The Rta Portal: Lessons Learnt Prior to Considering the Vertical and Horizontal Extension of the Process

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Keywords

The author identifies the lessons learnt from the set-up, governance, funding and project management of the RTA Portal to date, and considers the proposed extension of the portal process to other areas of claim, and the raising of the value of RTA claims dealt with through the portal.

The recent one-year anniversary of the launch of the road traffic accident ("RTA") Portal provides a compelling opportunity to review the remit and origins of the Portal, the development of the policies that guided its rules, and the impact of that public policy and drafting process on the effectiveness of the Portal to date. As part of this review, careful consideration of the governance, corporate and funding arrangements for the portal—and the implications they have for its operation—are also explored.

The Ministry of Justice ("MoJ") has observed the RTA Portal as a success, and is seeking to extend the process to cover the resolution of higher value RTA claims, and other categories of claim, including personal injury claims against employers. However, there are important project management lessons to be learnt from the establishment of the RTA Portal as the possible horizontal and vertical expansion of the scheme is under consideration. In particular, the overlap in time between the development of policies, rules and the electronic portal itself—as well as understanding the suitability of other areas of personal injury claim and a higher limit proposed for RTA claims using the Portal—are critical to the success of any future expansion.

The RTA Portal

Description

The RTA Portal is a process introduced to apply to all road traffic accident claims between £1,000 and £10,000 concerning accidents that occurred in England and Wales from 2010. It is governed by a protocol, and the portal process requires the forms and information to be sent through secure electronic exchange—allowing for the deposit of documents relating to the claim or its defence, including medical evidence reports, Part 36 offers, and the response to those offers.

The value of the claim, for the purpose of deciding if it should fall into the new process, is based on the level of general damages, which includes pain, suffering and loss of amenity ("PSLA") and special damages (excluding damage to the vehicle and hire costs). However, the claim needs to include a minimum of £1,000 PSLA (i.e., be above the small claims personal injury limit) to be included in the process. Although vehicular damage and or hire costs are excluded for the purpose of valuing the claim, they can be recovered as an element of special damages ("SD") within the process.

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Claims currently excluded from the process, and which are therefore still subject to the pre-existing protocol and costs regime, are as follows:

- Claims which do not include at least £1,000 for pain suffering and loss of amenity ("PSLA") (the personal injury small claims limit); and
- Claims involving employers' liability and/or public liability.

Also excluded, for reasons of added complexity in the process, are the following:

- Motor Insurers Bureau ("MIB") Untraced Drivers Agreement cases;
- Claims where the claimant or defendant is deceased;
- Claims where the claimant is bankrupt; and
- Claims where the claimant or defendant is a protected party.

For cases where the value of the claim was initially considered to fall within the process but it later becomes clear that it will exceed £10,000 PSLA:

- The claim will exit the process;
- The claimant shall notify the defendant that the claim is valued at more than £10,000; and
- Where the claim is found by the court to have unreasonably exited the process the court may limit any costs awarded to the claimant up to the maximum of the fixed recoverable costs applicable to the new process.

The process itself consists of three sequential stages. Stage 1 provides early notification of claims to defendants and insurers, using a Claim Notification Form ("CNF"), in which every box is mandatory. As soon as the claimant solicitor has all the information required to complete the CNF, it should be sent electronically to the defendant's insurer.

Stage 2 relates to medical evidence, offers to settle and negotiation. Here, the claimant's solicitor obtains a medical report, fitting a prescribed template, once the defendant's insurer has made an admission of liability. Offers and opportunities to negotiate follow.

There is a Stage 3 where quantum cannot be agreed and an application is made to the court to decide quantum. Prior to moving to Stage 3, an interim payment amounting to the defendant's offer should be made.

Origins

The MoJ committed the last government to the implementation of the Portal in its response to the consultation paper: *Case track limits and the claims process for personal injury claims*, confirming that a new claims process would be established for road traffic accident personal injury claims valued between £1,000 and £10,000.

In its response, the MoJ indicated that it would continue to work with stakeholders throughout implementation. The MoJ then held workshops and meetings with representative bodies: the Association of Personal Injury Lawyers, the Motor Accident Solicitors Society, the Law Society, the Trade Union Congress, the Association of British Insurers, the Forum of Insurance Lawyers, and the Motor Insurers Bureau. These meetings sought to develop the detail of the new claims process. In addition, the Civil Justice Council mediated and reached agreement with representative bodies on the fixed recoverable costs for the process.

Objectives

The Portal was established with the aim of ensuring that the process delivered fair compensation to the claimant as soon as possible. It provides for insurers to have early notification of the claim, with sufficient information to enable them to make a decision on liability, while recognising that there are steps that the claimant solicitor has to follow before notification can be given. The aim was for the process to be as clear and well defined as possible and to include fixed time periods and fixed recoverable costs.

Policy Development

I was involved for considerable periods of time in the development of the first RTA protocol and process, serving on both the policy development committee and the CPR subcommittee formed to draft the protocol's rules. Among the stakeholder groups involved in the policy development of the portal, I represented The Motor Accident Solicitors Society ("MASS").

From the outset, the policy development for the Portal suffered from a lack of focus on key points, with a lack of clarity in the policy process affecting the efficiency of the rule drafting.

Of some concern at the outset was a certain dissonance on some key points between the MoJ and the Civil Justice Council ("CJC"). The CJC was established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system. It provides advice to the Lord Chancellor, the Judiciary and Civil Procedure Rule Committee on the effectiveness of aspects of the civil justice system, and makes recommendations to test, review or conduct research into specific areas. As such, it has a very broad remit, and in policy terms, without a clear demarcation of roles, had the potential to conflict with the remit and authority of policymakers at the MoJ.

Some of the policy development by the MoJ affected what could be achieved by the policy committee. On some counts they were very prescriptive with regard to what they would, and would not, countenance as the outcome of discussions. On other key points the ministry's position was not resolved to the level needed by the policy committee, which was the trigger for dialogue and mediation between insurers and other representatives, or a reference back to the MoJ.

For example on CPR Pt 36 offers, there was a difference of opinion over what should occur with regard to the number and provision of medical reports, and what should be provided under the protocol. Here, almost up to April 30, 2010, when the protocol was launched, the rules sub-committee ("the rules committee") was still waiting for the then-justice secretary to make a judgement on what should be done with regard to this critical part of the process.

On occasions the clarity and completeness with which decisions by the policy committee were recorded also fell short of the technical standards needed by the rules committee, with implications for rule drafting noted below. This was a particular problem, given the small overlap between membership of the policy and rules committee, and the lack of a common secretariat.

Rule drafting

It was the role of a specially established subcommittee of the CPR Committee to turn policy development decisions on the portal into drafted rules that would govern its operation. A key frustration for the rules subcommittee was the level of detail required on some items required it to seek more detailed decisions and/or information from the policy development committee and/or the MoJ.

Problems in this area were exacerbated by the small number of personnel shared by the policy and rules committee: with the insurer representative serving only on the rules committee. The MoJ in retrospect could have aided integration further by ensuring its solicitor was party to the policy discussions from the outset, thereby assisting the task of turning policy decisions into drafted rules for discussion.

Representations from insurer interests were a further complication, as individual insurers made their own representations, rather than looking to present a shared position, for example through the Forum of Insurance Lawyers ("FOIL").

The result of such uncertainties was that committee members were in a position to open, or reopen, policy items for debate that should not have been within the remit of the rules subcommittee. This was a structural fault in public policy formation for which a better solution could have been utilised.

Portal development

With delays in the development of the policy and rules resulting from flaws in the public policy process identified above, the development of the Portal as a secure electronic communication system commenced before the rules had been finalised.

As an electronic communication system, the portal needed to reflect the protocol as based on the final policy rules. But, stemming from the overlaps in the process identified above, there was a disharmony between the Rules and the Portal—a disharmony that has affected the operation of the Portal to date in very concrete, practical ways. Such instances of disharmony are reported to the RTA Portal's board, of which I am a member.

Unsurprisingly, a common complaint concerns CPR Pt 36 offers. According to the protocol, at the end of Stage 2, and to go beyond Stage 2 to Stage 3, a Court Proceedings pack (Parts "A" and "B") is needed. Part A is to contain the pleaded case, coupled with confirmation of any damages agreed. When it comes to Pt B, this is to contain the final offer of both parties and has Pt 36 consequences. The system does not allow amendments to Pt A. This therefore confounds any portal users who require amendments, which would normally be the case. The RTA Portal Board has recently bulletined a work around, but this took considerable time and was obviously not ideal.

There are also issues around children's claims and interim payments. Here rules and the portal diverge, as one is required to answer a question in the positive to proceed—divergent to the answer needed to deal correctly with regard to children's claims and interim payments. In other words, you have to confirm that damages are not agreed under the Portal in order to proceed to Stage 3, whether or not this is the case!

The protocol makes provision for dealing with additional damages. However, these elements of claim can only at the moment be dealt with outside of the Portal.

Further, there are problems with the claim notification form. Specifically, who is authorised to submit this on behalf of the client? There is huge, and unanticipated, competition between those instructed by insurers, claims management companies and lawyers to submit first here. This can result in an unseemly race to get the client and submit the claims notification form, in a way that can and often does leave the client confused.

Such matters can be corrected, although in the meantime uncertainty is created. Of greater concern are aspects of the portal's governance, dealt with below.

Governance of the Portal

The RTA Portal Company is a joint venture company, with a board consisting of four insurer members and four claimant members, with an independent chair.

The company's objective and purpose is to:

> "develop, manage and administer through a claim routing portal or other claims process … giving effect to the procedure established by Parliament through the Ministry of Justice and embodied in Rules of the Court effective from April 30, 2010 (SI 2010 No.621 (L.3)) and to do so in accordance

> with those rules of the court. The Company will deliver the process to users and undertake such activities as are consequential to the management and administration of the process including all residual functions of a Project Steering Group established to oversee the development of the portal."

It now oversees services delivered through MIB Portal Services Ltd. There are two shares in the company, one held by claimant interests as the Claimant Co Ltd, the other by Motor Insurance Bureau-owned MIB Portal Services Ltd itself.

At present all funding is by insurer interests. This is far from ideal, compared to a "user pays" system, introducing as it would the need for a strong counterweight to influence that the MIB has as the portal's funder in directing matters affecting both management and policy of the Portal.

This issue was recognised in a paper on the topic of "User pays" sent to the MoJ by the Portal Company in February this year which noted: "The Claimants and Insurers agree that it is of fundamental importance that … in future they should make equal funding contributions." The paper added: "It is now essential for decision-making to be truly equal, including in relation to financial matters."

The paper proposed a "modest change to the rules" to give the proposals effect, but so far the MoJ has indicated that it does not support the proposed change. This is despite a warning in the paper that "failure to achieve user pays poses a risk to the future participation of the Claimant group".

The future of the Portal, the extension of the process

The assessment of the Portal by policy makers

On March 29, 2011, justice ministers hailed the Portal a success, noting:

> "The time taken to resolve road traffic accident personal injury claims of up to £10,000 has dropped from one year to four months in some cases following the introduction of a simple online system that allows lawyers and insurance companies to resolve low-value claims without going to court."

The proposal following this assessment—an assessment to be supplemented by more detailed statistical work currently being conducted by Professor Paul Fenn of Nottingham University Business School—is for a horizontal extension of the process to other areas of claim, and a vertical extension of the process to take in higher-value RTA claims.

> "We propose expanding the availability of this online system to process Employers' Liability and Public Liability personal injury claims as well as deal with higher value claims of up to £50,000."

Using figures from my own firm relating to time taken to resolve RTA claims using the portal, is seems likely that there has been a reduction in the cost of resolving claims, and a significant reduction in the time taken to resolve those claims. There are problems in the disharmony between the rules and the Portal, as noted above. But while it is frustrating that such problems were avoidable, they can be corrected in time.

But there are reasons why a simple and unconsidered attempt to transpose the process to larger RTA claims, or to other areas of claim, is likely to fail to deliver the same benefits.

Vertical extension of the Portal

Although the Portal's £1,000—£10,000 limits will seem arbitrary in some circumstances, two scenarios from my own firm's experience highlight the problems of extending the process to higher-value RTA claims.

Scenario 1

In this case, the claimant had a whiplash injury and banged his head. He suffers tinnitus, fatigue, headaches, loss of memory immediately following the accident and temporary loss of sense of taste and smell with continuing mild but intrusive cognitive problems following the accident. He had a relatively short period of time off work to recover from his physical injuries but struggles in his pre-accident employment because he cannot concentrate or organise his work as he used to before the accident. He suffered post-traumatic stress disorder-type symptoms and continues to be bad tempered and suffer from depression. General damages and special damages ("SD") are likely to be worth less than £50,000 as continuing symptoms are mild but the extent of the brain injury and future consequences need to be investigated properly.

Initially his solicitor would want an orthopaedic report, a neurologist's report, a neuropsychologist's report to address cognitive problems and psychological symptoms and possibly an ear, nose and throat ("ENT") report. It's arguable that the latter two could wait until recommendation from the neurologist, and the Protocol only allows for two reports initially. However, to wait for a recommendation from the first two experts instructed before obtaining further reports when we already know they will be needed could delay progress of the claim.

Scenario 2

In this case the client was involved in a motorcycle accident. Put in to a temporary coma by the accident, he suffered: concussional head injury; permanency of some adverse effects on higher level cognitive functions; splenectomy, resulting in a lifelong dependency on anti-biotics; and increased risks of dying that had been increased by 1–1.5 per cent above normal population.

The client also had: pneumothorax, with a chest drain; a fractured pelvis, with aching that continues on activity, for example when ascending or descending stairs; a broken tooth requiring dental treatment, including a composite fill, and future restoration and replacement of crown; a knee laceration that was severe and, required debridement, leaving scarring and some ongoing symptoms; a fractured rib; the need for speech therapy; some psychological symptoms attributable to the accident; some limitations to hobbies and activities.

The client had not resumed motorcycling, though was not "bothered enough" to consider counselling or lessons to increase confidence. He had been able to resume some of his more adventurous activities and excursions abroad, although he remains limited in some of his abilities—for example, with rock climbing, although he has been able to go rock climbing.

Medical evidence has confirmed that although these were very serious, life-threatening injuries, he has made a very good recovery with no significant hampering ongoing symptoms.

He has the risk of future infection and death due to the splenectomy. Although a fairly small risk, death is the most serious deterioration possible, so the Claimant would not be unreasonable in seeking a provisional damages award.

Counsel considers it is a very difficult case to gauge. Past SDs are minimal at around £5,000 as the client continued to receive full pay during absence from work and future losses are confined to any increased costs of medication, extra immunisations, purchase of anti-malaria tablets etc. Counsel has valued it at £25,000 including SD on a provisional damages basis, and around £50,000 on a full and final basis.

If the Portal was extended, would the court decide at Stage 3 that such a claim should continue under Pt 7 because of potential complexity/provisional damages award and allocate despite quantum being within the possible new limits? There is provision under current practice directions for the courts to take a case

of this sort out of the process. But the concern must be that it is only in the exercise of the court's discretion, within limited parameters. There is as a result some scope for injustice here through inconsistent exercise of discretion by the courts.

Scenario 1 and Scenario 2—witness statements

In both scenarios above, witness statements would normally play a big part and enhance recovery of damages. Under the Protocol, only the documents sent to the defendant under the Protocol can be filed and served at Stage 3. PD 8B excludes witness statements. As well as the evidence of the Claimant, family members, friends and colleagues can give invaluable information in support of a brain injury claim, for example. Also, a witness statement may prove that recovery took longer than predicted in a previously served medical report. Stage 2 costs as they stand are not enough to cover the work involved in obtaining witness statements anyway.

So whereas provision for obtaining and serving statements would be in the interests of the claimant, if the Process was to be extended to claims up to £50,000 and even up to £25,000, a recovery of between £10,000-£25,000 is still a significant sum to most people, and it is surely important that claimants are allowed to submit enough information to get the best outcome, and indeed to assist the courts in making the correct award.

Horizontal extension of the Portal

The proposed extension of the Portal process to other areas of claim is also problematic for a number of reasons. Put simply, in practice the completeness of insurance coverage is much weaker in the areas proposed for expansion, and the number of claims is also much lower, calling in to question the economic sense of creating a dedicated portal, which would require both start-up and ongoing funding.

For example, of areas proposed for extensions, only employers' liability has a compulsory insurance requirement as motor liability does. It is intrinsic to the LV RTA protocol that the Defendant position will be managed as a matter of course by the RTA compulsory compensator, normally the Insurer.

For most areas of claim, there is no parallel safety net equivalent to the MIB to cover the uninsured and untraced third party situations. MIDIS, the online RTA Insurer search facility to identify the correct Insurer details, does not exist for other liability types.

What is more, in RTA cases there is a right of action against the Insurer rather than the culpable driver. There is no parallel right in other liability types. These I would argue are at least desirable pre requisites to horizontal extension.

Then there are problems beyond this of the relative complexity of multifarious statutory and other liabilities. There is also the difficulty of fixing a price for liability investigation, and an across-the-board time scale for this and other parts of the process.

Finally, on this point, I would reference the Government's annual CRU statistics, below. As these show, employers and public liability cases are around 100,000 each per annum, while RTA cases are 790,000, and have more or less doubled over the last six years, and last year alone increased by 17 per cent. Further, other categories of case than RTA will have much a much lower percentage of liability admitted cases.

Latest CRU figures for number of claims made between April 1 and March 31 in each respective year

Total numbers of claims registered (combined accident and disease)[1]

	Clinical Negligence	Employer liability	Public Liability	Motor	Other *	No liability **	Total
2000/2001	10,901	219,183	95,883	401,757	3,120	5,087	735,931
2001/2002	9,779	170,554	100,989	400,445	1,953	4,595	688,315
2002/2003	7,977	183,342	109,782	398,892	2,290	4,414	706,697
2003/2004	7,121	291,210	91,453	374,761	2 069	3,629	770,243
2004/2005	7,205	253,502	87,247	402,924	2,459	2,538	755,875
2005/2006	9 321	118,692	81,615	460,097	3,232	1,465	674,422
2006/2007	8,575	98,478	79,841	518,821	3,522	1,547	710,784
2007/2008	8,876	87,198	79,472	551,905	3,449	1,850	732,750
2008/2009	9, 880	86, 597	86,164	625,072	3,415	860	812, 348
2009/2010	10,308	78,744	91,025	674,997	2,806	3,445	861,325
2010/2011	13,022	81,470	94,872	790,999	3,855	3,163	987,381

Conclusions

From its inception, the development and implementation of the Portal has seen predictable divisions between claimant and insurer representatives charged with assisting with policy development, rules drafting and the desired operation of the joint venture services company to run the Portal. Some of these divisions caused delays to the process, not just because of the difference between their positions, but also because of the difficulty of resolving them. Had such clarity been present, the portal could have been developed much sooner, and the need to meet the April 2010 launch deadline would not have required the policy process, rules drafting and development of the electronic Portal to overlap.

Use of the Portal is not compulsory, but electronic communication is compulsory. Further, compliance with data protection legislation requires electronic communication to be secure. Thus, it is necessary for both requirements to be made clear in the protocol prior to any extension of the Portal, and to be combined with, if possible, a mandatory requirement for Portal usage. Without these changes, such a far-reaching extension of the Portal concept envisaged by the MoJ is likely to prove problematic, or even impossible.

Yet more fundamentally, unless the matter of "user pays" and/or genuine equality of governance are resolved, the at-times uneasy alliance between these two groups that has made the creation and operation of the RTA Portal possible is under threat.

As February's note from the Portal company to the MoJ made clear, failure here would risk the future participation of the claimant group. Without resolution of governance, when conflicts arise, there is occasionally a lack of appreciation at MIB Management Services Company that the portal board is co-controlled by insurer and claimant members, with an independent chair.

[1] Table compiled by APIL. Past two years statistics available on DWP website at *http://www.dwp.gov.uk/cru/performance.asp* [Accessed July 24, 2011].

* Other: No exact definition, but examples include electrocution, dog bites, childhood trauma, injuries from broken exercise machine cables or a tile falling off someone's roof and hitting a passer-by on the head. Basically it is any incident which does not come under motor, public, employer or clinical negligence.

**No Liability: No liability type recorded on CRU records, i.e. the CRU 1 application form is submitted without any incident type details being given at all. This usually indicates that the compensator has omitted to tell the CRU what category the case falls under, so the CRU is probably in the process of trying to establish this information. The terminology has now changed to read "*Liability not known*".

I firmly believe that if this issue is not addressed, it will represent a potentially fatal flaw. It is most critical that the MoJ fulfil its fundamental obligation to provide a balanced, independent forum for the administration of justice.

Not withstanding these important reservations, the completeness of cover and readily available and traceable information in motor claims, are features of lower-value motor claims that have probably allowed key aims around the costs and timetable of disputes to be resolved. The volume of motor claims has also made the development of the Portal worthwhile in terms of its economies of scale.

As shown above, those same preconditions are lacking where both vertical and horizontal extension of the Portal is proposed. At the time of writing it is unclear whether insurers and claimant representatives will be united over the types of claim that should be "in scope" for extension. However, it is unlikely that there will be full agreement!

As to the RTA Portal process and protocol, taking account of progress to date, certain points need to be addressed to secure public and professional confidence in its operation, and to deliver the full public policy benefits that are expected from the portal:

- Steps need to be taken to clarify the requirement for Portal usage.
- The current dissonance between the protocol's rules and the electronic process must be resolved. The most urgent areas for action are misalignments that prevent progress between stages of the protocol that prevent progress to the next stage. Work in this respect is under way through release 2 by RTA Portal Co.
- For higher value claims, prior to any vertical extension of the Portal process, an extensive mapping exercise should be undertaken by MoJ to identify which additional and alternative rules are needed to accommodate claims above £10,000. If appropriate rules cannot be identified, MoJ should be willing to revise the policy of extension.
- MoJ must set out a plan and accompanying timetable to introduce "user pays" and/or a fully balanced governance principle for the Portal. It should also map how this could be adapted to the context of first vertical, and then horizontal extension of the Portal process.
- If horizontal extension remains the aim of public policy, then extensive research and consultation is needed as to how the effectively universal insurance coverage, and data to support it, that exists in RTAs can be introduced for other areas of claim.
- A review of the Portal's performance to date must include a review of the imperfect relationship between the policy, rules and technical processes, as lessons need to be learned prior to future revisions of the existing Portal process, or its vertical and horizontal extension.
- MoJ should review its relationship structure with insurers in the context of consultations and representations. It is clear that multiple insurer interests, working through multiple points of contact, has disrupted the public policy process, and undermined the authority of insurers' representative bodies. This has fed in to the disharmonies between policy, rules and portal development described above.
- The MoJ and CJC should review and amend the relationship protocols to which they work where the development of civil claims policy is concerned. Again, this should be achieved ahead of any extension of the Portal process being commenced.

Everyone involved in the process of the developing the RTA Portal—including myself—can and should heed these "lessons learned" as we look to the future. But it has only through many months of diligent work by the MoJ, insurers and claimant representatives alike—with the latter two on a voluntary basis to serve their respective constituencies and, more importantly, injured people—that practical solutions have been achieved.