

Access to Justice Submission to Justice Select Committee Inquiry - Personal injury: whiplash and the small claims limit

1. Introduction

Access to Justice (A2J) welcomes the opportunity to provide evidence to the Justice Select Committee's inquiry. We would also be pleased to brief committee members in person.

A2J is campaigning to ensure that any personal injury compensation reforms above all deliver the best outcomes for injured people. We are supported by a range of organisations including claimant solicitors, insurers, medical reporting agencies and charities. We are determined to be constructive in our approach and help policymakers identify the arguments and evidence which will support fair and practical proposals.

It is essential not only that those suffering injuries through no fault of their own are compensated appropriately but also that the processes by which they achieve justice are straightforward, transparent and minimise the frictional costs borne by all motor insurance premium holders. We support the principle of reform but current proposals risk hitting the wrong target and creating a market opportunity for claims farmers and 'McKenzie Friends' who operate at the edges of acceptable business practice at the expense of legal professionals.

In this submission A2J provides evidence which examines the apparent motivation behind reform proposals, including:

- The number of road traffic accidents;
- The value of 'whiplash' claims;
- The drivers of motor insurance premium pricing;
- The definition and incidence of insurance fraud.

A2J also sets out an 'alternative claims framework' ('ACF') which will:

- Significantly reduce whiplash claims and legal costs;
- Help tackle insurance fraud;
- Reduce the financial incentives for nuisance calling and lessen the risk of a 'claims farming charter';
- Be easy to implement with almost immediate effect;
- Protect cyclists, motor cyclists and other vulnerable road users from being discriminated against; and
- Maintain the rights to appropriate compensation and support for injured people.

Finally, it examines the government's proposed legislation and ask what it could mean for litigants in person pitched against insurance industry legal experts and whether addressing what is known pejoratively as a 'claims culture' could result in a permanent barrier to justice. The reforms as they stand will also create unnecessary complexity, with claimants treated differently in law depending on the particular nature of their accident and the timing of claim.

A clear, fair and long-term approach to the conduct of whiplash claims and the setting of the small claims limit would provide policymakers, insurers, the general public, accident victims and their representatives with the certainty and reassurance they need.

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2. Capital Economics research

In March 2017 Capital Economics published a report commissioned by A2J looking at many of the issues concerning whiplash and the small claims limit, *'Boosting insurers' profits: an analysis of the impact of the United Kingdom government's proposed whiplash reforms.'* The full report can be accessed at <http://accesstojusticeactiongroup.co.uk/ce-report/>. Some of its conclusions are below.

The number of road traffic accidents

The number of traffic accidents reported to the police declined from 190,000 in 2006 to 140,000 in 2015. However, no evidence suggests the overall number of accidents has fallen. Indeed, the number of licensed vehicles on our roads has increased by 11 per cent from 2007 to 2016, from 33.7m to 37.4m.¹ This, plus an increase in road traffic of two per cent over the same period² means a reduction in accidents is unlikely.

The plausible explanation for the decline in accidents being reported to the police is two-fold. First, members of the public do not have the legal duty to report accidents and police forces have actively discouraged them from using 999, other than in an emergency. Secondly, there has been a material decline in the number of police traffic officers. From 2003 to 2014, the number of such officers fell by 36.9 per cent. Over the same period, the number of accidents reported to the police fell by 31.6 per cent.³ However, hospital emergency road traffic admissions or the estimated number of clinically seriously injured road casualties show no material decline.

Meanwhile, public awareness of the right to make personal injury claims has risen following the Conditional Fee Agreements Order 1995 and the Access to Justice Act 1999. The number of motor cases - which includes but is not exclusively whiplash cases - registered to the Compensation Recovery Unit (CRU) rose from 519,000 in 2006 to 828,000 in 2011, although this fell to 771,000 in 2015.⁴ However, the ABI suggest that cases which specifically relate to whiplash are nearer 1,500 a day (or 547,500 a year).⁵ This reflects MedCo data which show that for the year ending 30 April 2016 approximately 531,000 searches of the MedCo system resulted in the selection of a medical reporting organisation or expert.⁶

Importantly, however, the real-terms value of these claims – i.e. accounting for inflation - rose by only 29 per cent between 1991 and 2010, a period in which road traffic rose by 20 per cent. Between 2010 and 2014, the value of such claims fell in real terms by 32 per cent.⁷

Comparisons of claims and accident numbers with other European countries are unhelpful because:

- Some countries do not recognise whiplash as a head of claim;
- Some do not allow recovery of legal costs if successful;
- Some only allow claims via a criminal prosecution.

Conclusion: there is no evidence of a fall in accident numbers. However, there is evidence of a fall in accidents reported to the police. Claims numbers have risen but the value of these claims is on a downward trajectory and largely reflects general inflation and increased traffic.

¹ Department for Transport Statistics, latest data is for end of Q3 2016.

² Department for Transport Statistics, road traffic for all motor vehicles has increased from 505.4bn kilometres in 2007 to 515.9bn in 2016.

³ Capital Economics, Department for Transport and HL Deb 23 February 2015 vol 759 c4899W

⁴ Compensation Recovery Unit

⁵ ABI - <https://www.abi.org.uk/Insurance-and-savings/Topics-and-issues/Personal-injury-claims/Whiplash-claims>

⁶ <http://www.medco.org.uk/media/1124/medco-factsheet-april-2016.pdf>

⁷ Capital Economics, Department for Transport, Office for National Statistics and Association of British Insurers

The value of 'whiplash' claims and the reason for rising premiums

It has been claimed that rising motor insurance costs relate to whiplash claims – and in particular to fraudulent claims. However, ABI data reveal that the total amount insurers paid out on whiplash or soft tissue injury claims fell by 17 per cent between 2007 and 2016.⁸ During the same period, average motor insurance premiums rose by 71 per cent.⁹

The likeliest reason for this increase relates not to personal injury claims - which have incurred a net reduction in costs – but the rapid decline in insurers' investment returns since the 2008 financial crisis. As these have fallen, prices have been increased commensurately.

For further details see <http://accesstojusticeactiongroup.co.uk/ce-report/> pages 15-33.

The definition and incidence of insurance fraud.

Trends in legitimate personal injury claims are conflated with what is often known as 'whiplash fraud'. The insurance industry says this is a problem but also reports it pays out on 99 per cent of insurance claims. This suggests either that the industry is willingly settling fraudulent claims or that fraud is not commonplace.

Law firms undertake an important filtering function, rejecting around 950,000 unmeritorious personal injury cases each year. Survey work undertaken by Capital Economics on behalf of A2J suggests only around three per cent of these cases are rejected because of suspected fraud.

However, the insurance industry's own data on supposed motor insurance fraud paints a different picture. By using definitions of fraud which go well beyond any legal basis the ABI is able dramatically to inflate its data. More detail can be seen at <http://accesstojusticeactiongroup.co.uk/ce-report/> pages 11-14.

By using ABI guidance, insurers may choose to flag any behaviour it sees fit as 'suspected fraud', for example the failure to provide documentation, withdrawing a claim for any reason or accepting a substantially reduced settlement in respect of claim. Anecdotal evidence also suggests insurers may flag claimants if they make more than one claim, if the accident they were involved in was at night, involves multiple passengers or other factors such as postcode.

By using such broad definitions the extent of actual fraud is masked – and a belief encouraged that because some fraudulent claims may be made, most claims should be viewed with suspicion. This feeds a false perception that the UK is suffering a fraud epidemic.

Potential savings to motor insurance premium holders

The main rationale behind the government's reform proposals has been to reduce the price of motor insurance premiums. As stated, these have risen sharply in recent years as a direct consequence of insurers' falling investment returns.

In its impact assessment published alongside its recent consultation, the Ministry of Justice assumes that 85 per cent of any savings accrued to insurers will be passed through to consumers. However, this assumption is based on a Competition and Markets Authority study which examined what proportion of increased costs – not savings – are passed on by insurers.

⁸ *Tackling Whiplash Prevention, Care, Compensation* (ABI, London), 2008 estimated (in 2016 prices) that the value of 'whiplash' payouts was £2.4bn. In the association's written evidence to the House of Commons Transport Committee whiplash inquiry in 2013 this had risen to £2.5bn. However, in *Reforming the Soft Tissue Injury ('whiplash') Claims Process* (Ministry of Justice, London) 2016, this had fallen to £2.0bn.

⁹ Office for National Statistics

In reality, given both the limited competition in the motor insurance market in the UK and the fact that it is a compulsory product, a pass-through rate of nearer 50 per cent would seem likelier.

Finally, in the 16 months since the government's reform proposals were first announced, only 3 insurers from the almost 250 who write motor policies have said they would pass any savings on, and none have said how they will do this. Therefore while the loss of victims' rights seems certain, consumers gaining any savings from these reforms looks very unlikely.

While the Ministry of Justice suggests that the government's original reform proposals would boost insurers' profits by approximately £200m per annum, Capital Economics estimates that figure would be between £500m and £700m.

For further information please see <http://accesstojusticeactiongroup.co.uk/ce-report/> pages 34-38.

3. An Alternative Claims Framework for Road Traffic Accidents

Summary

The focus of the government's proposed reforms is to reduce frivolous and/or fraudulent claims and the behaviours that encourage these claims, not the genuine claims; remove frictional costs by simplifying the claims process and moving towards an online digital service, and, overall, to reduce claim costs.

The Alternative Claims Framework (ACF) will achieve all these aims while protecting peoples' rights. The framework also draws together the Brady Report, the Insurance Fraud Taskforce and the Nuisance Calls Action Plan. The principles underpinning the ACF are broadly supported by a large majority of leading claimant law firms in the UK.

The objectives in proposing the ACF are to:

- Simplify the claims process, particularly for the consumer, and remove frictional costs;
- Future-proof the reforms and thereby provide certainty to all stakeholders;
- Reduce the volume of RTA PI claims pursued and associated claim costs;
- Robustly regulate the sector, particularly CMCs, and eradicate fraud and cold calling;
- Protect access to justice for people injured through no fault of their own.

Definition of 'whiplash'

It is also opportune to set out a definition of a whiplash injury, as 'whiplash' is the physical action which causes the injury, not the injury itself. Therefore we would recommend the following:

'A whiplash injury claim means a claim brought by an occupant of a motor vehicle other than a motor cycle where the significant physical injury caused is a neck strain resulting in pain to the neck that may radiate into the shoulders and arms.'

ACF - Key Points

- The Access to Justice Act 1999 raised awareness of rights to pursue claims, and as a result the number of low-value RTA personal injury (PI) claims registered with the CRU – including whiplash - rose from 519,000 in 2006 to 828,000 in 2011. Since 2011 the number has reduced by 7%, to 771,000 per annum
- As a result of various reforms the annual claims costs associated with low-value RTA PI claims have fallen by 17% since 2006 (£0.4 billion/pa). Over this period, the average motor insurance premium has increased 71%
- The government's proposals will deny most innocent victims access to legal advice for the sake of a £40 claimed premium saving which insurers admit is unlikely to occur
- It is impossible to identify any savings to be made from the proposed reforms due to the myriad factors which underpin the insurance pricing model. The anticipated pass-through rate of 85% is wholly unrealistic
- The impact of the introduction of a £2,000 small claims limit is being assessed but is likely to result in up to 25% of all RTA PI claims falling within the small claims track, significantly reducing the costs and damages associated with these claims
- The reforms will have a catastrophic economic impact. Capital Economics estimates 66,000 jobs would be directly or indirectly at high risk if the small claims track were increased to £5,000 for all personal injury claims (the original government proposal), with a further 11,000 at moderate risk.¹⁰
- The market exit of well-regulated legal professionals will create a vacuum into will be filled by unscrupulous claims management companies and McKenzie Friends with little regulatory control.

¹⁰ *Economic Value of Personal Injury Claims Specialists* (Capital Economics, London) 5 January 2017, p.29

The Alternative Claims Framework ('ACF')

ACF Proposal	Note
Small Claims Limit	The Small Claims Limit for all PI claims to be increased to £2,000 in line with inflation since the limit was last revised in 1991. To provide a stable market and certainty the limit should be adjusted in line with inflation every three years
Fixed Costs & General Damages	To future proof the revised claims process, the fixed costs and general damages also increase every 3 years in line with inflation
Ban pre-medical offers	The government support this recommendation, which is being legislated for as part of the Prisons and Courts Bill
Embed and enhance askCUEPI and MedCo	Undertake an impact assessment to determine what enhancements are required
Adopt the recommendations in the Brady Report to more robustly tackle CMC regulation	Expedite the introduction of the recommendations and introduce an immediate ban on CMC cold calling
Adopt the recommendations of the Insurance Fraud Taskforce Report to address fraud issues	Expedite the introduction of the recommendations, other than recommendation 10 for which we propose the limitation period of 3 years should remain but subject to exceptions all low-value RTA PI claims should be submitted through the Claims Portal within 12 months of accident date. No costs are recoverable for pre-issue work, and therefore the money is taken out of the market, thereby preventing solicitors from paying CMCs for such work. This also tackles the problem of 'aged claims' with a higher propensity for fraud
Pedestrian, cyclist and motor bike claims should be excluded from the reforms	The reforms are targeted at low value RTA PI claims sustained in a motor vehicle. The nature of the injuries sustained in a pedestrian, cyclist or motor bike accident are very different to a typical whiplash type injury; more complex in nature and not open to fraud
Tariffs for whiplash claims, if introduced, should be set independently by the Judicial College	While there are concerns about the introduction of tariffs, should they be introduced for straightforward and low-value whiplash claims only. The Judicial College has independently set the appropriate boundaries within which to assess the value of an injury since 1992. The college is the body best placed to set the new fixed tariff levels and at levels commensurate with the current guidelines

An industry led body with a neutral chair should be established to oversee the reforms and be responsible for their future governance.

4. Legal reforms, litigants in person and the disparity in arms

In its 2013 report on whiplash,¹¹ the House of Commons Transport Select Committee raised concerns that raising the small claims track limit would result in an “inequality of arms” in personal injury claims, whereby litigants in person would in most cases be without legal advice or expertise whereas defendant insurers would still be able to access and deploy their legal teams. There is nothing in the current proposals to suggest this concern has been addressed and it is beyond question that they represent a significant barrier to access to justice.

Moreover, the effect of the considerable number of legal reforms introduced in recent years remains unclear. These reforms include:

1. The ban on the payment of referral fees for personal injury claims
2. The ban on the recoverability of the success fees from the losing party
3. The ban on the recoverability of after-the-event (ATE) legal expenses insurance premiums from the losing party
4. The reduction of legal fees for RTA portal cases from £1,200 to £500
5. The extension of the Road Traffic Portal to cases valued up to £25,000
6. The introduction of a Portal scheme for Employer and Public Liability (EL/PL) for claims valued up to £25,000
7. The introduction of a fixed recoverable costs scheme for non-portal cases
8. The introduction of ‘qualified one way costs shifting’ (QOCS)
9. The introduction of fixed cost medical reports
10. The removal of strict civil liability for employers who breach health and safety regulations
11. The removal of QOCS protection for claimants found to be fundamentally dishonest
12. The introduction of the AskCue(PI) process to help reduce fraud
13. The allocation of randomly allocated medical experts through the MedCo system.

Further, radical reforms without a full understanding of those already undertaken would be premature – a view also expressed by Louise Ellman MP, chair of the Transport Select Committee.

However, the introduction of the ACF would be proportionate, reasonable and carry the support of most major personal injury law firms.

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¹¹ *Cost of motor insurance: whiplash* (House of Commons Transport Select Committee, London), 2013