
The Future of Holiday Claims - A Response to Government

Position Paper - Response to Stakeholders Questions

Frank Brehany - frankbrehany.com - 19 January 2018



Consumers
Campaigning
Commentating

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Introduction:

This Position Paper is in response to the additional questions posed by the Ministry of Justice following the initial Consultation on Holiday Claims and the Justice System.

Commentary will be provided on the nature of these additional points and questions in satisfaction of the Ministry's desire that those responding should satisfy the following request: *"It will of course be helpful for us to receive your comments on the specific issues raised in the consultation"*.

It is important to recognise that any Consultation is not simply about answering set questions; set questions can mask the motives that underpin agenda. It is the duty of ALL Stakeholders to examine each sentence, paragraph and word, to determine the underlying agenda or risks posed to that particular Stakeholder's sector. It is not the duty or obligation of any Stakeholder to acquiesce or be complicit in any shifting baseline, because that in itself would betray that particular Stakeholder's sector and their experience. Government & Civil Servants have indicated the 'value' in each Stakeholder's submission; they should recognise that there is no value in unilaterally determining a limited or reducing baseline because this simply will not provide for an informed position, unless of course the position has been pre-determined.

It should be noted that the additional points and questions subject of this paper were raised with Stakeholders on 2 January 2018, requiring a formal response by 15 January 2018; this amounts to less than two weeks, following a holiday period.

Due to a family bereavement, permission has been received from the Ministry of Justice for a later submission of opinion; the Ministry is thanked for the application of its discretion.

This report should be read in conjunction with the earlier Paper's submitted to this Consultation.

This Paper, as with the previous Paper's will be published and circulated to media outlets and politicians, in order to develop the debate on the future management of holiday claims. All three Papers will be submitted to the Justice Committee.

About the Author:

I am a retired Police Officer and a self-funded Solicitor.

I work extensively in the media, providing comment on Travel Consumer related issues.

I am not connected to nor do I work within or with any Law Firm or other Legal entity.

In the last 10 years, I have provided extensive comment to the UK & EU about Travel Consumer issues, creating over 65 reports to highlight their detriment; I have also provided Consumer commentary to the FAA (USA), the Australian House of Representatives and The World Tourism Organisation.

For 14 years, I was the Consumer Director of the Independent Travel Consumer Organisation, HolidayTravelWatch (HTW), until I left that post in July of this year.

I have some 20 years experience, both in the handling of holiday claims and latterly as a Consumer Campaigner, helping Consumers deal with their Travel Complaints. Whilst at the helm of HTW, we proudly aided 97.5% of holidaymakers to self-resolve their complaints and worked with specialist lawyers to help progress less than 2% of holidaymakers cases, where it was clear that they would not be capable of settlement by self-resolution methods.

I remain associated with Consumer issues, principally but not limited to the areas of Carbon Monoxide, Holidaymakers Rights, Justice & Consumers, Consumer Rights, Whistleblowers, Toxins, Cabin Air Quality.

I am active in the field of Standards. I am currently the Chair of the BSI's ACE1/_/1 Cabin Air Quality sub-committee (UK); I am a voting member UK representative on CEN TC436 Cabin Air Quality (Europe); I am a voting member representing Consumers on ASHRAE SSPC 161 Cabin Air Quality (USA).

I do not receive any funding from any source and my continuing work to independently advocate the Consumer position is entirely self-funded.

The Subversion of Justice - A Government decided?

I want to begin by referring to the opening paragraphs of this report. In those paragraphs I allude to a concern, expressed in my earlier reports, that Government needs to listen and carefully consider the key issues at stake. **The failure to listen will in my view lead to unintended consequences, such as a substantial rise in Litigants in Persons', extra pressure upon the Courts and the Judiciary, a shifting baseline in both the Access to Justice and the delivery of that Justice, the rise of factory-lawyering staffed perhaps by an unskilled or inexperienced personnel. This latter point is important because if that scenario arises, it is likely that a new legal niche industry will arise of holiday claim professional negligence.**

Despite submissions, discussion and the challenges I have made, there has been no public demonstration of evidence to support the propositions offered by the Travel Industry or Government other than bland statements.

However, as an active Stakeholder, and assuming that other Consumer stakeholder's are also contributing to this inquiry, Consumer Stakeholder's should be concerned by statements made by the Justice Minister, Lord Keen of Elie (Richard Keen QC) to the Justice Committee (16/1/18)¹. It is intriguing that this appearance before the Justice Committee took place on the day following the end date of the additional questions posed by the Ministry of Justice on 2/1/18. In summary, it was observed in the broadcast that:

1. He appeared to qualify and dismiss the concerns of Access to Justice (expressed by one member of the Committee) as stated in the leading case of R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) 26 July 2017 (covered in my supplementary Position Paper);
2. In his opinion, Litigants in Person can bring their own claims into the Small Claims Court successfully;
3. He cited 'evidence' that this had been successfully done for personal injury claims sitting under the £1,000 limit (no data was offered in support);
4. Their intention was to 'simplify the claims process';
5. They intended to make the relevant pre-action protocol 'user-friendly';
6. If a matter demonstrated a complexity, then it could be moved either by application of the party or by the judge to the fast-track;
7. There was some consideration about sources of accessible information for potential litigants - there was some discussion about Citizens Advice Bureau, though it was not clear whether there was funding to support that resource;
8. There was some discussion about how to help those who are digitally challenged;

¹ <http://www.parliamentlive.tv/Event/Index/f81a8a79-7007-4c0b-8e79-b9cd6b268941>

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9. He considered that 'good CMC's' could be an important factor within the personal injury/small claims court market;
 10. He asserted that there were many 'fraudulent' RTA claims, but when challenged, the assertion did not appear to be based on hard data but on a series of assumptions;
 11. He suggested that with the changes proposed it would cause Personal Injury Claimants to 'pause and think about the merits of their claim';
 12. He did not think that Claimants needed to consider the complexity of legislation in the early stages of the claim, reverting back to the point that the claim could be transferred back to the fast-track;
 13. He appeared to dismiss the concerns that ordinary Claimants would be faced with legal teams who would be prepared for the complexity of making a claim.

I would recommend that Civil Servants & Ministers and indeed those outside this cohort, watch and listen to the Minister's responses to the Justice Committee.

The answers provided are the clearest indication yet that decisions about the future course of how personal injury Claimants access Justice, are driven not just by agenda, but as the Minister appeared to suggest, by the costs incurred by Insurance Companies in dealing with claims.

This latter point reveals an interesting point with regards to the Travel Industry. This is an Industry, replicating the somewhat successful campaign of insurers, which 'cries wolf' at these investigatory costs, but appear either unwilling or unable to either demonstrate key data to support their propositions, or, (apart from some recent leading headline cases - I question the value of these 'one-off' initiatives) to apply a far more robust anti-fraud position, working to pressure government to support them in that aim.

This latter point is key because it provides for a fundamental question for society:

'If we have become concerned about alleged fraudulent activity at a high level (for example with company directors, bankers etc), and that concern is also expressed toward a claims industry who may be engaged in the subversion of Justice, is it right that changes to a legal system to cure these ills should be directed at a Citizen/Consumer, or, should society direct its resources to those who perpetrate such fraudulent activity which is an affront to that society?'

The issue of who is subverting Justice is key in this debate; it is an important aspect of Public Policy.

When considering that subversion, care must be taken when expressing the wide proposition that a large number or the majority of claims are fraudulent. Care must also be taken in stereotyping Claimants as being the more likely to make that fraudulent claim, when in fact it is likely to be a small minority, influenced by the slick sales and operations of a Solicitor or a Claims Company. The government may offer the response that this is a chicken or egg argument and that it is logical to head for the 'Consumer pays' principle. This would be an error of Judgement, because it will not resolve the problem and in fact, as I have already stated, deliver unintended consequences

Equally, if the answer provided is that the Citizen/Consumer should be the focus of of a disproportionate action to 'reduce' claims and thereby help an Industry to reduce its alleged costs, then it would not be unreasonable to form the objective view that those same industries are receiving a form of State Aid, when that State should be deploying a far greater zero tolerance to fraud. Government, acting on behalf of Citizens/Consumers, should act directly against those who are considered to be the principal actors in the subversion Justice, accompanied by more than adequate resources to meet that policy.

What was interesting overall about this exchange, was the fact that little was added to the Committee's Members' concerns about fraud and how this should be tackled; effectively, the proposals were a 'sledgehammer to crack a nut'.

In terms of this Consultation, as I have concluded in earlier Papers in this Consultation, there is a strong sense that the 'value' attached to opinion offered, exploration of facts, real analysis of data, understanding the de-motivating of Claimants to access Justice, are somehow taking second place to Government and quite possibly, an Industry's agenda.

Those managing and deciding the issues of this Consultation ignore these concerns at the peril of future Consumers/Claimants.

The Consultation - Additional Questions:

As already detailed, the Government produced a set of questions on 2 January 2018, calling all Stakeholders to respond by 15 January 2018.

For the purposes of this report, the format and method by which the questions were sent to Stakeholders is produced below:

"Thank you for responding to the Call for Evidence last year. The Civil Procedure Rule Committee is now considering the necessary Civil Procedure Rule and Pre-Action Protocol (PAP) amendments in order to extend fixed recoverable costs (FRC) to package holiday gastric illness (GI) claims. It is not proposed, at this stage, that these claims would be required to go through the Claims Portal process. A sub-committee is considering the detail, and has asked for further information from stakeholders who deal with these claims (specifically, low value – under £25k damages – package holiday sickness/GI claims). The intention is then to draft the most appropriate PAP wording so that FRC can apply to these claims.

We would be grateful for more detail as to your perceptions of the processes to be followed in the investigation/formulation of GI claims and the response to such claims and, in particular, the manner and extent to which you consider, if at all, the handling of such claims differs from the other PI pre-action protocols (PAPs). In other words, what work and/or evidence is required at each stage of the claim? What critical factual information is required from the Claimant in the letter of claim to facilitate prompt investigation? What is required to ensure that liability is determined and, thereafter, a fair settlement achieved expeditiously at the pre-action stage? What timescales would be appropriate in such cases?

Given the wording of existing PI PAPs, what aspects of those PAPs are suitable for GI claims? Please provide suggestions if there is no suitable existing wording for particular aspects of a GI claim.

We would be grateful for your email response by close on Monday 15 January".

Examination of the issues:

GI Claims:

With regard to the 1st paragraph of the Ministry's questions, I would refer to the expression 'package holiday gastric illness (GI) claims'.

Whilst this is technically a brief explanation of the problem, I am fearful that the description applied is nonetheless an example of a **shifting baseline**.

It is of course about language, but to suggest that all illness can be dove-tailed into a 'gastric illness claim' description, fails to recognise the severity and nature of the said 'gastric illness'. If, as we have read in newspapers and in offerings from the Travel Industry, that these claims are simply about a holiday illness that is self-limiting, then that would be the wrong perception of the majority of these claims.

It is true that some holidaymakers report a period of illness that is self-limiting to a period of 24 to 72 hours.

In my experience, the period of illness often runs from an index point within the holiday for a period of some 2 to 3 weeks, which often means that holidaymakers are suffering upon their return to the UK.

It is also the case that many of the 'gastric' illnesses are not of the nature of 'Spanish Tummy', 'Montezuma's Revenge' or the 'Turkey Trots' (phrases oft used by the Travel Industry and the Media), but reveal diseases such as Salmonella, Giardiasis, Campylobacter, Cryptosporidium, Cholera to name but a few, and quite often are multi-origin-sourced from within hotels, hotel resorts and mega-resorts.

These ranges of illness are often long-term, lasting on average from 6 to 12 months from the index point of the holiday and in some cases, my own experience has revealed a small proportion of holidaymakers whose period of illness stretches for up to 2 to 3 years beyond the index point of the holiday; some have been rendered unemployable.

It is that complexity with which the government hopes to rationalise, through the phrase 'package holiday gastric illness (GI) claims' and insert this work-type into the inadequately resourced Small Claims Court and its own complex processes.

Recommendation 1:

It is therefore my strong recommendation that Ministers, prior to making any final decision on the future management of holiday claims examine the current description to define these claims. I would strongly recommend that Ministers adopt a relatively simple process by adopting the methodology of descriptives found within the style adopted by the JSB Guidelines. The Government will need a wide-Stakeholder input. I would strongly recommend that government takes this course of action because even if the government rejects the positions offered, this small step will help holidaymakers and Judges to understand the complexity, what is required to progress the claims and to help determine if a particular claim should remain in the Small Claims Court or whether it should be escalated to a higher court.

Claims Portal:

It is noted that there is no current intention to introduce Holiday Claims into the Portal. **At this stage, without some fundamental re-think on the whole issue, I would not recommend that such claims are introduced into the Portal.**

Under £25k:

It is noted that the additional questions are related to those claims with a value under £25k. I would simply observe that this will include virtually all holiday claims and would refer simply to my commentary above on 'Package Holiday Gastric Illness (GI) Claims'.

FRC:

The additional questioning is seeking '*appropriate PAP wording*' (it does not indicate which PAP is being considered, for example, the Protocol for Personal Claims or the Protocol for low-value RTA Claims as its model), so that '*FRC can apply to these claims*'.

I would comment as follows:

1. The PAP issue is not clear; is there an attempt to fit a square peg in a round hole given the complexity of Holiday GI Claims?
2. On the issue of FRC, the questions state that any suggestions offered creates the conditions whereby '*FRC can apply to these claims*' - has the issue of FRC already been pre-determined?

In light of these concerns, I would offer the following Recommendation:

Recommendation 2:

It is my recommendation, that if the Government is intent in progressing with their proposals, a separate and distinct Pre-Action Protocol (PAP) is defined and drafted for GI Holiday Claims. The precedent already exists within the PAP structure; such a PAP should be designed along with a better understanding and categorisation as detailed in Recommendation 1 above.

Investigation/Formulation/Construction of GI Holiday Claims:

I refer to my personal information at the beginning of this Paper. My experience was first fashioned through the handling of these claims as a Solicitor and latterly as the Consumer Director for HTW. Any commentary that I offer therefore will be based on that experience and importantly, of the Consumers themselves. From a purely legal perspective, the Consultation should seek further detail from those who currently provide legal representation for GI Holiday Claims.

In response to Lord Keen's proposition that a simplified 'user-friendly' process will be the panacea to low-value GI Holiday Claims, it is important to highlight the experience of some Consumers who take different types of claim to the small claims court or into arbitration:

1. **Consumer A** currently has a contractual claim before the Small Claims Court. They have done everything possible to negotiate with the Defendant, who fails to respond on each and every point raised by them or the court. The Judge in the case (valued at £1,200), has failed to read the papers which set out very clearly and simply what the key issues are and has ordered the parties to jointly instruct an expert for £500. The parties have been unable to find any expert who will do this work at the limited cost. The Claimant now has to return to court to seek further directions on an expert or witnesses. The costs are already outweighing the value of the case;
2. **Consumer B** pursued a travel contractual case before the small claims court. They were faced with a robust challenge by the travel company which caused extreme difficulty for the Consumer. The Consumer however rose to the challenge and expended a great deal of time and money, again far outstripping the value of the case, so that they could rise to the challenges presented by the Travel Company. On the day of the trial, the Travel Company

failed to turn up to Court. Judgement was entered against the Travel Company and the Claimant then encountered difficulty in enforcing the Judgement;

3. **Consumer C** decided to bring his case against the Travel Company through Arbitration; they accepted by doing so their route to Court would be closed. The process was advertised and promoted to them as simple and 'user-friendly'. Once commenced, the Consumer completed relatively simple documentation but was met by formal documentation, obviously drafted by legal advisors. The documentation raised a number of challenges and again the Consumer expended a great deal of time and money, outstripping the value of the claim, to meet those challenges. When the Arbitrator provided their decision, it was clear that they had not read the Consumer's case and that the decision was made in error. The Consumer appealed and lost and was then faced with making a Public Law challenge on their Right to a Fair Hearing; they found it was virtually impossible to find a Solicitor or Legal Representative who was capable or willing to help them challenge the decision.

These experiences are widespread and common; the government must not fool themselves into thinking that the current Small Claims Process or indeed Arbitration, or their proposals will deliver an easy route for potential Claimants; it will not deliver an Equality of Arms!

Recommendation 3:

Before any decision is made by government, I would strongly recommend that they institute an Independent Inquiry into the operation of the Small Claims Court and the Court users experience. Such an Inquiry should examine in particular the nature of a Claimants case, their understanding of 'legality' and what is needed to bring a case and the challenges they face. The Inquiry should also seek opinion from other Stakeholders.

To aid the complex issues posed by the additional questions, the following recommendation is made:

Recommendation 4:

If government is intent on delivering its proposals, then simply seeking wording for a proposed extension of a PAP or the delivery of a new PAP would in my view be insufficient. What would be required is a radical departure from the way complaints are handled & considered by all parties. The following 'General Principles of GI Holiday Claims' is my response to the 'questions' posed and I would strongly recommend that these provisions are imported into any new processes:

The General Principles of GI Holiday Claims:

If the Government is intent upon delivering their proposals, then in constructing any PAP for GI Holiday Claims, they should pay due regard to the issues that arise time and again within the complaint, from the index point of the illness to full recovery and possible settlement.

The Minister has declared that PAP's should be 'user-friendly'; I say it must go much further and assume that Consumers will not understand the law or how it is applied; it must also call to account potential Defendants and ensure that the use of process is not slanted entirely in their favour - a true balance must be achieved!

It is important that in the construction of any standalone PAP, the following Principles must be imported:

- A. **The index point of the illness must be established** before any consideration of a complaint or claim, this would provide benefit in:

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- A. Limitation calculations, and
 - B. Determine at an early stage the identity of minors and how any given limitation is applied;
- B. The index point of the illness must also be supported by an early complaint** to either the:
- A. Hotelier, or
 - B. The Tour Operator or Organiser;
 - C. Such a complaint should be put into writing by the **Consumer**;
 - D. The **Hotelier/Tour Operator/Organiser** must demonstrate that they have received the complaint, acknowledged that complaint directly with the Consumer and have indicated within an achievable timeframe (within the operation of the holiday) of how they intend to resolve any such complaints;
 - A. The actions of the **Tour Operator/Organiser** at B (D) should mirror their obligations under the Package Travel Directive/Package Travel Regulations, particularly at Regulation 15 where action must be taken to help a Consumer making a complaint or if they are in difficulty. This point is vital because in my experience, all too often, **Travel Companies fail at this critical stage to deal with such complaints**, often offering excuses that range from: 'the illness was brought in by other holidaymakers', 'It's Montezuma's Revenge', 'It's the Turkey Trots', 'It's Travellers Diarrhoea', 'No-body else has complained', and, it has previously come to my attention that some tour companies, from the UK, have re-directed their staff away into other parts of the resort so depriving holidaymakers the chance to make their complaint. Other actions against holidaymakers who complain include, isolation, warning other holidaymakers not to speak with them and in several cases, some holidaymakers have acquired a 'security detail' or had their rooms entered with a pass-key and had their room-safe's emptied of lists of holidaymakers along with cameras. This is a brief snap-shot of what can happen if an ordinary Consumer makes a complaint; such experiences do not match the reality of regulatory obligation. **A robust PAP would in my opinion cause Defendants to take more seriously complaints initially made in resort, as this is of course the index point of the complaint. If the goal is to reduce complaints then this critical period is when to do it, not several months later!**
 - B. Each **Consumer**, adult or Minor, complaining of illness should maintain a diary of their illness, along with any other related effects, for example, bloating, dietary changes, or any other physical symptom that was not present prior to the holiday;
 - C. There is perhaps a need to examine the methodology of the response to the complaint and for any PAP to set out that methodology with format and clarity;
 - D. That methodology of response should be accompanied with clear evidence and documents to support the opposition to the complaint - this should be provided within the holiday period;
- C. There needs to be a clear positive statement that any medical assessment or treatment offered** by a hotel, resort or travel company should state:
- A. Who is paying for the medical assessment or treatment;
 - B. In the event that they are not paying for the assessment or treatment, they should provide advice about travel insurers, public health options and private options;
 - C. Where the assessment or treatment is offered and accepted, an open disclosure of any instructions given by the hotelier, resort or tour operator to any medical practitioner must be given to the Consumer;
 - D. Any test results must be returned directly to the Consumer and not to the hotelier, resort or travel company;
- D. Where any Consumer falls ill during the holiday, they must make declarations about treatment**, they should:
- A. Declare any medical treatment they sought in resort, identifying the source of that treatment;
 - B. Declare the costs of any treatment sought;

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- C. Declare the reasons why they have not obtained treatment in resort;
 - D. Declare what assistance they sought from their travel insurer;
 - E. Provide proof of expenditure on medical treatment;
- E. Where any offer to settle the claim in resort is made with the Consumer, it must:**
- A. Clearly state that offer;
 - B. It must declare whether it is in full and final settlement;
 - C. It must positively recommend that the Consumer should seek independent legal opinion before acceptance;
 - D. The Consumer should be formally given 28 days to accept the offer;
 - E. If the Consumer accepts the offer within that 28 day period and in particular in resort, the Consumer should be given a 14 day 'cooling-off' period in which time they can reconsider and reverse their offer to accept the offer to settle;
 - F. Where an offer is made to settle a claim for a minor, that offer must:
 - A. Positively encourage the Consumer to obtain Independent Legal Advices on behalf of the minor;
 - B. The Consumer must demonstrate that they have sought those advices;
 - C. If the offer is agreed for the minor, each and every offer made to settle a minor's claim must be approved by a court in England/Wales or where appropriate, the UK;
 - G. Whether an offer is made to an adult or a minor and it is not accepted, then the Consumer should provide clear reasons why that offer is not accepted;
- F. From the period from the end of the holiday to 365 days after the holiday, the parties so defined must:**
- A. In the case of the **Consumer**, they must restate their claim in writing to the Travel Company - they should detail the steps taken by them in resort according to the PAP - they should also demonstrate how the hotelier or travel company responded to the original complaint;
 - B. The **Consumer** must maintain their 'illness diary' as set out in B (B) above, for a period of 12 months beyond the end of their holiday;
 - C. The **Hotelier or Travel Company** should again be given the opportunity to respond to any deficits raised by the formal letter of complaint and any deficits arising from obligations arising within this PAP during the holiday period;
 - D. Where an offer to settle is made, the provisions contained in **E** above are to be repeated and **actioned by the parties**;
 - E. Where no change in response is detected as a result of the formal complaint and/or no offer is made or accepted, then the **Hotelier or Travel Company** will have six months to investigate matters arising from the formal complaint, however,
 - A. They should **indicate to the Consumer** how they intend to construct their enquiries, identifying the principle areas and parties of investigation;
 - B. Each and every month utilised by the **Hotelier or Travel Company** for investigation will require them to provide a full report on their investigation activity to the Consumer;
 - C. During the period of investigation, the **Consumer** should be allowed to intervene with questions, suggestions or directions on the said investigations, producing new evidence where it becomes available to the hotelier or travel company;
 - D. Upon arrival back in the UK, each **Consumer** complaining of illness arising from their holiday, must visit their medical practitioner and obtain a stool sample test;
 - E. Where a **Consumer** is requested to provide access to their medical records, they must do so;
 - F. Where a **Hotelier or Travel Company**, upon receipt of a **Consumer's** medical records, who then make an offer to settle, they must follow the process at **E** above, in doing so they must acknowledge and accept that:

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- A. The offer is made in recognition that the **Consumer's** health complaints may not be fully resolved, and
 - B. That the offer is an interim offer and therefore **not** in full and final settlement;
 - G. At the end of the six month investigation period, the **Hotelier or Travel Company** will provide a full response to the issues raised in the formal letter of complaint, the exception will be:
 - A. If **both parties are in agreement**, then the period for the Hotelier's or Travel Company's responses can be extended by up to a further three month period;
 - B. To achieve a valid agreement to extend, the **Hotelier or Travel Company** must set out in full detail, the reasons why they wish to extend the investigatory period, the sources and routes to their investigation and what they hope to achieve during the extended period;
 - C. For each month in the extended investigatory period, the **Hotelier or Travel Company** will make a full report back to the Consumer, detailing their progress;
 - D. During the extended period, the **Consumer** will be entitled to ask questions, comment or offer their own direction on the **Hotelier's or Travel Company's** investigation;
 - E. Any agreed extension to the investigatory period, will automatically extend the post-holiday period as defined in **F** by the same period;
 - H. Once the formal response has been provided by the **Hotelier or Travel Company**, the **Consumer** will have three months to consider, seek advices or respond to the Hotelier or Travel Company as to their findings;
 - I. Throughout the holiday and post-holiday period, **full disclosure of documents** will be made by all parties to each other:
 - A. **All parties** must carry out an audit of documentation that is relevant to the complaint;
 - B. That **audit must be declared** to each party, by the other, each and every month the complaint/claim is in action;
 - C. Once the formal response has been delivered to the formal complaint, each party will **deliver all documents** contained within their audits to the other party;
 - D. **When considering disclosure, each party must deliver an audit and documentation to their cases that is both helpful to their positions along with documentation that is detrimental to their stated positions;**
 - E. Documentation is to have a **broad meaning** to include storage systems in whatever form;
 - F. If either party **fails to deliver** their monthly audit of documentation, or fails to disclose any documentation, then they will not be able to rely on any documentation in support of their position - **this will render any formal complaint or any formal response invalid;**
 - G. To enforce or to challenge the sanction imposed by F (I) (F) above, either party will have to make a **formal application to the Court** for adjudication on the issues;
 - J. If at any stage, the **Hotelier or Travel Company** wishes to make a formal offer to settle matters with the Claimant, then the process as defined in **E** above will be followed;
 - G. **Once formal action commences, elements from other PAP's post-formal action can be adapted and used in the GI Holiday Claim process;**
 - H. **If FRC is to be used** as a crude device, to try alter the route to progressing with GI Holiday Claims, it is strongly suggested that given the International, multi-contract (possibly aggravated by post-brexite single market issues), investigatory nature and challenges of these claims, that informed consideration is given to the whole issue of FRC's. I am seriously concerned that

without proper due diligence on this issue alone, a set of unintended consequences that I have already detailed will not only grow in reality, but will have the opposite affect on controlling a so-called 'compensation culture'. There is a need to recognise the specialism attracted by this work-type and for a formal Consultation, involving a wide-Stakeholder platform, to discuss, devise (without reference to the simplistic RTA model) a methodology whereby a realistic market-rate FRC for legal services can be agreed;

- I. With regards to **Experts**, utilising an agency with a 'quick-turnaround' type of expert is simply not appropriate for these claims. If they are to remain in dispute following the formal response, disclosure and any offer made, the pattern of how experts are used, obtained or ordered should remain as it currently is. However, **there should be no limitation on the costs of experts**. True experts in this field come with a premium and the system and the courts should recognise that it is a false economy to settle for a lesser expertise simply because of cost. Experts should be employed at market rates. The **delivery of this high value expertise** will not only help the parties access key issues and responses on liability and health, but will also import confidence that any streamlined process for GI Holiday Claims introduces;
- J. If the government wishes to introduce its intended policy for GI Holiday Claims, it must resist the notion that Litigant's in Person, pursuing a PI Claim in court is simple, as advocated by Lord Keen. If that view is maintained, then **the government should fund and resource Independent Court Advocates**, who are available for Consultation and assistance within the Court. This would revolutionise the Small Claims Process for GI Holiday Claims, helping the Judiciary, rebalancing the representation deficit and ensuring that the courts do not become overly clogged with secondary issues, along with ensuring that Claimants enjoy the right to a fair hearing.

A Summary of the Recommendations:

Recommendation 1:

It is therefore my strong recommendation that Ministers, prior to making any final decision on the future management of holiday claims examine the current description to define these claims. I would strongly recommend that Ministers adopt a relatively simple process by adopting the methodology of descriptives found within the style adopted by the JSB Guidelines. I would strongly recommend that government takes this course of action because even if the government rejects the positions offered, this small step will help holidaymakers and Judges to determine if a particular claim should remain in the Small Claims Court or whether it should be escalated to a higher court.

Recommendation 2:

It is my recommendation, that if the Government is intent in progressing with their proposals, a separate and distinct Pre-Action Protocol (PAP) is defined and drafted for GI Holiday Claims. The precedent already exists within the PAP structure; such a PAP should be designed along with a better understanding and categorisation as detailed in Recommendation 1 above.

Recommendation 3:

Before any decision is made by government, I would strongly recommend that they institute an Independent Inquiry into the operation of the Small Claims Court and the Court users experience. Such an Inquiry should examine in particular the nature of a Claimants case, their understanding of 'legality' and what is needed to bring a case and the challenges they faced. The Inquiry should also seek opinion from other Stakeholders.

Recommendation 4:

If government is intent on delivering its proposals, then simply seeking wording for a proposed extension of a PAP or the delivery of a new PAP would in my view be insufficient. What would be required is a radical departure from the way complaints are handled & considered by all parties. The following ‘General Principles of GI Holiday Claims’ is my response to the ‘questions’ posed and I would strongly recommend that these provisions are imported into any new processes (Please read the ‘General Principles of GI Holiday Claims’ above which form part of this Recommendation).

Conclusion:

I refer the Consultation to my previous Position Papers; they are not exclusive to each other and should be considered as consecutive opinions.

As we debate this topic and the issues that underpin GI Holiday Claims, there are key questions that must remain central in Ministerial thinking, they are:

1. Who is actually subverting Justice?
2. Are those subverting Justice offending the principals of an ordered Society?
3. Is government focussed on the ‘Consumer Pays’ Principle rather than focussing correctly on those who subvert Justice?
4. Is it really the government position that the route through Small Claims Courts is paved with ‘milk & honey’ and that Consumers pass through unscathed?
5. Does the government really understand what goes on within the Small Claims Courts?
6. Are the government and Industry purported positions really supported by data?
7. Does government understand the actual nature of GI Holiday Claims?
8. Does government understand the actual nature of how GI Holiday Claims are progressed from resort to court?
9. Is government blinded by the simplicity of ‘portals’ and ‘RTA Claims’ and therefore cannot see the complex nature of niche complaints?
10. Has the government already pre-determined the outcome of how Consumers will actually pursue their GI Holiday Claims?
11. Does government truly understand the very real unintended consequences of their actions?
12. Does the government not see the irony of Lord Keen’s commentary on ‘good’ and by implication, ‘bad’ CMC’s, and the whole issue of so-called ‘compensation culture’?

These are important questions to which I suspect no answers will be forthcoming. **I strongly recommend that government follow my recommendations.**

It is one thing to have a valuable Consultation, it is quite another to simply go through the motions.

This government has declared that the Consumer position in the post-brexit years is secure.

If that is the case, then they need to pay close heed to the Consumer, who spends their hard-earned cash on what they see as an essential of life. If that ‘essential’ is delivered with poor quality and they discover that it has become impossible to fairly access solutions to their complaints, what does government think is going to happen next?

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