

PACKAGE TRAVEL CLAIMS: BACKGROUND

1. Package travel claims are personal injury ('PI') Public Liability ('PL') claims that come under the Package Travel Regulations ('PTR') 1992¹ which implement the EU Directive aimed at consumer protection in respect of package holidays organised by tour operators. Under the PTR, the tour operator is liable to the consumer for any damage proved to have been caused to them by the failure to perform the contract or the improper performance of the contract. This would include liability for personal injury from negligence in a resort (such as gastric illness ('GI') arising from food poisoning, or 'slips and trips').
2. Over recent years, the travel industry has reported a significant increase in the number of such claims arising abroad, many of which they believe are unmeritorious. As with other claims, the costs of successful GI claims are generally recoverable from the defendant. The recoverable costs of these claims have not been fixed, meaning that the amount of legal costs that a representative can recover are not set in advance, as they would be if the injury occurred in England and Wales. This meant that the costs can be disproportionately high, which can act as a disincentive for a defendant tour operator to challenge unmeritorious claims. In turn, this can encourage unmeritorious claims: it is notable that in recent months some claimants have been convicted and sentenced by the court for making fraudulent claims. Aside from increased costs, the increase in claims numbers is of concern to authorities in other countries, given the implications for local hoteliers. This affects this country's reputation with overseas' providers.
3. On 9 July 2017, the then Secretary of State announced measures to tackle the apparent increase in PI claims arising from package holidays. Part of this work included a request to the Civil Procedure Rule Committee ('CPRC')² to consider proposals to amend the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims³ ('the EL/PL PAP') to bring holiday claims within the existing fixed recoverable costs ('FRC') regime. It also included a Call for Evidence and a commission to the Civil Justice Council ('CJC') to consider how to improve the handling of both GI claims and low value personal injury claims more generally. This response paper sets out the way forward on package travel claims in so far as it relates to the proposed amendments to the EL/PL PAP and summarises the responses to the Call for Evidence.

Call for Evidence, CPRC and CJC consideration of EL/PL PAP

¹ On 16 April 2018, revised regulations were laid before Parliament. The way forward set out in this document will apply equally under the new PTR.

² The CPRC makes the rules of court for the County Court, High Court and the Court of Appeal and is chaired by the Master of the Rolls.

³ Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for types of civil claims. They are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules.

4. The *Call for Evidence on Personal Injury Claims Arising from Package Holidays and Related Matters*⁴ was published on 13 October 2017 and closed on 10 November 2017.
5. In summary, the Call for the Evidence:
 - (a) welcomed views and evidence on the drafting and effect of proposed amendments to bring package travel claims within the EL/PL PAP, in particular:
 - (i) extensions to the existing EL/PL response times for acknowledging and investigating claims;
 - (ii) the date on which amendments should take effect: either the date of when the claims notification form (CNF) was submitted or when the cause of action accrues;
 - (iii) the intention for communications between parties to be dealt within the Claims Portal and that each claimant would be required to make their claim separately;
 - (iv) that claims made under the Supply of Goods and Services Act 1982 would also be subject to FRC;
 - (v) the nature and timing of evidence required for these claims and any data on the volume and associated costs of such claims; and
 - (vi) whether the extension of FRC should apply to claims made under the Supply of Goods and Services Act 1982/the Consumer Rights Act 2015;
 - (b) invited comment on the work to be undertaken by the CJC;
 - (c) asked for further data on the volume and associated costs of gastric illness and other personal injury claims arising from package holidays; and
 - (d) invited comment on further issues to be considered relevant to the Call for Evidence.
6. At its meeting in December 2017, the CPRC considered that a new bespoke PAP would better address the concerns raised by both claimants and defendants as to how GI claims are handled at the pre-action stage. In view of this, the CPRC had some further questions, on which the Government sought further views from stakeholders in January 2018. These questions focused on the process involved with these claims and, in particular, how the handling of these claims differed from other PI claims. In addition, respondents were asked to comment on aspects of existing PAPs that were suitable for GI claims. The CJC also considered, in parallel, the PAP and fed its views to the CPRC during its deliberation of the amendments.
7. All responses to the Call for Evidence and the further request for information, including the helpful contributions from the CJC, have been considered in finalising the way forward. A total of 43 responses to the Call for Evidence were received, of which 37% were from the travel industry and legal firms representing defendants; 33% from legal firms representing claimants and some claims management companies; and 30% from a range of other bodies representing regulatory organisations, individuals, consumer advocates and bodies representing the legal profession and insurance industry. A similar number and breadth of

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652419/gastric-illness-call-for-evidence.pdf

responses were received to the further request for information. A detailed response to the specific issues raised in respect of the EL/PL PAP amendments is set out below.

8. The way forward, as set out in the amending Civil Procedure Rules (CPR) which cover the new Package Travel PAP, was agreed by the MoJ and the CPRC. We consider this is the right way forward, and it balances the interests of claimants, defendants and the travel industry in a fair and equitable way.
9. The Civil Procedure (Amendment No.2) Rules 2018 statutory instrument ('SI') was laid before Parliament on 16 April 2018. This SI amends Part 45 of the CPR to bring package travel GI claims within the existing FRC regime. This means that these claims now attract the same fixed recoverable costs as those that apply to claims for similar claims for personal injury suffered in England and Wales. The rules, together with the PAP for Package Travel Claims, came into force on 7 May 2018. The PAP and new rule are available at: <https://www.justice.gov.uk/courts/procedure-rules/civil>
10. A list of respondents is at Annex A of this response paper.

SUMMARY OF RESPONSES AND THE WAY FORWARD

11. Extending FRC to package travel claims (scope and rates): In the Call for Evidence, we proposed that the recoverable costs of package travel PI claims up to a value of £25k should be fixed at PL rates⁵, the same rate as if the cause of action occurred in England and Wales. FRC prescribe the amount of costs the winning party can recover from the losing party in civil litigation and are an important mechanism towards controlling costs more generally. The Government is of the view that FRC provide certainty to both parties as to what the legal costs of a claim will be and make the costs of claims more proportionate. Defendants can challenge claims which they believe to be unmeritorious without fear of litigation being too costly. This is why the Government's wider policy is to extend FRC where appropriate in civil litigation, especially for lower value claims.

In considering which FRC regime should apply, claimant respondents generally argued that any FRC regime would need to reflect that GI claims are often subject to local standards in foreign jurisdictions and are more complex when compared to road traffic accident (RTA) claims. Defendant respondents commented that GI claims should be fixed at RTA rates, as recommended by Lord Justice Jackson in his report⁶ on extending FRC, published on 31 July 2017. There was also some concern amongst some respondents that introducing FRC would prevent access to justice for genuine claimants, if FRC were extended to other package travel PI claims.

The Government's initial proposal was to extend the current FRC to *all* package PI PL claims in the fast track. Generally, claimants argued for restricting any extension of FRC to GI

⁵ The EL/PL rates can be accessed at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs>

⁶ <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/extended-recoverable-costs-supplemental-report-online-2-1.pdf>

claims only, whereas defendants argued for wider application. Claimants noted that the revisions to the PAP should only include GI claims because other claims often involve complex issues to determine liability and, to do so, would require consideration of other rules such as the Montreal Convention (in the case of aviation claims) and the Athens Convention (in the case of marine claims).

Other factors cited by claimant respondents included case law surrounding package travel claims, which differs from that relating to domestic EL/PL claims: representatives are required to serve local standard evidence, instruct local experts and submit documents which often require translation to confirm that a breach occurred overseas. As such, the amount of work which is required to investigate these claims can be significant. In contrast, defendant respondents favoured broadening the scope to include all PI claims arising from package holidays. There were some concerns that, if limited to GI claims, this would encourage an increase in the number of non-GI related package travel claims. Those representing defendants' views provided some suggestions as to how the EL/PL PAP could be amended to accommodate the inclusion of all package travel claims.

Way forward: FRC are only being extended to cover package travel GI claims at this stage, at the existing PL rates and apply to any claim where the package is one that is regulated by the PTR, or any subordinate or amending legislation arising from EU Directive 2015/2302, apply. This is because the evidence shows a significant increase in GI claims but not in other package PI PL claims: at present the problem clearly lies with GI claims. That said, we stand ready to take further action to extend the scope of this provision should there be evidence of an unfounded increase in other types of package travel PI claims.

It is important to note that the case was not made out to cover non-GI claims at this stage. In particular: there is no evidence of a serious problem with other package PI PL claims; different circumstances pertain in different types of claim, not least the application of the Athens Convention (for cruise claims) and the Montreal Convention (for aviation claims), which potentially give rise to unforeseen consequences in applying a new PAP. As the Association of Personal Injury Lawyers put it, an extension to include all types of package holiday PI claims represented a 'cure that goes much further than the identified malaise'.

It is clear that defendant tour operators have taken a robust stance in bringing fraudulent claims to justice. They need to continue to do so, taking proactive action in order to: discourage claims arising; challenge unmeritorious claims: and to keep detailed data so that the scope of the PAP can be reconsidered if there is an unfounded increase in other areas. We stand ready to consider the case for extension, should a clear case be made out.

In addition, by fixing GI claims at the existing PL rates at this stage, we are bringing such claims in line with similar claims for personal injury where the cause of action occurred in England and Wales. There will, however, be an opportunity to reconsider the appropriate rates in any consultation on Sir Rupert Jackson's recommendations to extend FRC more widely: the Government is considering the way forward on his report.

12. Group bookings and the Claims Portal: In the Call for Evidence, we proposed that each claimant would be required to make their claim separately (see Question 1(g)), and that communication between the parties should be through the Claims Portal. We invited views, with evidence, as to the practicality of this approach. Claimant respondents noted that there are often interlinking liability and causation issues for different claimants within the group and

it is important that lawyers and experts have access to information relating to each claim, and that each claimant should be required to make their claim separately. Defendant respondents, on the other hand, argued that applying FRC for each claimant within a single booking was not necessary as the additional work undertaken per claimant did not warrant claimant lawyers being paid more. In their view, the same work is undertaken for each claim on the same booking as the facts, alleged illness and resort are usually identical. In relation to the Claims Portal, almost all respondents agreed that the nature of the GI claims process would not be suitable for the Claims Portal, as most of these claims would generally fall out of the Portal, since liability is usually denied.

Way forward: While we accept that GI claims are often made under the same holiday booking reference (typically a family), we have concluded that it is appropriate to treat claims separately at this stage, as with all other types of PI. The bespoke PAP encourages claimants to set out in the letter of claim to the proposed defendant any other package travel claims as part of the same holiday, including subsidiary claims which will not attract FRC. We have also decided that, in the light of responses and the restriction of FRC to GI claims only, the Portal should not be used at this stage given that the nature of the GI claims process would not be suitable for the Portal as currently operating.

13. The appropriate PAP, timescales and process: As with other existing PAPs, the purpose of the new PAP for package travel claims is to encourage earlier settlement of GI claims. The initial proposal, as set out in the Call for Evidence, was to use and amend the EL/PL PAP for package travel claims. As set out above, both claimant and defendant respondents called for a bespoke PAP for GI claims.

Questions 1 (c) to (g) of the Call for Evidence proposed amendments to extend the existing EL/PL response times for the submission, acknowledgment and response to the Claim Notification Form (CNF). We proposed to extend the consideration period from 35 days to 70 days and increase the time from 5 days to 10 days in which the Court Proceedings Pack must be returned to the claimant. Those representing claimants commented that any extension to the existing time periods would result in even longer delays and reduce the incentive for tour operators to deal with matters quickly. The purpose of the EL/PL PAP is to encourage earlier settlement and significant extensions would undermine that purpose. Defendant respondents supported the extensions and noted that it is necessary when handling overseas claims. It is often the case that investigating a claim is delayed due to the difficulty of making contact with local hoteliers (given that they may only operate during the holiday season) and a longer time is therefore required to reach a resolution.

In relation to the CNF, the majority of respondents agreed that the date of submission of the CNF is the most appropriate date from which any amendment should take place.

Way forward: On reflection, we agree that a bespoke PAP, rather than an amended EL/PL PAP, would better address GI claims, allowing the appropriate application of FRC. The new PAP requires that the defendant must acknowledge receipt of the Letter of Claim within 42 days of the date of posting of the letter. The defendant will have a maximum of six months from the date of acknowledgment of the letter of claim to investigate. Time periods, although specified in the PAP, may be varied by agreement between the parties (para 5.3 of the PAP). It is worth noting that these are maximum periods: parties are expected to act reasonably and expeditiously. It is a feature of these claims that a defendant hotelier may

not be available to respond for some time as the hotel, for example, may be closed out of season, but it is not an excuse to delay if responses can be made sooner. In addition, annexed to the PAP are templates for the letter of claim, letter of response and a specimen disclosure list which should be used by the parties. The new PAP applies to GI claims submitted on or after 7 May 2018.

14. Impact of FRC proposals: In the Call for Evidence, we sought further data on the volume and associated costs of package PI claims and received some data from defendant respondents. In particular, the Association of British Travel Agents ('ABTA') reported a 500% increase in GI claims between 2013 and 2016 (the most recent year for which data is available), and projected around 41,000 GI claims across the whole industry in 2016. The total projected costs of GI claims to the industry (including damages and both claimant and defendant costs) was estimated by ABTA to be over £240m in 2016. We have considered the impact of the proposals.

GI claims are for relatively low levels of damages, whereas the cost of defending these claims can be disproportionately high. As mentioned above, FRC will bring certainty and control the costs of GI claims, which will enable defendants to defend unmeritorious claims robustly whilst not preventing genuine claims from being pursued. It appears that the vast majority of these cases settle out of court and prior to commencing any court proceedings. By extending FRC to GI claims, claimant lawyers are now able to recover legal costs of fixed amounts for successful cases, depending on whether a claim settles before issue of court proceedings or before trial. It has not been possible to get data on the legal costs currently recovered by claimant lawyers broken down by when cases settle, but we believe these costs are likely to be reduced as a result of these reforms.

As it appears that the majority of GI cases settle out of court, there should not be a significant impact on the court system. However, if the number of litigated claims decreases, there would be a reduction in court fee income. There is a risk that those representing claimants might be less willing to take on cases which are relatively more expensive to process, meaning some claimants may be unable to obtain legal representation. However, we think this is unlikely and, whilst some claimant lawyers might not be willing to take on some cases, we think others would enter the market or existing providers may expand to meet demand.

Annex A - List of respondents

Accident Courtesy Ltd
Aegis Legal Solicitors
Air Travel Insolvency Protection Advisory Committee
Association of British Insurers
Association of British Travel Agents
Association of Personal Injury Lawyers
BLM Law
Carnival UK
Chartered Institute of Legal Executives
Civil Aviation Authority
CFG Law
Claims Portal Ltd
Congruent Ltd
DAC Beachcroft LLP
Dartana Ltd
Dnata Travel Services
DWF LLP
Forum of Insurance Lawyers
Goldman Knightley Solicitors
Hudgell Solicitors
Horwich and Farrelly
Irwin Mitchell LLP
Jet2 Holidays
K Kelleher
Kennedys Law LLP
Miles Fanning Legal Services LTD
Mr Brehany
Mr Parkes
Mr and Mrs Wood
My Lost Holiday
Plexus Law Ltd

Sick Holiday

Simpson Miller LLP

Slater and Gordon Lawyers

Stewarts Law

Spanish Confederation of Hotels and Tourist Accommodation

Solicitors Regulation Authority

On the Beach

The Law Society

Thomas Cook Group

Thompsons Solicitors

TUI Group

Weightmans LLP