Whiplash and the cost of motor insurance: what's behind the insurance industry claims

Submission to the Transport Committee by Thompsons Solicitors

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About Thompsons

Thompsons is the UK's most experienced personal injury law firm. It has a network of 29 offices across the UK. At any one time we will be running 70,000 claims on behalf of people who have been injured at or away from work, through no fault of their own.

Introduction

For many years the insurance industry has been stoking the debate about compensation culture and using its considerable influence with government and sections of the media to stoke concerns about rising insurance premiums in order to undermine access to justice for injured people.

Behind insurance industry claims of compensation culture is a determination to engineer the market so that weak, unrepresented claimants have to negotiate and litigate against strong, well financed and expertly represented insurers.

The motive is pure profit, not concern for the consumer.

We now address the specific points in the Select Committee's terms of reference:

Whether the government is correct in describing the UK as the "whiplash capital of the world"

The number of personal injury claims in 2011/12, including employer and public liability and clinical negligence, exceeded one million. Motor claims accounted for nearly 80% of that total.

Between 2007 and 2011, motor claims increased by 43% to 790,999, while employer liability (work injury) claims fell by 66% to 81,470.

The issue is what has caused the increase in motor claims.

In our view it is due to abuses by insurers and others in the industry (including claims firms, many of which are owned by or linked with insurers) through their practices of third party capture and selling cases on for substantial referral fees.

Fuelling the rise

Third party capture, a tactic used by insurers to try to "capture" and settle an injury claim direct with the claimant before independent legal advice or a medical report are obtained, actually fuels claims by encouraging people involved in RTAs to make injury claims that they may not have intended to bring.

Typically the insurer will cold call or write to a policy holder after an RTA resulting in bent metal (vehicle damage only) is reported to them. They also contact passengers who were in the car at the time of the accident.

The insurer suggests that they discuss any claim for injury that they may have direct with them and may suggest a sum of money up front in final settlement of the claim, if the claimant does not involve solicitors.

Insurers are, under the industry's voluntary code, meant to advise the policy holder that they have a right to independent legal advice but often they do not.

Alternatively, or in addition to, an insurer may automatically refer the policy holder to one of its panel solicitors.

We have provided the MoJ with examples which suggest that claimants are first being encouraged by insurers to make a claim and then become victims of insurer attempts to undersettle. These include:

1. A union member was allocated solicitors through their motor insurers following an RTA. The insurer advised the claimant to accept an offer of £2,250. The claimant was unhappy with this offer and the service they had received. Thompsons was instructed to take over the file. The insurer made an increased offer of £3,000 which we advised client to reject. We made a part 36 at £8,537 and advised our client to accept any offer of £5,000 or more prior to issue of proceedings. The offer was rejected and proceedings were issued for an amount over £5,000.

2. We settled a claim for a client who suffered whiplash and back injuries when her car was hit by another vehicle. Before we were instructed, and within hours of the accident, the Royal and Sun Alliance – the other driver's insurer – were on the phone admitting liability. The victim was then repeatedly called over a weekend in what became a campaign of harassment to get her to accept £1,000. A colleague then advised her to seek legal advice through her trade union. Thompsons was instructed, medical reports revealed the extent of her injuries and her claim settled for five times the amount first offered by the insurer.

These are clients who may not have thought about making a claim until they were subjected to hounding by an insurer, a claims firm or an insurer panel law firm (tipped off by the insurance company).

Perhaps the committee should ask the ABI and insurance company representatives that go before it how extensive a practice third party capture is among its members.

Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to 'exaggerated, misrepresented or fabricated' claims.

The insurance industry has consistently refused to provide any real evidence as to how it arrives at the £90 figure, or indeed any previous figures it has used. Aviva says it is £118, which appears to be based on an estimate of average legal fees without, again, explaining how that estimate was reached. We are not told what proportion are claimant solicitors' costs, disbursements, defendants' solicitors' costs or what are insurers' in-house costs.

We asked Nick Starling of the ABI to clarify this point after the publication in 2006 of the Frontier Economics report (commissioned by the ABI) *Outcomes for legally represented and unrepresented claimants in personal injury compensation,* which was similarly opaque on legal costs. He told us that government research showed that claimant lawyers receive 43p for every £1 insurers pay in PI compensation, but that the ABI's own research showed it was more than 90p for claims settled between £1,000 and £5,000.

He didn't explain how the ABI had calculated that.

Industry adding costs

Credit hire agreements are also said to fuel premiums, adding around £44 to each motor insurance policy. They must be costing the industry a considerable sum.[1] This is the practice whereby insurers, claims management companies and some lawyers try to be the first to get to the claimant after an accident and provide them with a replacement car (whether or not its needed) while theirs is being repaired. This is similar to third party capture.

Claimant insurers also have sweetheart deals with bodyshops in return for referral fees. This dramatically inflates the repair bill. A judge has described the practices by Royal and Sun Alliance in apparently inflating

[1] "Greedy firms to profit from your car insurance" This is Money 2 March 2011 http://www.thisismoney.co.uk/money/cars/article-1713879/Greedy-firms-to-profit-from-your-car-insurance.html#ixzz1Y7cOlSh7

the price of car repairs as falling somewhere between “sharp practice and “outright fraud”. [2]

It is entirely in the insurance industry’s power to put a stop to third party capture, credit hire and bodyshop deals and to reduce premiums as a result of the subsequent savings. Instead it is using the premium stick to beat and disenfranchise legitimate injured claimants.

The precedent for a reduction in premiums is not good. There have been a number of opportunities for insurers to pass savings on to consumers, but none have been taken. These include:

1. The development of the RTA portal for claims worth under £10,000 and which is being extended to all personal injury claims below £25,000. There has been no passing on to consumers of the savings it is said to be producing.
2. The Jackson civil justice reforms which came into effect on 1 April.
3. Fixed recoverable claimant costs, which have been cut dramatically by the government.

The fact is that It instinctively goes against the grain for insurers to reduce premiums, rather than to pass savings on to shareholders.

The committee might consider asking the ABI and insurance representatives what percentage reduction in premiums insurers can guarantee if costs come down.

Whether the proposals put forward by the government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent.

Fraud is a red herring in this debate. Insurers *can* tackle fraud and some are taking a more robust approach than in the past. The courts will and do support insurers when they deal with fraud correctly. If insurers are able to identify fraudulent claims with such confidence as to assert that they are the cause of high premiums, then they should be able to take criminal proceedings against those known fraudsters, along with the claims firms and doctors who encourage dishonest claims.

Insurers could close down those businesses overnight by working with the police to routinely challenge known offenders.

The reality is that these allegations of fraud are intended to achieve government policy outcomes that will stop genuine claims.

The government’s proposals in respect of medical evidence and fraud will do nothing to reduce either the number of fraudulent claims or premiums. The two are not, in our view, linked. Our evidence to the 2011 Transport Select Committee enquiry into what was fuelling the rise in premiums pointed out that in Northern Ireland motor insurance premiums had risen substantially above inflation, significantly more than in England and Wales[3], while RTA claims were until 2009 falling[4].

The insurance industry had not criticised or called for a reform of the claims process in Northern Ireland, which in our view demonstrated that there was actually no direct link between claim volume and premium levels.

A claimant intent on pursuing a fraudulent claim will not be put off by having to use the small claims track. They will in fact have a further incentive to pursue the claim because, in contrast to cases outside the small claims track – where from 1 April, in an exception to QOCS, they will have to pay costs – they won’t run the risk of paying costs.

The small claims court was never designed to deal with fraud.

[2] Office of Fair Trading http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/motor-insurance/
[3] Office of Fair Trading http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/motor-insurance/
[4] Compensation Recovery Unit (NI) RTA statistics 1 April 2000 – 31 March 2009 and 2009 – 11.

The primary action against fraudsters should be criminal proceedings. Insurers have not provided evidence that they are working with the police to ensure that known offenders, including claims firms, are routinely challenged.

The MoJ's whiplash consultation paper suggested that insurers do not fight fraud because it is cheaper to settle the case. That is a nonsense. If the case is fraudulent, the insurers stand under the current regime to save having to pay the damages and claimant's costs and will get an order for their costs to be paid. For it not to be cheaper to settle the case, the insurer's costs would have to exceed the damages and claimant's costs currently payable. So if the potential damages were £4,000 and the potential claimant's costs £3,000, the insurer's costs to fight the case would have to exceed £7,000.

Under the government's proposals, which force all whiplash claims into the small claims court where there is no costs recovery, the economic balance would be titled towards settlement rather than contest because, using the previous figures, the £3,000 claimant costs are removed and the sum to fight the fraudulent case would have to be £4,000 or less to make it economically viable.

It must be fundamental to insurers that they do not give into fraud.

Medical evidence

The proposals on medical evidence are not logical and again, the insurance industry has not guaranteed a reduction in premiums even if they result in reduced claims or costs.

Currently, either side can propose a doctor and the parties agree between them who the doctor should be or they get their own doctor where they can't agree. That is both fair and independent and allows insurers to object and to get their own report if they don't agree with the claimant's. It is then for the court to decide which report it prefers. If insurers are not using this opportunity then that is not a reason to fundamentally change the system.

Insurers, in pushing for independent medical panels, appear to be saying that the courts are incapable of weighing up the medical evidence of the two sides. The insurers say there are experts who can determine genuine whiplash claims. If there was a genuine problem with current medical evidence, then insurers would have been rejecting claimant doctors' reports, which they consider to be biased, and insisting that both reports go before the courts.

The likely impact of the proposals on access to justice for claimants who are genuinely injured.

The unrepresented injury victim would not only have to deal with experienced insurers but will also be confronted with experienced solicitors and counsel.

Increasing the small claims limit has the potential to lead to the growth of a huge and unregulated industry. Insurers will see the opportunity to set up limited companies to do small claims linked to BTE or at a low fixed fee which will allow them to effectively control the market including which medical expert the claimant can go to.

The outcome, putting it bluntly, will be a market that is stitched up to the advantage of insurers. Claimants will have the Hobsons choice of fighting the insurers on their own, having to pay out of their compensation, or opting for a representative owned and run by insurers, who will be compromised by their lack of independence from those insurers.

The government's proposals will reduce the numbers of whiplash and RTA claims, not because people aren't genuinely injured but because they will choose not to represent themselves, or decide they will lose such a significant proportion of their damages as to make pursuing a claim not worth while. And if they chose to deal direct with insurers, they will receive significantly less compensation.

Whatever the claims of the insurance industry, based on the Frontier Economics report referred to above, that unrepresented claimants receive as much or more than represented ones, the reality is that they don't.

The FSA's 2009 work on third party capture found that on average, 3rd parties were awarded 274.95% more through court proceedings that the initial rejected out-of-court offer from an insurer (Source: Financial

Services Authority: 3rd Party Capture Risk report 2009).

Whether there are other steps which the government should be taking to reduce the cost of motor insurance.

Motor premiums could be reduced by ending insurance industry rip-offs. Instead of playing into the hands of insurers, the government should:

- Outlaw third party capture.
- Ban credit hire agreements
- Shut down claims firms.
- Outlaw "CLAIM" texts and "robocalls" made by claims management companies.
- Outlaw cold calling by insurance companies
- Make bodyshops manufacturer approved and industry accredited, not just insurer approved.

This document has been formally accepted as evidence by the Transport Committee's inquiry - Cost of motor insurance: whiplash

For further information about the inquiry go to:

http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/inquiries/parliament-2010/whiplash/