CPR Committee Consultation on Model Order for Directions to be used in all Credit Hire Cases

Response from the Motor Accident Solicitors Society (MASS)

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This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Simon Stanfield.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 120 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents, many of which involve an element of credit hire. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a prerequisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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1. Executive Summary

The CPRC's consultation on model credit hire directions is welcome and rightly identifies a significant risk that if a solution is not reached, a large volume of satellite litigation will follow.

We believe that evidence disclosed in relation to the key credit hire issues of impecuniosity and Basic Hire Rates (BHR) should be proportionate in accordance with the overriding objective, balanced between the parties with an equality of arms, and maintain relevance to the issues at hand in accordance with existing authorities. It is vital that model directions seek to be just that – a model, seeking to offer a strong basis for the majority of claims and not an obscure few. Other mechanisms within the CPR for the investigation of a claim must not be overlooked, including but not limited to specific disclosure, Part 18 questions and CMCs. The model directions must be suitable for Litigants in Person and offer genuine accident victims straightforward and proportionate steps to the recovery of damages.

It is respectfully submitted that the above aims, and those stated within the Consultation, are not met by the draft in its current form. We are deeply concerned that the existing draft would apply to all three tracks, leaving grossly disproportionate case management directions in the Small Claims Track (SCT).

Our primary concerns relate to the following areas:

- The addition or potential duplication of witness evidence
- The extension/doubling of the time period for disclosure
- The disclosure of alternative forms of credit
- The inequality of arms in relation to debarring orders
- The necessity for the directions to follow existing authorities
- The applicability of the directions to the small claims track

This document outlines our concerns and provides an alternative list of draft directions for consideration.

2. Consultation Sections 7, 8 and 9 regarding cross party consensus

MASS note the above sections of the consultation, which rightly encourages interested stakeholders to confer. To that end we were represented at a roundtable meeting on Monday 31st July 2017, chaired by Kirsty McKno ('The CHO' chair). Claimant and Defendant

representatives attended with an aim of a compromise or narrowing issues. A summary of these discussions will be submitted to the CPRC under separate cover.

3. Comments on the proposed Directions

For ease of reference please find attached at Appendix [1] our comments on each individual aspect of the draft directions. The extent of prescriptive disclosure, going beyond that which currently exists and going into alternative forms of credit is our primary concern and must be removed.

4. Alternative proposed Directions

Please find attached at Appendix [2] our proposed alternative directions, which in our view offer a proportionate alternative maintaining fairness in what is a model list of directions.

5. **The allocation to track of credit hire in general and the applicability of disclosure in the Small Claims Track**

Wider consideration of the nature of credit hire litigation is appropriate within the context of this Consultation. The draft directions clearly envisage detailed and extensive disclosure for credit hire claims. If this is the case, and an agreed and more proportionate alternative is not taken forward, then the complexity and extent of disclosure/case management arguably means that all credit hire cases should be in the Fast Track as a minimum by default. CPR 31 on disclosure and inspection is **specifically excluded** from the Small Claims Track.

Furthermore, PD27A includes extremely simplified draft directions at Appendices A, B and C. These existing provisions support the notion that when they and the Small Claims Track were created, it was clearly never intended for something as complex as a credit hire case to fall within the remit of the SCT. If that is the case, then the model directions as drafted sit far outside of the normal rules and represent a very specific (and perhaps unwarranted) derogation from the exclusion of CPR 31. Consequently, if proportionate case management is not brought in, then these cases should never reside in the Small Claims Track.

APPENDIX [1] – COMMENTS ON PROPOSED DRAFT DIRECTIONS

Paragraph of CPRC Directions	Comments
1 (a) – Witness Statements for *Need* and *Impecuniosity* within 14 days of the Order	We do not agree to the inclusion of paragraph 1(a) for the following reasons; (1) The direction requires a Claimant to prove need and impecuniosity in each and every case, which presupposes that those issues remain live at the time of allocation. However, it is not uncommon for need and/or impecuniosity to have been agreed by the parties prior to this stage. Therefore, forcing the Claimant to file a witness statement in each and every case is (a) onerous, (b) unnecessary in some cases, and (c) will only serve to increase costs and pre-hearing preparation. The latter point is highly relevant when the majority of these claims are being brought within the Small Claims Track which is specifically designed to minimise costs (see CPR PD 26 8.1). (2) In addition to the above, impecuniosity is evidenced primarily by way of disclosure, not by witness evidence. It is often clear from the Claimant's disclosure alone that they were unable to afford hire on an upfront basis (see *Lagden v O'Connor*). A witness statement dealing with impecuniosity in each and every case is therefore unlikely to add enough value to justify the cost of preparing the same. It would be more proportionate for the Defendant to ask the Claimant for clarity in their main witness statement or by way of Part 18 questions (in Fast Track and Multi Track claims). (3) Paragraph 3 of the consultation paper suggests that the proposed directions will be *"dealt with as distinct steps"*. This suggests that a further witness statement will be required for (a) non hire issues i.e. liability / quantum and (b) other hire issues i.e. enforceability, period etc. This will mean further costs being incurred contrary to the overriding objective and the need to conduct litigation at proportionate cost. Additionally, the Small Claims Track is designed for a Litigant in Person to conduct a claim without legal representation. A direction, which in effect requires the Claimant to file numerous statements, will only lead to confusion and mistakes. (4) Finally, although the debarring order in direction 1(c) refers to a Claimant being debarred from asserting impecuniosity only, the effect of making direction 1(a) a *will* provision means that a Claimant who fails to address need will be in breach of a Court Order and will require relief from sanction (CPR 3.9). Paragraph 1 of the consultation makes it clear that the proposal of standard directions is to avoid contested directions hearing, where in effect the inclusion of this direction may alternatively lead to contested relief applications. (5) For the above reasons we would invite the CPRC to remove direction 1(a) from the proposed Model Order for Directions to be used in all Credit Hire cases**.** In the alternative, inclusion of this direction should be with a provision for the same to be filed no earlier than 28 days.

1 (b) (i) & (ii) – Financial Evidence in Support of Impecuniosity	We do not dispute the importance of providing disclosure in order to evidence the Claimant's financial means, however, it is equally important to avoid satellite litigation on exactly what evidence is necessary. It is our view that the proposed directions are overly prescriptive, require too wide a period of disclosure and encourage duplication. We therefore do not agree to the wording of paragraph 1(b) (i) & (ii) for the following reasons; (1) In the majority of cases, the Claimant's main (and usually only) source of income will be their wages and they will be easily identifiable in the Claimant's current account. Therefore, by requiring all sources of income *in addition* to bank statements, the Claimant is being forced to duplicate this disclosure. We are aware that some Defendants state disclosure of the wage slips allows for an overall view of the Claimant's financial picture, but this is a misnomer in our view. The Claimant's gross income is entirely irrelevant as it is only their net available income that could potentially be used to hire on an upfront basis. We object to disclosure of financial documents not in the parties' name, as these would be outside of the Claimant's possession or control. (2) We also believe that disclosure of documents for three months prior to hire is a misnomer. We refer to the Justice website where guidance is given in relation to the current model directions for financial documentation[1] in credit hire claims. The Justice website states *"This is a direction that is likely to be made where there is a claim for "credit hire" following a road traffic collision. The claimant's claim includes the cost of taking credit to hire a vehicle. This can succeed only if he did not have enough money available of his own. He is ordered to provide copies of documents that may show whether he did or did not have enough money available."* (emphasis added). The latter paragraph is important because it emphasises that only available money is relevant and it must be that only available money at the time of hire can be considered. As an example, if a Claimant were to receive a windfall some 2 months and 20 days prior to hire starting, but they were to dwindle that windfall away so that by the time of the accident occurring there was no money available, would the Court find that they were not impecunious because they had some funds months or even weeks earlier? Surely the answer has to be a resounding no, the Claimant had no funds when the hire started. So why is three months prior to hire starting relevant? The Claimant's available money at the time of taking credit hire is the only factor that should be considered by the Court and for this reason we believe that disclosure in direction 1(b) (i) & (ii) could be limited to one week prior to the commencement of hire. As a compromise and for simplicity our proposed directions include provision for 1 month pre-hire statements.

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/documents

	(3) As to the direction requiring disclosure for '*the earlier of 3 months after the cessation of hire or the repair/replacement of the Claimant's vehicle'*, we strongly object. It would appear this proposal seeks to address a scenario where, for example, a Claimant receives a pre-accident value cheque, is off hired and yet does not use the money to replace his vehicle for some time. An argument of 'need' thus arises. The direction creates uncertainty as to the volume of disclosure required. It is primarily relevant to a small subset of cases and relatively unique scenarios yet leaves us with additional disclosure that in most cases is not relevant or merely serves as an invitation to a fishing expedition for a Defendant. We therefore propose reversion to the current model direction which only requires documents *"covering the period of hire"*
(1) (b) (iii) – loans, overdrafts and credit facilities to prove impecuniosity	We strongly disagree with the inclusion of a direction for disclosure of credit cards, loans, overdrafts or other credit facilities. The inclusion of the same in the Model Directions suggests that a Claimant should incur debt in order to mitigate their loss when hiring a replacement vehicle. This is not what *Lagden v O'Connor* expects. We therefore propose removal of credit cards in 1(b) (ii) and other credit facilities in 1(b)(iii) for the following reasons (1) In *Lagden,* at paragraph [61] Lord Hope of Craighead considered the principle that *"The wrongdoer must take his victim as he finds him"*. Lord Hope confirmed that *"this rule applies to the economic state of the victim as it applies to his physical and mental vulnerability"* and therefore the principle *"requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages".* In road traffic accident claims such as these, where the injured party could only have afforded upfront hire by <u>borrowing</u> money i.e. from a credit card or by taking out a loan, the consequences that the wrongdoer must bear <u>is</u> the additional cost the Claimant incurs in hiring on credit. It is therefore irrelevant to consider credit facilities when assessing a Claimant's financial means. (2) This point was considered in *Kerr v Toal* [2015] NIQB 83. In his Judgment, Burgess J gave his view upon general requests by Defendants for details of a Claimant's credit facilities in the context of impecuniosity, stating [17b] *"The concept of a form of borrowing from a different source in place of one under a credit hire agreement does not bear examination and I see no reason why access to borrowing powers should be regarded as relevant to the questions of a plaintiffs ability of inability to pay."* (3) Although the decision was made in the High Court of Northern Ireland, it is the only known authority on the issue and Burgess J had clear regard to *Lagden v O'Connor* when reaching his decision. Consequently, we believe this decision should be considered persuasive in the County Court and this direction should be removed.

Timing of disclosure – 14 days from date of Order	Similar to the timing provision in relation to witness statements, we consider 14 days from the date of the Order to be wholly insufficient for disclosure of the documents referred to in direction 1(b). At present, the model Small Claims directions grant on average 28 days (if not longer) and in Fast Track and Multi Track matters the time would be extended even further. Here, the proposals require the Claimant to provide disclosure of *more* documents than previously, but in a shorter timeframe. This places an unreasonable burden on the represented Claimant and would be more so for a Litigant in Person. Whereas the adoption of model directions proposes to minimise the number of contested hearings, we can foresee a substantial increase in applications for extensions of time or relief from sanction in relation to disclosure, an inadvertent knock on effect which is undesirable for all parties. This would impact in costs and use of the Court's resources. In any event, Subject Access Requests under section 7 of the Data Protection Act 1998 (DPA) affords any organisation 40 days to comply from receipt of payment. In the circumstances, as the documents referred to in direction 1(b) are often outside of the Claimant's possession, it is desirable to afford a longer period rather than a shorter period. We therefore propose that the timing for disclosure be extended from the current 14 days to at least 28 days if not longer.
(1) (c) – Debarring Order in relation to impecuniosity	Whilst we do not dispute the importance of sanctions for failing to comply with Orders, we do consider the proposed debarring provisions in relation to impecuniosity to be unfair and an inequality of arms contrary to the overriding objective. In the current model directions, and those proposed in this consultation, a Claimant is tasked with providing specific disclosure for up to 6 months of financial disclosure (including bank statements, wage slips, credit facilities) and if the Claimant fails to provide any account statement, or any part of the statement period, they face being debarred from asserting impecuniosity in relation to period and rate. In effect, the Claimant is expected to display absolute perfection and any omission could be the difference between winning and losing their case. However, there is no equivalent debarring provision applicable to the Defendant's BHR evidence. We would propose the removal of the debarring order in relation to the Claimant's impecuniosity evidence **or** the inclusion of an equivalent provision in relation to the Defendant's BHR. Removal of the debarring order would allow a degree of flexibility in relation to the evidence, allowing the Court to assess the evidence in the whole, or alternatively the inclusion of an equivalent provision would ensure an equality of arms in accordance with the overriding objective. We note objections from Defendants on the grounds that BHR is lay evidence without documents. This is incorrect as it must comply with numerous provisions e.g. geographical area and must evidence with documents where the rates are

	from with searches etc. We do note that the debarring order in direction 1(c) states "save with permission of the Trial Judge", however our experience is that there is an automatic presumption that the Claimant is debarred unless it can be shown that the omission is so minor that the overall financial picture can still be assessed. It is our view that this stance is diametrically opposite to where the starting point should be i.e. the evidence is sufficient unless it can be shown that omissions make it impossible to find on the balance of probabilities that the Claimant could not afford hire on an upfront basis.
(1) (d) – Liaison between Parties to agree the Basic Hire Rates	Whilst collaboration on the Basic Hire Rate has foreseeable benefits, it is on very rare occasions if ever that the parties are able to narrow this point. The inclusion of this direction therefore takes matters no further and will instead add an undesirable layer into the litigation process, serving only to increase costs. In any event, there appears to be no sanction for any party failing to engage in reasonable endeavours to agree the BHR. It is therefore suggested that this element be removed as it adds no value.
(1) (e) The provisions for BHR evidence	Similar to the points made regarding the lack of debarring order for the Defendant's BHR, there appears to be less onus on the Defendant's rates being an exercise of perfection. Although direction 1(e) states that the Defendant's BHR should show basic hire rates <u>available</u> within the Claimant's <u>geographical location</u> from a mainstream <u>provider</u>, there is no reference to them also being contemporaneous. We note that His Honour Judge Gore's original draft model directions included a provision that the Defendant's BHR evidence also be contemporaneous. This appears to have been removed in the current consultation without explanation. Our proposed draft directions reintroduce this provision as it reflects the test in *Stevens v Equity* and it ensures that the Defendant is providing the Court with an accurate BHR, specific, to that time of year without taking advantage of lower season variations. It is imperative that the Court takes a robust approach to BHR in light of the recent press coverage of the AutoFocus scandal, in which numerous representatives of this company have been imprisoned for perjury on an "*industrial scale*".

APPENDIX [2] – PROPOSED ALTERNATIVE DIRECTIONS

1) Credit Hire Directions on impecuniosity and hire rates:

a) If impecuniosity is asserted by the Claimant and not admitted by the Defendant, the Claimant's disclosure will include: -

i) Evidence of available cash assets for a period of 1 month prior to the commencement of hire and covering the period of hire

ii) Should the evidence at i) not provide evidence of income, the Claimant's disclosure will include evidence of all income from all sources for a period of 1 month prior to the commencement of hire and covering the period of hire

Disclosure in accordance with para (a) above shall be given by no later than 4pm on [*28 days from the date of service of order]*

b) The defendant may instruct a single witness to provide evidence of basic hire rates available within the Claimant's geographical location, for the vehicle hired, from a mainstream (or, if none is available, a local reputable) supplier and relevant to the dates of the claimed hire period. The evidence to be served by 4pm on *[14 days after paragraph (1) above]*.

c) The Claimant's evidence in rebuttal if so advised to be served by 4pm on [*28 days after paragraph (b) above*]