

HOUSE OF COMMONS JUSTICE SELECT COMMITTEE

Reforming the Soft Tissue Injury ('Whiplash') Claims Process



Written evidence from the Association of Personal Injury Lawyers

January 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for more than 25 years to help injured people gain the access to justice they need and to which they are entitled. We have around 3,500 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

We welcome the opportunity to provide evidence to the Justice Committee about the Government's proposals to reform the process for 'whiplash' claims. We believe the proposals undermine fundamentally the rule of law, a key tenet of our constitution which ensures everyone is treated fairly. Furthermore, the proposals are without foundation in evidence and are profoundly unfair to people who have been injured through no fault of their own, the vast majority of whom are entirely honest. The proposals, if introduced, would result in injured people subsidising the insurance industry which collects premiums precisely for the purpose of paying compensation to people who have been injured.

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The premise for change

1. There have been two previous occasions in recent years when the Government at the time has considered increasing the small claims court limit. In 2007, the idea was abandoned by the Lord Chancellor, Lord Falconer, who said such a move would deny “a great number of people access to legal representation. Ultimately denying them access to justice.” He also raised concerns about whether advice centres could cope with the additional influx of work, and concluded “it seems that raising the limit will be to the advantage of the defendant, not the claimant.”¹ Instead, the process for dealing with lower value personal injury claims was reformed to make the system more efficient, ultimately leading to the introduction of the online claims portal.

2. In 2013, the Government said the time was not right to raise the small claims limit, citing the risk that it may deter access to justice for genuinely injured people, and the risk that such a move may encourage the growth of disreputable claims firms. It proposed deferring any increase until safeguards against these unintended consequences were put in place. In the same year, the Government expressed concerns to the Transport Select Committee that raising the small claims limit at that time could have the detrimental effect of under-settling of claims.

3. Nothing has changed in intervening years. In fact, the number of whiplash claims registered with the Government’s Compensation Recovery Unit (CRU) has fallen consistently in the past six years, by a total of 41 per cent since 2010/11. Even when whiplash statistics are combined with the number of injuries registered by insurers with the CRU as ‘neck and back’ injuries, there has been a significant fall of 11 per cent since 2011/2012.

¹ Speech to APIL conference of Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, 20 April 2007.

4. Furthermore, the cost of personal injury claims to the insurance industry has fallen significantly since reforms were introduced in 2013. Data published by the Association of British Insurers (ABI) shows the cost of personal injury claims to motor insurers has fallen by more than 12 per cent (£500 million) a year since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act – from £4.1 billion in 2013 to £3.6 billion in 2015.

5. The number of personal injury claims which would be affected by these proposals has fallen. The cost of claims has fallen. Nothing has happened to address concerns expressed by previous Lord Chancellors. So there can be no possible justification for increasing the small claims limit for all claims attracting general damages of £5,000 or less – a move which will affect around half a million injured people.²

Small claims court limit

6. The Government proposes to increase the small claims court limit for all personal injury claims from £1,000 to £5,000. We recognise that the limit has not been increased for 25 years and accept the argument that an increase to reflect the rate of inflation could be justified. In principle, however, we remain of the view that the small claims court is an inappropriate forum for personal injury claims.

7. The small claims court is designed for 'litigants in person' – ordinary people unrepresented by solicitors. Traditionally it is used for settling disputes about faulty goods or services. Personal injury cases are different. They all require, at the very least, an ability to gather the right evidence and the ability to identify the value of the claim before a claim can be successful. This can be extremely difficult without the assistance of a specialist lawyer.

² YouGov Reports publication *Personal Injury 2016* shows that more than two-thirds of successful claimants (68 per cent) received compensation of £5,000. In 2015/16 there were 677,000 successful personal injury claims according to the CRU.

8. Outside the small claims court a 'polluter pays' system operates in personal injury cases, which means that if the defendant who has caused the injury loses his case he pays the claimant's legal fees in the main (some of the cost is borne by the claimant). But in the small claims court the injured person cannot recover his costs from the wrongdoer, even if his case is successful.

9. The vast majority³ of personal injury cases are worth £5,000 or less. If the Government increases the small claims court limit to £5,000, most people who have been injured through no fault of their own will be forced to bring their claims in this court. This leaves injured people with some very difficult choices:

- To represent themselves without legal help - this leaves people extremely vulnerable because defendants are almost always represented by lawyers (paid for by the defendants' insurers) or, at the very least, professional insurance claims handlers employed to deal with the cases in the small claims court.
- In 2012, APIL commissioned research which found that, of 4,000 people surveyed, 70 per cent would not know how much to claim for a whiplash injury.⁴ This means that, literally, they would not know where to start.
- To seek legal assistance from a solicitor – the small claims court does not allow for the injured person to claim the costs of his case from the losing defendant. So the claimant loses twice: once because he has been injured through no fault of his own and again because he will have to pay for the help he needs to bring his case out of his own pocket. This is the only place in the legal system where the injured person is required to do this.
- Abandon the claim altogether – many people with perfectly legitimate claims may not be able to afford legal help and will be forced to abandon their claims. In APIL's research about whiplash claims, 70 per cent of people said they would not want to pursue a whiplash claim without the help of a solicitor. They will receive no justice and the person whose negligence caused the injury will get away scot-free.

³ The YouGov Reports publication *Personal Injury 2016* shows that more than two-thirds of successful claimants (68 per cent) received compensation of £5,000 or less.

⁴ Survey undertaken by Canadean Consumer Research through its online omnibus panel, and published in APIL booklet *The Whiplash Report 2012*.

Removal of damages/introduction of a tariff

10. Removal of damages for pain and suffering for 'minor' road traffic accident (RTA) claims is unlawful and could be subject to legal challenge if introduced.

11. The payment of damages for pain and suffering is an important acknowledgement that the injury inflicted was needless. It can help to atone for the negligence which caused the injury, and it holds the wrongdoer to account. The most devastating aspect of any car crash is not damage to the vehicle, but personal injury and the very purpose of insurance is to provide recompense for that.

12. In the Court of Appeal in 2001, Lady Justice Hale said that "The right to bodily integrity is the first and most important of the interests protected by the law of tort". In the House of Lords in 2007, Lord Hope of Craighead said "...every wrong, however slight, attracts a remedy. Every right, of whatever value, may be enforced." He also pointed out that "damages are given for injuries that cause harm, not for injuries that are harmless."

13. Current compensation payments are set in brackets for different types of injury by the Judicial College. This allows judicial discretion to take individual circumstances into consideration, not least the impact of the symptoms on the injured person's ability to function in everyday life and ability to work. A similar injury can produce very different effects on, for example, a young mother nursing a baby, a professional fitness instructor, or someone who suffers a complete loss of confidence as a result of the injury and the incident that caused it. This is more likely to apply to those who are already vulnerable, such as elderly people.

14. One of the Government's proposals is to fix the amount of compensation for pain and suffering for minor claims at £400, a sum which is derisory, offensive and is certain to result in under-compensation. Even the Government's consultation document acknowledges that the average award based on Judicial College guidelines is £1,750. To remove judicial discretion from awards will inevitably lead to under-compensation in many circumstances.

Insurance premiums

15. One of the key reasons given for the Government's proposals is that motor insurance premiums will be reduced by £40 as a result of the changes. An injured person may well argue that losing the right to compensation is too high a price to pay for an extra £40, but this is not the point. Based on experience to date, the idea that motor insurance premiums will be reduced is naïve at best.

16. As outlined in paragraph 4, the insurance industry has made substantial savings in personal injury costs following the LASPO Act of 2013. Yet by 2016 the average car insurance premium had already reached levels not seen since before the introduction of the Act. ABI data on average motor insurance premiums published in October 2016 shows that the average premium has increased by more than eight per cent since the introduction of LASPO⁵. Premiums have risen by 13.5 per cent in the past year alone, according to Consumer Intelligence.⁶

17. If these draconian reforms are introduced, the insurance industry will most surely renege on its promise to pass on savings to motorists just as it has done in the past. Nor is there any reason to believe that there is political will to force the industry's hand, as evidenced in a parliamentary answer of January 2016 in which treasury minister Harriett Baldwin said: "The pricing of insurance products is a commercial matter for individual insurers in which the Government does not seek to intervene...the Government expects that the insurance industry will pass on savings to consumers."

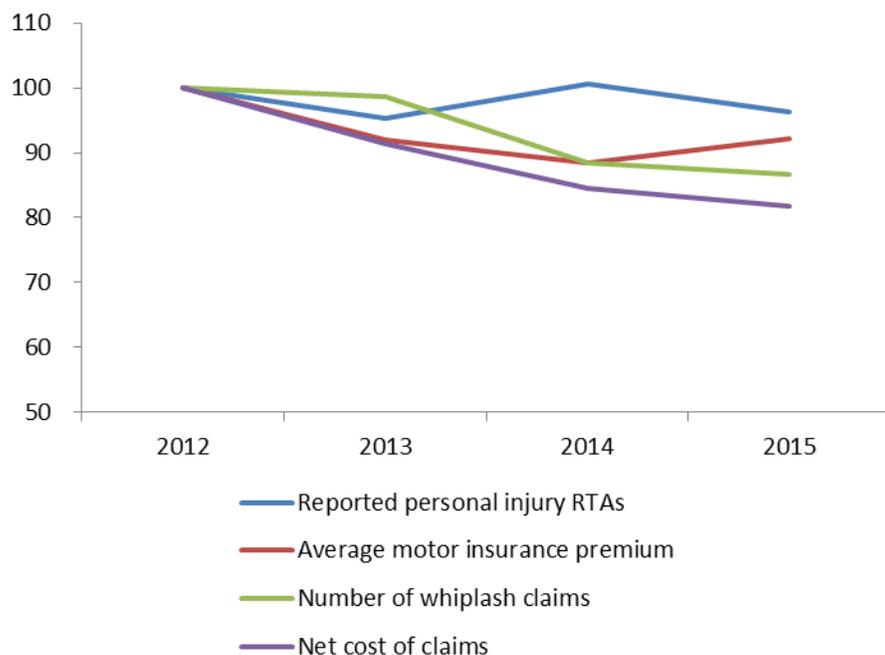
Impact assessment

18. The assumptions outlined in the Government's impact assessment are fundamentally flawed. Economic analyst Compass Lexecon was commissioned by APIL, the Law Society and the Motor Accident Solicitors Society to examine the Government's assumptions in its consultation. It produced the graph and analysis below.

⁵ <https://www.abi.org.uk/Insurance-and-savings/Industry-data/Industry-data-downloads>.

⁶ <http://www.consumerintelligence.com/articles/motor-premiums-rise-again>.

Figure 3: Number of personal injury road traffic accidents, average motor insurance premium, net cost of claims and Whiplash claims (base = 2012)



Notes: Number of whiplash claims published by the CRU refers to financial years, i.e. 2012 refers to April 2011 - March 2012.

Source: Reported RTA accidents - DfT, average motor insurance premium and net cost of claims - ABI, number of whiplash claims - CRU.

“The graph shows that, in 2015, the number of Whiplash claims and the net cost of motor claims fell compared to 2014 (by 12% and 3% respectively) but the average motor insurance premium increased (by 4%). It is not possible to say with certainty whether there is a direct relationship between the average motor insurance premium and the number of Whiplash claims without controlling for other factors. However, given that premiums have risen despite Whiplash claims and the net cost of claims falling, there appears to be a lack of evidence of a strong positive correlation between the cost of claims or the number of Whiplash claims and motor insurance premiums.”⁷ (Compass Lexecon analysis)

⁷ APIL response to Ministry of Justice consultation Reforming the Soft Tissue Injury (‘whiplash’) Claims Process, appendix 2, page 9
<https://www.apil.org.uk/files/pdf/ConsultationDocuments/3345.pdf>.

Fraud

19. The first sentence of the foreword to the Government's consultation says the purpose of the measures is to 'crack down on minor, exaggerated and fraudulent soft tissue injury ('whiplash') claims'.

20. In fact, there is no evidence that a high proportion of personal injury claims are fraudulent, as is claimed in the consultation. Data published by the ABI relates to the level of motor and liability insurance fraud *in general*. In its public pronouncements about fraud, the ABI routinely includes both 'proven' and 'suspected' fraud (ie, what the ABI thinks is fraud but which cannot be proven as fraud). It has long been the case in our justice system that one is innocent until proved guilty.

21. When the ABI separated the two figures for the first time in 2014 it became clear that 'proven' (or 'confirmed') fraud was just 0.25 per cent of all claims, and this figure remained the same in 2015. This data relates to *all* motor insurance claims, including policy-holders over-egging their own claims, or making false declarations in applications for insurance. Personal injury fraud is a fraction of that figure, and fraudulent whiplash claims are a fraction of that. Nobody knows for certain the size of the fraction because independent, reliable figures for personal injury fraud do not exist.

22. We do not condone fraud. It should be remembered that fraud is a crime and fraudsters should be treated as criminals. Great emphasis is placed by the insurance industry on the concept of the 'honest' motorist in this debate so it should be remembered that people with genuine 'minor' injuries are not 'dishonest'. The fact that genuinely injured people, with modest but perfectly valid claims, are consistently being vilified in the same breath as fraudsters and people who exaggerate claims is not only disingenuous, it is offensive.

23. It is important to be clear that, while moving the majority of claims to the small claims track will inevitably reduce the number of all genuine personal injury claims, it will not stop fraud in whiplash claims. What will almost certainly happen is that people will turn to claims management companies (CMCs) to conduct their claims. CMCs will seize this opportunity, driving to epidemic proportions the scourge of cold calling, texts, and advertising which encourages people to make claims for whiplash, even when they have not been injured. This will inevitably increase the number of fraudulent claims, rather than help to reduce them.

The status of people suffering personal injury

24. For reasons difficult to comprehend, those who have been injured needlessly by others have come to be seen as somehow undeserving of full and fair compensation. Wealthy celebrities who sue for libel as a result of damaged reputation are not vilified in this way. Nor are people who sue as a result of discrimination in the workplace, or for breach of contract.

25. The Government's proposals hit a new low when it was suggested that a personal injury is only as important as compensation for a late train. The suggested £400 fixed tariff for injuries with symptoms lasting less than six months is only slightly higher than the amount of compensation available to someone travelling from London to Glasgow whose train is delayed by two hours. A similar amount of compensation can be claimed for a three hour delay to a flight from Manchester to Barcelona. A delayed train or flight is undoubtedly inconvenient, but this is nothing compared to six months of pain, six months of sleepless nights, or six months of not being able to look after young children properly.

Cold calling and spam texting for personal injury

26. A HM Treasury document⁸ published at the same time as proposals for reform were first announced in the Autumn Statement of 2015 suggested that plans to remove the right to damages for pain and suffering was part of the Government's determination to 'crack down on the fraud and claims culture.'

27. Defining 'claims culture' in a parliamentary answer of 19 April 2016, justice minister Dominic Raab said 'the Autumn Statement referred to the cost to society of the substantial industry that encourages claims through cold calling and other social nuisances and which increases premiums for customers.'

28. As the Government clearly equates 'claims culture' with cold calling, the logical, fair and just action would be to ban all cold calling for personal injury cases, not remove the right to claim damages for pain and suffering from genuinely injured people.

29. More needs to be done to address other reasons for premium increases, or at least recognise the impact of these issues and recognise that the Government is clearly aiming at the wrong target with these reforms. The obvious issue is increases in the insurance premium tax, but there are others, as outlined by the ABI in *Post* magazine in August 2016. They include increases in vehicle repair costs, increases in the number and cost of vehicle damage claims and ongoing lower investment returns.⁹

30. It is difficult to understand why a vulnerable group of consumers has, uniquely, been singled out for special treatment simply because the insurance industry has been unable to account for day to day increases in the costs arising from collisions, and has failed to keep its promises to reduce premiums.

⁸ *A better deal: boosting competition to bring down bills for families and firms*, November 2015

⁹ <https://www.postonline.co.uk/post/news/2469197/abi-rejects-claim-that-insurers-are-profiteering-over-savings-on-personal-injury-claims>.

Discount rate

31. In its public response to the Government's proposals¹⁰ the Association of British Insurers warned the Government to reconsider its plans to review the discount rate, arguing that a reduction in the rate could "wipe out any savings from these reforms".

32. The discount rate is the deduction applied to compensation payments to offset any interest earned on the investment of the money awarded. It affects in particular people with severe injuries who have substantial need for ongoing care. The rate has not changed since 2001, and has failed to reflect plummeting interest rates in recent years. The result has been that severely injured people have been under-compensated as too much has been deducted from their damages. The Lord Chancellor has now announced a review of the discount rate. Any reduction will result in fairer damages for severely injured people and the cost will be met by the insurance industry.

33. The fact that the ABI has chosen to link the Lord Chancellor's review of the discount rate with these latest flimsy proposals for small claims reform is the clearest indication of all that the drive for reform to the personal injury system has less to do with justice and payment of fair compensation than savings for an embattled insurance industry.

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¹⁰ <https://www.abi.org.uk/News/News-releases/2016/12/Proportionate-compensation-for-minor-injuries>.