



**Unite the union response to Consultation:**  
**“Case track limits and the claims process for personal injury”**

Response due 13 July 2007 to [nina.skomorowski@dca.gsi.gov.uk](mailto:nina.skomorowski@dca.gsi.gov.uk)

**1. Introduction**

- 1.1. Amicus the Union and the Transport and General Workers’ Union recently merged to form the UK’s largest union, Unite, with 2 million members.**
- 1.2. Core to the unions’ work is health and safety and the pursuit of damages for those who have suffered injury, particularly at work. Unite, and the unions that amalgamated to form it, have for decades provided support for members to pursue compensation claims for injuries and diseases caused by work and in the employment field.
- 1.3. For more than 20 years the union has extended that assistance to members’ families for injuries suffered away from work.
- 1.4. This service has been of great value to the membership and society as a whole, particularly in the context of access to justice. Before legal aid ceased, in 2000, to be available for personal injury (PI) cases the unions backed PI cases. This had the effect of reducing reliance on legal aid and provided access to justice at no cost, even when legal aid was not available, or only available upon payment of a contribution. Unite has continued to provide this support, which has helped the current system work, and – to date – we have been able to support cases under the current funding arrangements.
- 1.5. Trade unions have continued to behave responsibly in pursuing appropriate cases. We have backed ground breaking cases for victims, such as those dying from asbestos related diseases, and we have backed straightforward “small cases”. All are important to our members, in different ways.
- 1.6. In backing cases we have also advanced the cause of health and safety. The Health and Safety Executive is under resourced so that there are too few inspectors carrying out too few inspections resulting in low levels of

enforcement, which increases the need for the litigation incentive to promote good health and safety.

1.7. Unions do not exist to make a profit and would prefer to prevent injury and loss rather than have to support claims.

1.8. However, as a result of the proposals in this consultation paper, Unite now fears its ability to continue to help thousands of innocent victims of injury is under real threat.

## **2. Executive Summary**

2.1 In spite of its laudable goals, the proposals in the consultation paper as a whole, if implemented will seriously damage the trade unions' ability to support cases and will inflict substantial harm to access to justice for many others, who do not benefit from union membership. The proposals present an opportunity to be exploited by liability insurers, to the detriment of claimants.

2.2 Unite does not object to a rise in the fast track limit to £25,000 per se, but as part of a package of measures whereby many cases under that level are subject to limited fixed costs and significant restrictions on the recovery of after the event (ATE) premiums or their equivalent, there will be great problems.

2.3 Unite knows that the ATE industry has concerns for its future and under the current system unions like Unite shadow it. Undermining or destroying ATE will present real problems to the ability of trade unions to continue to back PI cases, in terms of providing for the risks of taking cases. Even if it is not certain that the worst will happen, it is incontrovertible that there is a real risk. Further there will be problems even if the worst does not happen. There is a way to avoid the prospect of harm to access to justice.

2.4 This risk of substantial adverse consequences to access to justice must be avoided. The way to avoid it is by restricting the scope of the proposals in terms of the types of cases that will be covered by any new system and to take stock of the effect before extending the system to other cases.

2.5 Fixed costs have many disadvantages. They have had some success in limited circumstances but, when their scope is extended, it can be expected that there will be adverse consequences for access to justice. The level of fixed costs should properly be assessed in relation to work done before being set. Thus, they cannot be fixed at the outset of a new system. (See in particular response to Question 18 on page 13 below).

2.6 ATE and the equivalent additional amounts unions can claim should be permitted to ensure adequate funding at a level that does not adversely affect access to justice and union legal services. (See response to Question 19 on page 14 below).

2.7 Unite would not wish to see employers' liability (EL) cases included in any new scheme or system at this time. In addition to other concerns, we do not want there to be adverse consequences for health and safety at work. (See Appendix 1 of this response at page 19 for a 10 point detailed consideration of the distinctive features of EL cases).

2.8 Unite would want to see any new system or scheme applying to more straightforward cases, particularly road traffic accidents that can be concluded on one medical report. The medical report template would assist in identifying cases that can be concluded on one report. (See Appendix 6 of the consultation paper particularly at page 63).

2.9 Unite is also firmly of the view that there should be no new tier, such as that proposed to be set at £2,500. We are not alone in believing this may amount to "raising the small claims limit by the back door". (See consultation paper, particularly pages 36 and 37 and our response to question 12 on page 10 of this document).

2.10 Such restrictions do not amount to a pilot scheme. The system proposed already has restrictions on scope.

2.11 Unite understands the calls for a review and implementation of change. We do not seek to defend the worst excesses and greed engendered under the current system. We reiterate that unions like ours have behaved responsibly throughout.

2.12 Unite is vehemently opposed to changes being made that restrict claimants' ability to claim damages for injuries caused by the negligence of others and which benefit those that cause injury and their insurers.

2.13 We have put forward further observations on the detail of the proposed process that Unite hopes will encourage it to be a success at the start and to provide a sound basis for the ways in which it may develop.

### **3. Comments on the consultation paper**

3.1 There may be problems with the current system of claiming damages for personal injury in the UK. Unite agrees with the Law Commission that these include that damages have not kept pace with inflation (See Law Commission Paper 257 dated December 1998).

3.2 The process of review culminating in this consultation paper began at a time when liability insurers and businesses were lobbying hard about the cost of premiums. That problem – which was partly cyclical and due to a failure to seek high enough premiums in previous years – has abated. Another problem was a runaway perception of a "compensation culture". This is now more widely accepted as having no foundation in fact and the pressure for action has dissipated, perhaps in part due to the Government's Compensation Act.

3.3 Other concerns have been those of cost (and proportionality) and abuses of the system. In relation to the latter we now have the Compensation Act, the impact of which is already becoming evident. The matter of cost must be seen in the context of the causative effect of the activity of those who are most vociferous in complaining about it. Cost must also be seen in the context of bad behaviour by some, which is being addressed at least partly by the Act.

3.4 What must not happen is that problems – perceived or otherwise – are addressed by penalising those who have done no wrong and in particular the innocent victims of legal wrongs.

3.5 Unite has no doubt that the combined effect of the proposals in the consultation paper will do exactly that – harm those who have a justifiable claim for damages. That is not to say that some aspects of the proposals, in isolation, such as the opportunity for early admission, are not good ideas, but that combined with no access to ATE and restricted fixed costs, will result in a benefit to those who commit legal wrongs. Society should continue to make the polluter pay, to encourage responsible behaviour and to avoid making it more difficult for the injured innocent to recover mere compensation.

3.6 Problems arise in part due to the lack of effective sanctions, in particular on defendants and their representatives. Indeed, Unite wants to see more detail on enforcement and integration of any new system with the pre-action protocols.

3.7 In this context Unite is also concerned about the tone and content of the paper, which is inflammatory and propagandist. For example, paragraph 54 reads “In addition a referral fee is often paid, for example to a claims management company or an insurer and this can be in the region of £600 - £900.” Such referral fees are unknown to Unite and an anathema to all responsible unions. Similarly, paragraph 90, which refers to ATE, mentions only one premium. The extract reads “Some providers charge a set premium, where the minimum premium can be in the region of £1,000.” This is not the norm.

3.8 Unfortunately most representatives of consumers of legal services do not appreciate that this is the extreme. What is the purpose of such alarmist language? Why should proposals now have a massive adverse effect on those, like unions, who have for so long provided access to justice for those who have suffered injury.

#### 4. The questions

Question 1. **Do you agree that the small claims limit for personal injuries should remain at £1000 in view of the proposals to improve the claims process? If not, please set out your reasons why and state what you consider the appropriate level would be.**

Comments: Yes, we do agree. Unite the union has fought long to overcome a perception that raising the limit will cause little harm. However, unchecked the remainder of the proposals in this consultation paper, will be worse for unions and their members and families than a rise in the limit in line with inflation since 1999.

The reasons why a rise in the small claims track limit would be harmful include that based on the number of cases that would be affected. Unite has previously pointed out that those who were advocating a rise to £2,500, including the Association of District Judges, the Constitutional Affairs Select Committee and (albeit with significant provisos) the Policy Department of the Citizens' Advice Bureaux, did so without the benefit of knowing that the unions are currently able to back even those cases of a value of less than £1,000, because there are relatively few of them. However, if the limit was raised as was suggested to £2,500, roughly half the cases would be those where costs could not be recovered, so that unions could no longer afford to back them.

The attendant consequences would impact on health and safety and many of those who are relatively poorly paid. Two thousand five hundred pounds is a lot of money to someone on a low income - about 3 months wage to the 1.3 million on minimum wage.

Unions represent 6.5 million members and their families - people, who make 150,000 claims a year. If the limit went up, we could not afford to carry on and 75,000 people a year people would be left without legal representation and therefore would be under settled or receive nothing at all. Unite has provided evidence in the past as to unrepresented claimants suffering in this way.

Others who do not have the benefit of union backing will be similarly affected. Legal Expenses Insurers have made a similar point in relation to the availability of their products to back claims if the limit went up.

Unite has also made the point that damages have not kept pace with inflation and refer to Law Commission Report 257 from December 1998, which recommended that awards of general damages less than £3,000 should be increased *by a factor up to 1.5*. In addition, if the recommended increases were not implemented until over a year after the publication of the report, it recommended that the increases should take into account any change in the value of money following publication. The recommendations of the report have yet to be actioned.

Unite has very real concerns that the proposals in the paper for a new claims process will have a similar effect to a significant increase in the small claims limit. Indeed at least two other organisations, involved from different perspectives in the claims process, have concluded that the proposals together amount to an attempt to raise the small claims track limit by the back door.

**Question 2. Do you agree that the small claims limit for housing disrepair should remain at £1000 for disrepair and £1000 for damages? If not, please set out your reasons why and state what you consider the appropriate level would be.**

Comments: Unite does not have sufficient experience in this area to make a useful contribution on the specific issue of housing disrepair, but support the Government in relation to its concerns for vulnerable tenants and do not object to consistency with the personal injury limit.

**Question 3. Your views are sought on whether the process for dealing with housing disrepair cases can be improved and simplified, and if so, how this could be achieved.**

Comments: Please see answer to question 2.

**Question 4. Do you agree that the small claims limit for other claims should remain at £5000? If not, please set out your reasons why and state what you consider the appropriate level would be.**

Comments: Unite is content that the small claims limit for other cases remains at £5,000. Our members who need to utilise the small claims track would not benefit from an increase.

**Question 5. Do you agree that the fast track limit should be increased to £25,000? If not, please set out your reasons why and state what you consider the appropriate level would be.**

Comments: In principle Unite has no objection to such an increase, but this is subject to the following provisos:

- the courts should be in a position to exercise discretion readily to allocate cases estimated to be worth less than £25,000 to the multi-track in appropriate circumstances. We ask that Unite be consulted further about such circumstances, but these would include many disease cases and those with a time estimate for trial of more than one day.
- paragraph 96 of the consultation paper states that “It is proposed that the new claims process will apply to all personal injury claims with a value less than that of the fast track limit.” Such a limit as part of the new procedure as proposed would have substantial adverse consequences on access to justice in the vast majority of claims. The reasons are those given throughout this paper and particularly those summarised on pages 2 and 3 in points 2.5 to 2.9 inclusive. If those points are taken into account effectively, together with other less crucial comments, then the reasons to object to a higher fast track limit are greatly diminished.

In the event that a case believed to have a value less than £25,000 turns out to be have a value more than that, we question the status of the binding admission (See paragraph 63 of the consultation paper). This also constitutes another risk to be insured against following admission.

**Question 6. Are there any measures that would make the handling of intellectual property claims more efficient and effective? Is so please tell us what those measures are.**

Comments: Unite does not have sufficient experience in this area to make a useful contribution on the specific issue of intellectual property.

**Question 7. If the difficulty of dealing with intellectual property cases is not the court process, what are the difficulties and how could they be resolved?**

Comments: Unite does not have sufficient experience in this area to make a useful contribution on the specific issue of intellectual property.

**Question 8. You may consider that different measures would be appropriate for different kinds of intellectual property – for instance because patent cases involve questions of technology. If you have a**

**response directed to a particular kind of intellectual property only, please say so.**

Comments: Unite does not have sufficient experience in this area to make a useful contribution on the specific issue of intellectual property.

Question 9. **Do you agree that these proposals set out a procedure for dealing with claims which will provide fair compensation in a more timely and cost-effective way? If not please say why and set out any alternative proposals.**

Comments: Unite does not agree that the proposals will provide fair and more timely compensation for many claimants, including union members and their families.

The structure of the paper and the questions is such that Unite has set out many of the problems and proffered solutions elsewhere throughout this response. We refer to those matters summarised on pages 2 and 3 in points 2.5 to 2.9 inclusive.

However, it may be appropriate to include here comments on the way in which the early admission procedure might tie in with the existing pre action protocol. If the liability insurers do not admit liability, the existing pre action protocols should be adapted, applied and made effective. The existing rules and practice are sound in many respects, but should be enforced. This of itself would improve the system.

Unite would be happy to be consulted further in relation to this issue, but for example, having waited weeks for a denial under a new process, the claimant should not have to wait for the current requisite time period before proceeding, nor should the claimant need to request documentation.

The consultation document at paragraph 80 refers to the expectation that the liability insurer denying liability will disclose the police report. If the new procedure was to apply to employers' liability cases – and we hope that it will not – then there should be much more to disclose in line with the documents requested under the current pre-action protocol.

Further we comment here in relation to the paper's comment about extensions of time (paragraph 79), but this would seriously undermine the chance to change behaviour. It is essential that the time for early admission is strict.

We know, and the Ministry has been told, that the liability insurers will not admit liability unless they are greatly incentivised. Such recalcitrance should not be rewarded by making claimants suffer. There are ways to incentivise them with more sticks than carrots taken from claimants. For example, Unite would wish to see an increase in damages, as a penalty for failure to admit, when such admission was clearly appropriate (see for example the case of Steven May in Appendix 2).

Indeed, the defendants' side could be the only ones to benefit from a maximum recoverable fee for the medical report (paragraph 64 of the consultation paper). If the doctor charges more, the claimant must pay out of his own pocket.

**Question 10. Do you have any comments or suggested amendments in relation to the draft forms?**

Comments: The forms can be expected to perform their proposed function. However, Unite shares the concerns of those who have pointed out that the forms for unrepresented claimants add to the risk of identity theft particularly by requiring them to provide information to the individual from whom they seek compensation.

We have two particular comments to make in relation to the preamble on Appendix 3 and Appendix 4. The first is that the wording of the fourth bullet point does not give sufficient encouragement to use the free and expert legal service that unions provide and the contact details need improvement.

Unite proposes that bullet point four should read:

"You are advised to seek the help of an expert as that the process can be complex and the assessment of damages is not straightforward. Expert help is readily available at no cost to you. If you, or a member of your family is in a trade union, then you are able to benefit from referral to a specialist solicitor at no cost to you. Contact the union direct or via {insert link and number}. You can also contact a solicitor through the Law Society (0870 606 6575) or APIL (the Association of Personal Injury Lawyers on 0870 609 1958)."

The reason for referring to unions first, is that the Law Society and APIL represent the more generic claimant in this scenario. If an individual is not able to claim through a union, then they may look elsewhere. We also know that unions are likely to continue to provide assistance responsibly and on the basis of no fee – win or lose.

Responsible liability insurers cannot object to these proposals, as they say they would not seek to discourage the public to take legal advice.

Unite is happy to work with the Ministry and others to attempt to agree suitable wording.

The second point here is one of principle in relation to the desirability of having independent advice from a qualified person, when an otherwise unrepresented claimant is at risk from dealing with liability insurers, who are conflicted in relation to offering the right amount or admitting liability and not arguing contributory negligence. There is much evidence about this.

Substantial evidence has been provided to the Ministry and to the Financial Services Authority, who we are told regulate the liability insurers in relation to their dealing

direct with claimants. There was a meeting at the FSA with claimant representatives to discuss this on 11 January 2007, after which the Minister said this issue was “on the front burner” and she hoped the MP raising the question was reassured. However, no progress has been apparent, but a spokesman for the FSA was reported in the Post Magazine on 17 May 2007 saying “I can't see how we could make the changes necessary to address this”.

Unite would wish to see a requirement, such as that in s203 of the Employment Rights Act 1996, whereby the claimant is not bound by a decision unless he or she has advice from a qualified lawyer. There should also be an obligation on the liability insurers to advise claimants properly of the provision and the opportunity to have free legal assistance from the outset, including if the individual is a union member or is related to a union member, when the injured person should be told it is in his or her interests to go to the union concerned.

**Question 11. Do you agree with the above time periods? If not please state why not and what they should be.**

Comments: Generally, it should be born in mind that the proposal for an opportunity to admit liability early, provided to the liability insurers, was intended to be short and carry significant consequences for failure. The time period must be fixed and short. It amounts to a pre-pre-action chance to avoid costs and to avoid additional delay.

The time periods for Employers Liability and Public Liability are not acceptable. There is recognition by having a time period twice as long as in road traffic cases (RTA), that EL and PL claims are different and they are. Unite maintains that the differences are such that the new system should not cover non RTA cases, at least at this stage. We refer to our specific comments about EL cases added as Appendix 1 to this response.

Specifically, 30 working days is at least 6 weeks. At Christmas and the New Year this and over Easter this can be nearer seven weeks. This is too long to be effective as part of the new scheme and carries adverse consequences that only affect claimants.

More than three weeks after notification to take advantage of an opportunity to admit early is too long under any new system.

It follows that Unite does not agree to a process that has different time periods depending upon the value of the claim (paragraph 73).

**Question 12. Do you agree that where the amount of damages cannot be agreed there should be an application to the court through the simplest**

**procedure possible? Please comment on what that procedure should cover.**

Comments: The question is, of course, largely rhetorical, but it should have added “consistent with access to justice and a fair and accurate assessment”.

A simple procedure can be envisaged whereby the claimant’s representative issues proceedings with confirmation of an admission and confirmation of compliance with a requirement for an offer to settle, where it is anticipated that the matter can be concluded on the basis of the present medical evidence. Perhaps a statement (or statements) could also be lodged and where possible a schedule of loss, whereupon the court could fix a hearing date before a District Judge for two hours, subject to objection by the defendant’s representative.

A system involving another arbitrary limit of £2,500 however is strongly opposed by Unite. A case worth £3,000 should not be dealt with substantially differently to one of £2,000. The justice required by both is the same. Such sums remain significant to many union members and those on low wages or none at all.

There is no difference to the nature and cost of the evidence in either case. This is one of the reasons why several stakeholders, with different perspectives (ATE providers, claimant lawyers and unions) think this is “raising the small claims limit by the back door”.

A simple procedure can of itself save costs. However, Unite does not accept that it follows that there is no need for ATE or equivalent (see paragraph 78 of the consultation paper).

Neither have we seen the Association of District Judges paper referred to in paragraph 78 of the consultation paper, but Unite understands that the TUC’s request for this has been ignored.

**Question 13. Your views are sought on whether additional measures could be introduced that would help improve the process where liability is not admitted, or is denied.**

Comments: In relation to paragraphs 79 and 80 of the consultation paper, we have previously commented that there should be no extension under the new scheme for early admissions.

The liability insurers would remain able to admit liability, or otherwise narrow the issues, at any time with the same consequences as now. Greater incentives – more imaginative than increased lawyers’ fees – should apply. These would include a higher award for the individual and a reversal of the burden of proof if there are previous related cases.

There should be greater sanctions on those who fail to admit liability when they should and Unite would like to see improved compliance with pre action protocols.

Where defendants deny liability they should disclose more than merely the police report, but all relevant documentation. It should be clearly understood that a failure to respond in time should be seen as a non-admission. See also the comments in response to question 9 above.

**Question 14. Do you agree with the proposals set out in Appendix 7? If not, please say why and set out any alternative proposals.**

Comments: Unite can appreciate the benefits of agreements as to rates following wide consultation and that these should be published to end unnecessary work and disputes.

The work that resulted in appendix 7 should be taken forward. The understanding from the meeting of representatives (including one from Unite) was that sums claimed up to the figures referred to would not normally require the expense of proof, but that the claimant who had a greater claim would remain free to prove it. There needs to be provision for regular review, perhaps under the auspices of the Costs Council.

One of the points Unite has in relation to the issue of fixed costs is that one, few or more of the liability insurers may require proof. How can this be catered for, particularly without considering any new scheme in practice? Indeed fixing costs would give liability insurers greater incentive not to agree.

**Question 15. Do you agree that regional hourly rates should be set and if so, how should they be set?**

Comments: Please see answer to Question 14. above.

**Question 16. Your views are sought on the development of an assessment tool for general damages.**

Comments: Unite can see the benefits of a quantum assessment tool. It should have the benefit of confidence from claimants and defendants. We agree that this is an issue that should be taken forward under the auspices of the Civil Justice Council.

We are mindful of the shortcomings to date of Colossus and Claims Outcome

Advisor. These include:

- Flaws in demonstrations: figures for damages produced were acknowledged to be out by a significant margin
- Variable claims for the products: those demonstrating Claims Outcome Advisor, which was not an inferior product, admitted that it was a more sophisticated version of “Kemp and Kemp” (a reference work relying on previous decisions of the courts)
- Information input by insurers: this affects the fundamental basis for all future assessments
- Limitations in relation to certain types or aspects of injury: such as the psychological effects of physical injury
- Failing towards under settlement: as some factors could be left out, but too many factors would not be included
- A tendency following introduction to reduce damages paid: those demonstrating Colossus showed a curve relating to damages that narrowed the band of damages assessed for injuries, but which also moved the total downwards, which of itself would inform the data base for the future to reduce damages yet more.

Question 17. **Do you agree that there is little scope for standardising contributory negligence? If not, please set out how it might be done.**

Comments: Unite considers that contributory negligence could be standardised. It was suggested that liability insurers could seek to assess levels of alleged contributory negligence more robustly and down to set percentages. This would not adversely affect access to justice, but could increase the number of cases falling within those concluded under a new claims procedure.

In any event, the position in a few circumstances is relatively straightforward, such as the failure to wear a seat belt in a road traffic case.

Standardising contributory negligence would be on the basis that the defendants and their representatives could benefit from early robust decisions. However, it is understood that the liability insurers are reluctant to take this further at present and as such we cannot see how it can be taken forward. If we are wrong about that and in any event, Unite would be happy to do take part in any future initiative to progress this.

Question 18. **Do you agree with the proposals in relation to costs? If not, please give your reasons and set out any alternative proposals.**

Comments: No. We do not agree with the proposals. Unite has great concerns

over the approach to this issue. The liability insurers have raised concerns over the issue of costs in relation to the current system, but average costs per case are undoubtedly substantially higher because they resist sound claims.

They should not then complain about proportionality and be the main beneficiaries of a new scheme, which operates to the cost of claimants.

Fixed costs are at best a blunt instrument. In principle justice is served when representatives are paid the right amount for the nature of the work and the amount of work required.

Fixed costs have many disadvantages and any extension of the current predictable costs in pre-action road traffic cases would result in the disadvantages outweighing the advantages. There is a fundamental difference between a properly assessed fixed costs regime, for pre issue cases only, when the insurers are incentivised to settle for those costs and fixed fees applying post issue, when the liability insurers can seek to benefit from running up costs to the point when the claimants' representative is no longer being paid. This only serves those who behave selfishly and irresponsibly.

The conclusion – based on recent research - that a couple of solicitors firms issue cases to avoid fixed costs, is flawed. It may equally be a response to recalcitrant insurers. However, if it were to be the case, then it would be wrong to penalise claimants across the spectrum. Instead those law firms that are the problem should be dealt with.

Here it seems that paragraph 86 envisages setting fixed costs by reference to guess work. We should see how any new scheme operates, commission research (as has been considered a successful approach to date) to look at how much work is reasonably required, before setting any rate for fixed or predictive costs. (See also references to the problem of fixed costs in particular cases set out at point 3 of Appendix 1 to this response and the final point we make in reply to question 14 above at page 12).

Paragraph 86 also seems to look to setting low or limited costs recovery compared to the current position (even in relation to road traffic cases, where there is a predictive costs scheme in operation).

The consultation paper does not explain the concept of referral fees in this context and this is part of the inflammatory tone in the paper. Unite emphasises that we believe substantial referral fees are abhorrent and harm access to justice. However, Unite shares the disgust at such practices in some quarters. These must not be allowed to result in a reduction in the quality of service for all. That would be the impact of the papers proposals taken together.

It may be convenient here to comment on paragraph 88. The idea that a claimant must beat his or her own offer to recover costs from proceeding to court, has an impact that is wholly unreasonable. It must result in claimants being encouraged to seek less by way of damages than the compensation he or she should be awarded. This will drive down damages overall. That will encourage those, like liability

insurers, who argue the need for proportionality, to shout even louder.

We repeat that Unite is opposed to another tier in the process such as that proposed by paragraph 89 for cases with a value less than £2,500.

We re-emphasise that, on careful reflection, we can see that the collective impact of all the proposals would amount to a disaster for access to justice generally and union legal services.

**Question 19. Do you agree that ATE insurance cannot be justified in the circumstances set out above? If not, please give your reasons, identifying the risk that is being insured, and set out any alternative proposals.**

Comments: ATE is not only justifiable, but is essential to maintain access to justice. However, effective changes can be made to the system, which will serve to reduce costs and ATE premiums as a consequence, and which will not cause significant harm to claimants' ability to recover appropriate damages.

Our concerns flow from the fact that under the current regime, Unite's recovery of notional premiums shadows that of ATE. We are, however, a cheaper alternative. Our ability to make legal services available to millions of people will be seriously damaged by these proposals.

It is right and proper that claimants and their representatives set off from a proper footing with a contractual agreement and cover for costs.

There is always a risk to the insured at the outset. There is always a risk even after liability is admitted, even if the risk and consequences may be considerably reduced. The risks include in relation to adverse costs orders, for example. This can happen if the defendant resiles from an admission, or raises issues like causation, or limitation, or due to a failure to beat a part 36 offer or indeed the claimant's own offer as envisaged under paragraph 88. The wrong defendant or insurer may deal with a claim in the first instance, but realise the error at a later stage. It is not uncommon for experts to change their minds, or it can happen when fresh evidence comes to light.

However, that is not the point. No premium is ever recovered in relation to the costs of a particular case, as it is only recoverable from a successful case.

There is an undeniable logic too for the argument that there will be no costs savings if we abandon the principle that the many pay for the few to replace it with a few paying much more per case to cover the same risk.

The many must pay for the few. Defendants' insurers have sought to argue otherwise, and their arguments have been thoroughly analysed in the Court of

Appeal and the House of Lords. In *Callery v Gray* [2001] EWCA Civ 1117, Lord Woolf, the Lord Chief Justice, Lord Phillips the Master of the Rolls sat alongside Lord Justice Brooke, who said this (paragraph 91): “In these circumstances, we consider that, from the viewpoint of both the claimant and his solicitor, it will normally be reasonable for a CFA to be concluded and ATE cover taken out on the occasion that the claimant first instructs his solicitors.”

His comments in relation to the liability insurers’ submissions were that they were (paragraph 99): “...outweighed by the legislative policy and by a number of practical considerations. Thus:

i) If the new regime is to achieve its object, the **legal costs of claimants whose claims fail should fall to be borne by unsuccessful defendants...**On these appeals the Court has to decide whether to permit liability for success fees to be apportioned in relatively small amounts among many unsuccessful defendants, or to insist on an approach under which they will be borne in much larger amounts by those unsuccessful defendants who persist in contesting liability.

ii) If the latter alternative is adopted, the defendants who contest liability will not share liability for costs in a manner which is equitable. Where there is a strong defence which it is reasonable to advance, a larger uplift will be appropriate than where a defendant unreasonably persists in contesting liability despite the fact that the defence is weak. Thus the more reasonable the conduct of the defendant, the larger the uplift that he will have to pay if his defence fails.

iii) In relation to claims arising out of road accidents, where defendants will be insured, the same insurers will often be sharing the costs involved, whether in the form of many uniform small uplifts or fewer large uplifts.

iv) **So far as insurance premiums are concerned, these will produce cover which benefits the defendants, for they will ensure that costs are awarded against unsuccessful claimants and that such awards are satisfied.**

v) **Defendant interests, with the assistance of the Court, should be able to restrict uplifts and insurance premiums to amounts which are reasonable having regard to overall requirements of the scheme.** In saying this we are contemplating a position where there will be adequate data to enable informed judgment of the amount of uplift and the size of insurance premium that are reasonable in circumstances such as those before the Court. We are well aware that that position has not yet been reached and that, on these appeals, we are faced with doing our best on very sketchy data. We have had particular regard to the fact that the representations and evidence submitted after the hearing have not been tested or analysed in the course of oral argument.

vi) **Claimants naturally want to know at the outset that a satisfactory arrangement to cover the costs of litigation has been made which provides sufficient protection for them, no matter what the outcome.**

vii) **Claimants incur liabilities for costs to their legal advisers as soon as they give them instructions.** Once a defendant starts to incur costs in complying with a protocol, the claimant will be exposed to liability for those costs if proceedings are commenced.

viii) Solicitors and claims managers are anxious to be able to offer legal services on terms that the claimant will not be required to pay costs in any circumstances. This will assist access to justice.

ix) **There is the overwhelming evidence from those engaged in the provision of ATE insurance that unless the policy is taken out before it is known whether a**

**defendant is going to contest liability, the premium is going to rise substantially. Indeed the evidence suggests that cover may not be available in such circumstances.”**

Unite agrees with the conclusions of the court and can see no reason to overturn this decision by means of a new process.

We have seen no evidence, in the cases Unite is responsible for, that the lack of incentive for claimant affects the conduct of the case. Unite does not require claims or points lacking merit to be pursued. Again unions and their members and their families should not suffer as a result of changes introduced to address problems that are perceived or that are caused by others.

**Question 20. What would be the impact on the ATE market of these proposals?**

Comments: Unite has been told that the market could collapse. This would seriously undermine “self insurance premiums” and limit access to justice generally.

The Executive of the Civil Justice Council has raised these concerns, having examined the books of ATE providers.

The Legal Expenses Insurance Group says: “The After the Event (ATE) proposals will result in considerable uncertainty and instability in the market. There is very likely to be...detriment to consumers and very serious damage to the Government’s access to justice objectives”

DAS, who provide “80e” policies, say “Without the spread of risks, many ATE providers would be unable to fund contested personal injury claims.”

A representative of Allianz Legal Protection – wholly owned by a liability insurer and a member of the Association of British Insurers – has questioned whether the Government wants to see ATE collapse. Of the new £2,500 limit we were told this appeared to have the effect of a rise in the small claims limit by the back door.

**Question 21. Do you agree that the new claims process should apply to all claims for personal injury, except clinical negligence, with a value of less than the fast track limit? If not, please give your reasons and identify which cases should use the proposed system.**

Comments: In principle Unite cannot see any objection to restrict an early opportunity to admit to the fast track.

However, the combined effect of the proposals for a new system would seriously damage access to justice and it cannot be disputed that the risk of that happening is

significant.

For these and reasons stated above, Unite would wish to see any new system limited in scope and its effect properly assessed, before it impacts on the majority of cases.

As we have said, this can only proceed in road traffic cases requiring one medical report at least in the first instance. The medical report template can assist in identifying cases that can be concluded on one report. The template appears at Appendix 6 of the consultation paper and page 63 in particular requires that the doctor needs to consider "*Identifying any further treatment required, and whether a further report is required from the same doctor.[and] Confirming whether a specialist medico-legal opinion or other advice is required.*"

## **Conclusions**

Unite has no doubt that the proposals, if they are all introduced at once, would be disastrous for access to justice and union legal services. Unite can nevertheless see the benefit of aspects of the proposed changes. Unite would wish to remain involved in ensuring that any new system is successful from the outset and has the chance to develop.

Unite has reached the firm conclusion that in relation to the new claims procedure:

- There should be no new tier, such as that proposed to be set at £2,500
- The new scheme should be confined to road traffic cases capable of assessment on one medical report
- Costs should only be fixed after effective research in relation to work done under any new scheme
- ATE and their equivalents should be permitted from the outset of a claim.

We are confident that the majority of cases would be covered under a new system restricted in scope in the way that Unite and others consider appropriate. The Liability Insurers will see considerable savings and the risks in terms of adverse consequences to access to justice will be kept to a minimum at the outset.

**Georgina Hirsch**  
**Director of Legal Services**

[Georgina.Hirsch@amicustheunion.org](mailto:Georgina.Hirsch@amicustheunion.org)

**4 July 2007**

## **Appendix 1**

### **Distinguishing features of Employers' Liability cases**

On careful reflection looking at the consultation paper as a whole, Unite has no doubt that it is inappropriate to extend the scope of the new process to cover Employers' Liability cases. In this Appendix we hope to be able to demonstrate some of the reasons for this particular conclusion.

#### **1. The relationship with the potential defendant or defendants**

There is a very distinctive feature of employers' liability claims related to the nature of the relationship between the injured worker and the employer. The opportunity for problems will be increased if there is a simple form submitted to the employer and no action on the part of lawyers for the claimant for a period of 6 weeks or more, as the consultation paper proposes.

This presents more opportunity for the employer to:

- Pressurise the injured person
- Unduly influence witnesses
- Tamper with evidence and documents
- Influence the insurer inappropriately.

This is a very real problem. We refer to the case of May and the actions of Marshall's (at Appendix 2) – cases with some unusual features, though not uncommon, and some that are commonplace.

The employer pays wages, has powers of discipline, allocates duties and under the contract is entitled to expect the employee to obey orders. This is the backdrop to an employers' liability claim.

The distinctive relationship has, for example, been recognised within the EU by the Committee on Employment and Social Affairs in relation to data protection. Medical information is sensitive data. Under data protection law, sensitive data may only be processed if specific consent is freely given. Due to the power imbalance between an employer and a worker, it is recognised that the worker is not free to give consent, if requested to do so.

By contrast in road traffic cases the scope for one party to unduly influence the other to the detriment of justice is far less. Nor do the same considerations apply in other types of case, including Public Liability.

## **2. Allegations of breach of statutory duty**

Many of these are unique to employers' liability claims. The main point here being that a simple early notification form, without assessment by the claimant's representative, will not help the employer or their insurers to assess liability in many cases. Again the case of Steven May can be used as typical in this regard. In that case, it required a trial to establish the claimant's case that the equipment was not "suitable" in the context of Regulation 4(1) of the Provision and Use of Work Equipment Regulations 1998. There are invariably breaches of statutory duty to raise in employers' liability cases.

A Health and Safety Manager can be expected to respond to a request for an opinion following notification of a claim – and they often do – by failing to the position that they were not at fault, when fault, in the sense of negligence, is not the only consideration. There is much more justification for looking to improve the efficacy of and to enforce existing pre-action protocols in such cases.

In contrast, road traffic cases involve considerations of negligence and "common sense" in the vast majority of instances. Even in PL cases there are far fewer statutory provisions to consider that local authorities and others understand well in most instances.

Any new process may thus result in greater cost, by the inclusion of employers' liability cases.

## **3. The information imbalance**

In EL cases, the employers normally have power in relation to the information relating to an injury. Indeed they have obligations to investigate and prevent recurrence. This extends to earnings details to enable a calculation of losses to be made.

In a one month period one of our lawyers reports that he recently issued four pre-action disclosure applications for earnings details in liability admitted employers' liability cases, when the employers failed to respond to requests and reminders. The four cases are against different employers. (Details can be supplied).

We are bound to raise the point that the employers will benefit from the application of fixed costs in such circumstances and have less incentive to behave responsibly.

## **4. The need to promote health and safety**

Claims for damages are a form of prosecution or enforcement of health and safety laws. They draw attention to and encourage better compliance with such laws. Unite is committed to prevention and would rather our members did not have to take cases.

Any new process must not undermine health and safety, nor encourage bad employers to ignore the law, when they face no sanction. The Health and Safety Executive cannot and do not take action in response to any but a tiny proportion of breaches.

We are sure that the current proposals taken together will significantly reduce the extent to which employers face the sanction of damages for injury.

## 5. Multi Defendant cases

These too are relatively common in EL claims. They apply, for example, in many cases of injury sustained on a building site. It is common place for the dispute on liability to be confined to an argument between employers.

Corporate structures and the corporate veil can cause problems. For example, in the print industry, it is not unknown for one company to own the factory and more than one who employs those that work in it, when all the companies share a common element in their name. It is not uncommon for the injured worker to have doubts as to who the employer is.

When there is more than one potential defendant in RTA cases, the issues are very much simpler.

## 6. Who is the employer?

Related to the previous point is that there can be confusion as to who has responsibility as employer. The courts have struggled with this concept over the years and this has become more of a problem over the last few years. There are conflicting decisions particularly from *Dacas v Brook Street* [2004] EWCA Civ 217.

In December 2006, in another case the President of the UK Employment Appeal Tribunal said: ***“We should not leave this case without repeating the observations made by many courts in the past that many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users...”*** *James v Greenwich Council* EAT 18 Dec 2006 UKEAT/0006/06 paragraph 61

This constitutes further recognition of the power of a company over a worker.

## 7. Time for investigation

The consultation paper itself recognises that as a result of the complications, it might take twice as long in an EL and PL case for the insurer reasonably to

carry out an investigation. Some of the reasons for that are referred to in this appendix.

The longer period makes it more likely that bank holidays, including Christmas, New Year and Easter will fall within it.

The insurers may say that they would like longer than 30 working days, which is another reason to limit the scope of any new process to RTA cases.

A longer time period in EL cases has a greater potential for prejudice to the claimant than an equivalent period in an RTA case.

It is not right that the victim in an EL case, should suffer greater prejudice, merely because the circumstances are more complex.

## **8. Causation**

The new process cannot work if liability is admitted, but other issues are still in dispute which have a material effect on the likely outcome and the risks in relation the outcome. Causation is going to be the most likely issue to cause problems.

It is accepted that in a relatively small number of RTAs the insurers might wish to argue the point in a low speed impact case, but the problem is far more significant in EL cases.

About a third of relatively straightforward EL cases involve an injury to the back. In many of those the question arises as to the nature of the circumstances, perhaps relating to the movement of a load. Admitting liability, but having causation in dispute in such a case, does not significantly reduce the amount of work required in relation to the events causing the accident and injury.

The problem is even greater in disease cases. In a liability admitted repetitive strain injury case, it has happened that days are spent in court with senior medical experts and non-medical experts giving evidence as to the work process, to consider the claimant's entitlement to damages. In one such case the conclusion was that the injury occurred as a result of an accident rather than a process, but liability was still established.

## **9. Disease cases**

The consultation paper appears to consider including disease cases in the new scheme. However, we hope it is apparent from the above that additional considerations in disease cases make it even more likely that difficulties will result in the failure of such a scheme.

Whilst limitation can arise in accident cases, more so in EL than PL, such arguments are much more likely to arise in a disease case.

Another example of a case relevant to this point is that of *T L Davies v Ford Motor Company*. The letter of claim was sent on 5<sup>th</sup> May 2006. No initial view on liability was received within the 3 month protocol period. Our lawyer gave the Insurers 14 days notice of our intention to take out a pre-action disclosure application which produced a letter dated 22<sup>nd</sup> September 2006 from Zurich, Portsmouth Office, confirming "*please note liability is fully admitted subject to causation in this matter. We therefore look forward to receiving your client's medical evidence in due course*". There was a slight delay in obtaining the medical report but the report was disclosed to the Insurers on 15<sup>th</sup> March 2007. A response was received from Zurich dated 30<sup>th</sup> March 2007 stating:- "*It is clear that limitation will be an issue in this matter as your client was counselled on a regular basis at the occupational health department. It is inconceivable that he failed to relate the loss of hearing noted in 2001 to noise at work and/or elsewhere. On that basis the time for claiming has long since passed. We would refer you to a case heard in Winchester County Court Tapper v Ford Motor Company Limited (unreported) on this specific point. We have no proposals to make in this matter and confirm that if the claim is pursued, proceedings should be served on our Insured at their registered office quoting this reference number.*" They are requiring us to serve proceedings and papers are currently with Counsel.

## **10. The profit motive and exposure to risk**

The employer is often in business for profit and otherwise will seek to balance returns and/or productivity with health and safety. Employees at work are exposed to any risks for a substantial proportion of their day and indeed their lives. These issues tie in with others referred to above, but add to the imperative that EL claims are distinct from RTA and also to some extent Public Liability cases.

## **Concluding remarks on Appendix 1 – EL cases**

This Appendix attempts to draw attention to the problems that would arise in relation to the prospect that EL cases would be included in the proposed new scheme. These points show that it would be likely that including EL cases at the outset would significantly increase the prospect that such a scheme would fail.

The return, in the sense of costs savings, is much greater in relation to RTA cases, both in terms of the effect on the average case and overall, given that there are far more RTA cases. Thus, limiting the scope of the scheme to avoid the problems associated with EL cases, would not substantially affect the total amount of savings that would benefit the liability insurers.

This appendix is not intended to demonstrate that by limiting the scope to exclude EL cases, the proposed new system will succeed in its objectives, but we have made observations elsewhere in this response designed to ensure maximising the benefits to be gained from a new system, whilst maintaining access to justice.

## **Appendix 2**

### **Steven May's case and Marshall's, an employer**

Demonstrating current problems that will be worse if the employer has six weeks added at the outset of the claims process, when the injured worker's representatives have not begun to investigate.

#### **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. However,

- The employers – Hydra Mining Tools International – 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 at pages 27 and 28). In the letter the employer says that the accident was caused by our member's 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 a relatively extreme case, but one which demonstrates features 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, which will be much more than they should have paid, if the employer and the insurers had admitted liability as they should have. There was no criticism from the court of the Defendants for disputing liability when the statutory duty was strict.

Worse still was that the Judge was dismissive of the claimant’s complaint that he had been put under pressure by his employers and the Judge 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.

“It is not uncommon to hear of employers providing bonuses to the workforce on the condition that no claims are made for accidents. It is hard to prove these exist as the bonuses will be discretionary, but employees are under no illusion as to the consequences of making a claim. This is a clever move because pressure comes from the worker's colleagues instead of management alone.”

Currently in the case of May v Hydra Mining Tools International, costs have yet to be assessed - as the court had no time to do so on the day of the trial - but the claimants costs are about £18,000. The Defendants lawyers claim for costs showed they spent longer on the case than the Claimant’s lawyers. If the Defendants had acted reasonably they would not have to pay anywhere near five times the agreed value of the claim, as they do now. Yet another relative statistic that adds to average costs per case and is used by liability insurers to argue that costs are out of control and that proportionality is a problem that must be addressed.

The Defendants’ representatives have since refused to enter into negotiations on costs thereby increasing costs further. And despite repeated requests they have still failed to provide a cheque for damages despite a court order to do so in 14 days of the judgment forcing us to begin further proceedings to recover the debt.

### **Marshall’s – an employer**

Our solicitors report:

“Employee Mr. HANSOM

Accident 02/09/04

Instructions received October 2004. Member did not return instructions questionnaire. Solicitor chased him up and received a letter from him in response saying that he had been in “talks” with Marshalls and had entered into a “cash agreement” with them, because he was struggling financially having been off work.

Claimant’s injury was a nasty laceration to his left thumb requiring an operation and hospitalisation for 2 days leaving him with a scar and ongoing symptoms which are likely to be permanent.

Marshalls paid him £2750 which basically just equated with his loss of earnings.

Marshalls instructed their own solicitors, Eversheds in Cardiff to deal with the matter on their behalf which was allegedly concluded in accordance with the attached “agreement”.

*The Claimant was concerned about bringing a claim particularly because there were redundancies in the air and he thought that by doing so he might jeopardise his position.*

Proceedings have now been issued and we are awaiting directions in relation to what in effect is a test case.”

Details of three other recent cases involving Marshall’s are available.

The solicitor adds:

“The above are of course illustrative only and I am quite sure only the tip of the iceberg insofar as there will be many other claims which are being “settled” by Marshalls directly before a Member even puts in a [union claim form].”

Rotherham Works: Wortley Road, Rotherham S61-1LZ England

Tel: + 44 0 (1709) 857 500

Fax: + 44 0 (1709) 857 501

E-mail: info@hydramining.com

RECEIVED

24 JAN 2007

Mr. D. Patterson  
Regional Organiser  
Amicus  
Sovereign Court  
300 Barrow Road  
Sheffield  
S9 1JQ

24 January 2007

Dear Doug,

Following our telephone conversation regarding the latest insurance claim from one of our employees Mr. Harry Green, I enclose a copy of the solicitor's letter and attach an extract from the Accident Record Book dated 11.9.06 where Mr. Green reported a "Sharp pain above his right groin".

Following this incident Mr. Green did not ask to change his method of working nor did he have to stop work at any time during the day of the incident and nor did he have any time off work following the incident until he went into hospital on Friday 27 October 2006 for a hernia operation. Mr. Green did not advise the company that the hernia operation was as a consequence of the pain he reported in September 2006.

The only time the company was made aware of the link was when we received a solicitor's letter claiming the company was negligent and in breach of statutory duty, which we strongly refute.

When Mr. Green was questioned he told us he had been advised by his solicitor not to discuss his claim with the company. However he did acknowledge that he had suffered pulls and strains throughout the past 40 years, since he has been a Plater since 1968 and has always been an active sportsman including martial arts. Mr. Green admitted he experienced similar pains on a number of occasions throughout his life.

He also acknowledged that the company had completed a risk assessment on his job and he had received training on material movements. He also acknowledged he was an experienced Plater and in the past had received training or instruction as a Plater. The company therefore could not have been at fault nor negligent and/or in

breach of statutory duty as claimed by his solicitor. A copy of which he had not seen until we gave him a copy.

I should point out that the company paid Mr. Green his wages for the 9 weeks he was absent from work following his operation and therefore fail to see what losses he sustained as claimed in the solicitors letter.

Doug, I am bringing this to your attention because I am concerned that employees feel it is OK to sue the company for damages for self inflicted injuries or injuries that are not directly related to their employment because they feel the Union will underwrite their costs and somehow it doesn't cost the company anything and they are encouraged by solicitors to make claims.

As you and I know any claims of this nature appear as contingent claims on the company's insurance claims experience until it is finally settled which could take several years during which time our insurance premiums are increased to reflect the contingent loss and even when we win our case we have to settle our own legal fees which run in to thousands of pounds.

We are already fighting an ongoing claim from Stephen May who dropped a roller on his toe, caused by his own negligence, but he was told by a union friend that "he will get something if he puts a claim in". He acknowledges that it was "just an accident" and the company was not to blame and we paid him for the week he was absent from work but he is still encouraged by his solicitor to pursue a claim against the company.

I understand that other employees are also being encouraged to make claims for so called injuries that can somehow be remotely blamed on the company. They are being advised that their costs will be covered by the Union so it will not cost them a penny.

Clearly Amicus has a responsibility to discourage this kind of blame culture so I would like you to look in to both these cases and talk to your solicitors.

If these unjustifiable claims go unchecked I am concerned that the cost of ELI cover in the future will force us out of business.

I look forward to your response in due course.

Yours sincerely



Gordon McShannon  
Chief Executive