualified Chartered Legal Executive lawyers.
  - 1.1.2. Approximately 3,700 members of all grades who work in personal injury, for both claimants and defendants.
- 1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.
- 1.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 1.4. This response includes contributions from some of CILEx's civil practitioners and members working in personal injury. Following the original call for evidence, CILEx liaised with members through its Personal Injury Specialist Reference Group, and its Civil Practitioners Specialist Reference Group, and conducted a survey of members into their experience of low value personal injury (PI) claims arising from package holidays. Their responses have been used to provide further detail to this call for further evidence.

## 2. General Points

### The apparent increase in the number of law value personal injury (PI) claims for Gastric Illness (GI) arising from package holidays.

- 2.1. CILEx reiterates its call for additional independent evidence that supports the Government's view that there has been a substantial increase in the number of GI claims resulting from package holidays over the past few years.<sup>1</sup>
  - 2.1.1. Following a survey of CILEx members specialising in civil and personal injury, a small proportion indicated that they had experienced small increases in the number of GI claims they have handled over the past year.<sup>2</sup> CILEx would be cautious, however, in suggesting that the experiences of our civil practitioners that responded to our survey are reflected similarly across all of our personal injury lawyers and civil practitioners.
- 2.2. CILEx would also welcome additional consideration regarding the impact cold-calling has had on the reported increase in the number of GI claims arising from package holidays.

### Extending the use of Fixed Recoverable Costs (FRCs) to claims of GI arising from package holidays

- 2.3. CILEx remains cautious of extending the use of FRCs to claims of GI arising from package holidays, and would reiterate its previous recommendations that the Ministry of Justice consider the impact this proposal would likely have on

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<sup>1</sup> See CILEx's response to the Ministry of Justice's call for evidence on personal injury claims arising from package holidays and related matters:

[https://www.cilex.org.uk/~media/pdf\\_documents/main\\_cilex/policy\\_and\\_governance/consultation\\_responses/cilex\\_submission\\_-\\_call\\_for\\_evidence\\_pi\\_package\\_holidays\\_-\\_final.pdf?la=en](https://www.cilex.org.uk/~media/pdf_documents/main_cilex/policy_and_governance/consultation_responses/cilex_submission_-_call_for_evidence_pi_package_holidays_-_final.pdf?la=en)

<sup>2</sup> 21% of respondents indicated that they have experienced a small increase in the number of GI cases they have dealt with, compared with this time last year.

11% of respondents indicated that the number of GI cases they have dealt with, compared with this time last year, have significantly increased.

63% of respondents indicated that the number of GI cases they have dealt with, compared with this time last year, have neither increased nor decreased.

5% of respondents indicated that they have experienced a small decrease in the number of GI cases they have dealt with, compared with this time last year.

genuine claimants, their ability to access justice, and the amount of legal costs they are able to recoup.<sup>3</sup>

2.3.1. Claims of GI arising from package holidays are often very complex, largely as a result of the research and evidence required to substantiate a claim. This level of complexity often results in a significant financial burden being placed on claimants seeking justice.<sup>4</sup>

2.3.2. CILEx is concerned that the introduction of a FRC model would likely fail to take into account the complex nature of GI claims arising from package holidays abroad, and could unfairly punish claimants as a result of a significant depreciation in the legal costs they will be able to reclaim.

2.3.3. As a consequence, CILEx believes that extending FRC to GI claims arising from package holidays will likely result in depriving genuine claimants from accessing justice and receiving the compensation they deserve.

2.4. CILEx also wishes to emphasise that the CPR Committee should avoid applying FRC schemes that are used for other types of claims.

2.4.1. CILEx has previously emphasised its concerns that in its call for evidence the Ministry of Justice provisionally proposed that FRCs for road traffic accident (RTA) claims or those that apply to public liability (PL) claims could be extended to GI claims arising from package holidays.<sup>5</sup>

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<sup>3</sup> See footnote 1

<sup>4</sup> One respondent said: "From my experience, firstly, it is often very difficult and requires a lot of time to identify a suitable local standards expert. Secondly, the cost of obtaining such expert evidence is usually very high as it can involve complex matter of local law and standards, even in cases of low value. The local standard that may have been breached is not necessarily cheaper to obtain evidence of, just because the injury suffered is far less serious."

Another respondent said: "These cases are not straightforward. Currently liability is more often than not denied. The issues that are then involved in terms of assessing liability can become complex."

Another respondent said: "Holiday illness claims require a much more significant amount of evidence to be gathered in order to be successful, as well as a greater deal to prove following the Wood v TUI case."

Another respondent said: "People with lower value claims, including people on low incomes who have suffered loss of earnings (but because they are on low incomes in financial terms this is a modest amount), will probably not be able to pursue claims as it will not be proportionate financially to do so. The cost of obtaining the evidence required, particularly expert evidence, will be prohibitive. This will affect their ability to obtain access to justice."

<sup>5</sup> See footnote 1

- 2.4.2. Notwithstanding that PL claims have greater propensity to reflect the nature of GI claims, CILEx is unaware of any PI claims which similarly reflect the unique nature of GI claims arising from package holidays. As a result, CILEx is unable to recommend a suitable FRC scheme currently in place for other PI claims which can also be applied to GI claims arising from package holidays.
- 2.4.3. Therefore, if following sufficient consultation, it is determined that that a FRC scheme should be introduced, then the CPR committee should fully consider what suitable FRC processes and levels should be so as to reflect the complexity of these claims.

### **3. Responses to questions**

#### What critical factual information is required from the claimant in the letter of claim to facilitate prompt investigation?

- 3.1. Outside of the information currently required in the Claims Notification Form (CNF), CILEx has received no indication from its members that additional factual information is required in order to facilitate prompt investigation.
- 3.2. CILEx is concerned that any additions may likely result in additional unnecessary bureaucracy, and a subsequent increase in costs faced by claimants.
- 3.2.1. By increasing the requirements of claimants at the beginning of the process, the CPR Committee may risk leaving genuine claimants being unable to access justice as a result of lawyers being unable to take on their claim because they will be unable to recoup the increased costs incurred at the beginning of the process as a result of a FRC scheme.
- 3.2.2. CILEx is concerned about unnecessarily increasing the burden on genuine claimants at the point of submitting a letter of claim, and we therefore ask the CPR Committee to take this into account when considering if any additional information is required by claimants in the letter of claim.

### Perceptions of the processes to be followed in the investigation / formulation of GI claims.

- 3.3. The process of collecting evidence in GI claims proves to be the most significant frustration faced by respondents who work on behalf of claimants and defendants.<sup>6</sup>
- 3.4. Respondents emphasised the difficulties in gathering and adducing expert evidence of the applicable local standards that have been breached, and proving that the breach of this local standard has caused the damage suffered.<sup>7</sup>
- 3.5. CILEx is also concerned that the costs associated with obtaining expert evidence and its impact on access to justice may likely be exacerbated if an FRC scheme is applied to GI claims.
- 3.5.1. Respondents told us that costs often include translation and interpreting costs where local standards experts do not read, write or speak English to a standard that allows them to prepare a written report and give evidence at trial, or be cross examined.<sup>8</sup> An FRC scheme may result in claimants being unable to recoup all of these costs following the resolution of a claim.
- 3.5.2. As a result, these costs can disproportionately impact claimants with lower household incomes, or those with low value claims (or both) who may suffer as a result of lawyers being unable to take on their claim.

### Perceptions of processes to be followed in response to such claims

- 3.6. CILEx is concerned that changes to established time periods and limits in the PAPs when responding to claims will likely prove unnecessary and counterproductive. Extending the time periods in which the claimant and

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<sup>6</sup> See footnote 4

<sup>7</sup> See footnote 4

<sup>8</sup> One respondent said: "Obtaining local standards expert evidence will often involve instructing a foreign expert based abroad and will therefore involve translation and interpreting costs, as the local standards expert often does not speak and/or write English, or if they do, not necessarily to a sufficiently high enough standard to prepare a written report in English and to give evidence at trial under cross examination. Often, the local standards expert is not conversant with the requirements of the CPR and this will have to be explained in detail to the expert to ensure a CPR-compliant report is obtained, thereby increasing costs. It is often the case that relevant witnesses might be foreign and/or based abroad and again not necessarily have English as their mother tongue, or be sufficiently fluent to provide a witness statement in English, meaning the cost of obtaining witness statements from them will be higher as this will involve translating and interpreter costs."

defence can carry out specified protocols will in all likelihood unnecessarily lengthen cases in practice. This is an important consideration since the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (EL/PL PAP) is implemented in order to ensure, as far as possible, that claims are handled efficiently and effectively.<sup>9</sup>

3.6.1. 40% of respondents disagreed or strongly disagreed with the proposal that the time within which an insurer must send an electronic acknowledgment after receiving a claim should be extended from "the next day" to "three days". Of this group, a majority commented that the extension of the time period would have little impact upon parties involved in these claims. Respondents highlighted two main concerns:

3.6.1.1. Firstly, respondents highlighted that the protocol provided by the EL/PL PAP is designed to make sure that claims progress more quickly and efficiently. It therefore follows that by extending the time period in which a defendant can send an acknowledgement after receipt of the CNF, the progress of these claims will be delayed, therefore leading to a potential increase in time and costs for parties involved.

3.6.1.2. Secondly, the defendants in these cases are often large travel corporations or insurance companies who not only have the resources to send an acknowledgement after receipt of the CNF by the following day, but in some cases they have electronic systems that produce acknowledgements almost immediately.<sup>10</sup> An extension of this time period not only seems unnecessary, but will likely result in increased time spent on procedures which are, according to our respondents, relatively easy to deal with as they stand.

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<sup>9</sup> One respondent said: "The point of the PAP was to streamline the process and promote the efficient handling of claims to reduce the time taken to settlement. Increasing the time limit will deflect from this purpose and cause delays in claims progressing."

<sup>10</sup> One respondent said: "Compensators are huge insurance companies or local authorities and they have electronic systems that can produce the acknowledgment immediately. As such I fail to see why they need additional time, it is only an acknowledgement."



3.6.1.3. Separately respondents highlighted that there may not be sufficient disincentives to keep to procedures. The EL/PL PAP provides a “must” condition that requires the defendant to send an acknowledgement after receipt of the CNF. However, this “must” condition seemingly has little impact since the sanction for breaching paragraph 6.9 of the EL/PL PAP is seldom used.<sup>11</sup>

3.6.2. Respondents disagreed with the proposal to amend paragraph 6.11(b) of the EL/PL PAP in order to extend, from 40 days to 120 days, the period within which a defendant must complete the response section of the CNF and send to the claimant, emphasising that extending the time period by 200% is far too long.<sup>12</sup>

3.7. CILEx would welcome further consideration in order to establish the impact these amendments may have on the speed at which GI claims are progressed, and whether these proposals are necessary in order to extend FRC to package holiday GI claims.

#### For further details

Should you  
require any  
further  
information,  
please contact;

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<sup>11</sup> One respondent said: “The current paragraph [referring to paragraph 6.9 of the EL/PL PAP] is meaningless anyway as although it has a 'must...' condition, there is no sanction for breaching this section of the protocol in any event.”

Another respondent said: “There is no need to extend the time for an acknowledgement of a claim. This will simply lengthen the process and waste further time.”

Another respondent said: “The electronic acknowledgement in reality is not an important part to the claims process. The existence of this rule can unfairly trip up insurers in cases of a simple IT error. Human input cannot be justified by the volume of claims and the essential response is that which is sent within the 15/30 days. It would be more appropriate to be rid of the acknowledgement requirement altogether. Additional days are unlikely to benefit either party.”

<sup>12</sup> One respondent said: “That is far too long. Half that time will be sufficient. The claimant will have lost interest in the claim by then.”

Another respondent said: “The purpose of the limited time is to ensure that only straightforward cases are dealt with under the protocol. If a case requires more investigation it will not be suitable for the protocol.”

Another respondent said: “120 days is longer than they would have had under the pre action protocol. It will prevent claims dropping out for lack of response, and give the defence longer to investigate, but loses the point of portal claims being faster to deal with.”