

Justice Select Committee

Inquiry into personal injury: whiplash  
and the small claims limit

Thompsons Solicitors' written evidence

March 2017

## About us

1. Thompsons is a UK-wide law firm with a network of offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland.
2. As the largest trade union and personal injury law firm in the UK, we specialise in personal injury and employment law for trade union members, their families and private clients. At any one time we will, as a firm, be handling over 30,000 cases. The firm participates regularly in government consultations and select committee enquiries on a wide range of issues relevant to our clients.
3. We provided a response to the government's consultation on the issues<sup>1</sup> that the government has now proposed to reform within Part 5 of the Prisons and Courts Bill and by way of statutory instrument in respect of the small claims limit.

## Executive summary

4. We are concerned that the reforms are:
  - not grounded in evidence;
  - not supported by the judiciary or legal profession;
  - unlikely to benefit motorists through lower insurance premiums;
  - unlikely to address any of the publicly perceived social ills (such as “cash for crash”, cold-calling and spam texts) associated with whiplash.
5. Finally, and in our view most importantly, the reforms will seriously disadvantage the victims of accidents whether on the roads, in the workplace or elsewhere.
6. No case whatsoever has been made for workplace injuries being included in any proposals to increase the small claims track. And indeed there are no grounds for such a move.
7. Doubling the small claims limit for non-RTA personal injuries to £2,000 goes well beyond any justified inflationary increase and does not follow the criteria for an increase set out by Lord Justice Jackson (henceforth Jackson LJ).
8. The prevalence of fraud in Road Traffic Accidents (RTAs) has been vastly overstated by the insurance industry. There has been no independent verification of the level of fraud claimed and very few cases proven in the courts.
9. The proposed reforms are likely to push more injured people into the hands of Claims Management Companies (CMCs).
10. CMCs should be banned in personal injury.
11. Pre-medical offers should be banned but the Bill in its current form lacks a rigorous mechanism for enforcing such a ban.
12. The Bill should specifically refer to ‘soft tissue’ injuries.
13. The Bill should ensure that those who sustain RTA-related soft tissue injuries in the course of their work (for example, police officers, paramedics, military drivers, fire fighters on emergency calls, carers driving between service users) are excluded from the proposed tariff system of damages, as should cyclists and other vulnerable road users.

<sup>1</sup> <https://www.thompsonstradeunion.law/media/2009/reforming-the-soft-tissue-injury-whiplash-claims-process-personal-injury-claims-in-england-and-wales-january-2017-thompsons-solicitors.pdf>

## The definition of whiplash and the prevalence of RTA-related whiplash claims

### The definition

14. We recommend that an amendment be made to the definition to restrict 'whiplash injury' to 'soft tissue injury' so as to avoid the legislation unintentionally being applied to a much wider range of injuries, such as bone fractures and breaks.

### The prevalence

15. At least two government reports have found the 'compensation culture' to be a perception rather than a reality<sup>2</sup>. However skilful lobbying and media management means that the perception has become a reality in many people's minds.
16. Our concern is that instead of tackling the 'crisis' in whiplash, the issue is being used to engineer a major shift in what Jackson LJ has called 'the asymmetric relationship' between claimant and defendant in all injury cases.
17. The changes proposed are dramatically in favour of the insurance industry at the expense of injured people. It would represent the end of the 'polluter pays' principle, rolling back generations of established English law.
18. Those who have sustained entirely genuine injuries face being put off from bringing a claim and being under-compensated should they do so.
19. Figures from the government's Compensation Recovery Unit (CRU) shows that the total number of injury cases has dropped by 6% since 2013 and whiplash injuries have gone down from 571,111 in 2011 to 335,365 in 2016 (a roughly 40% decrease).
20. The same CRU figures show that workplace injury claims have fallen by 12% in the last decade.

## **Do fraudulent whiplash claims represent a significant problem and, if so, would the proposed reforms tackle this effectively?**

### The significance of the problem

21. The insurers have failed to provide any objective evidence of fraud on anything like the scale they have suggested.
22. The figures put forward bear no relation to our experience where fraud is an issue in less than 1% of cases (and in those cases we refuse to act at all or any further).
23. Rob Townend of Aviva in his evidence to the Committee referred to figures of £800m in detected insurance fraud and a total of 70,000 cases. Yet James Dalton (ABI director of general insurance policy) when asked by the Committee if he could say how many such cases had actually been proven before the courts answered "No."
24. The power is in the insurers' hands to refuse to pay out if they think a claim is fraudulent or exaggerated. Better still, they can report their suspicions to the police. Yet in the most recent figures it was shown that insurers pay out on 99% of all motor claims<sup>3</sup>. Rather than clear up their own systems to root out questionable claims, insurers are encouraging government to reform the compensation system in a way that will hurt all injury victims, including those injured at work.

<sup>2</sup> Including Lord Young's report 'Common Sense Common Safety' (15 October 2010) - [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60905/402906\\_CommonSense\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf)

<sup>3</sup> Association of British Insurers - 'Lifting the bonnet on car insurance' <https://www.abi.org.uk/~media/Files/Documents/Publications/Public/2016/Motor/Lifting%20the%20bonnet%20on%20car%20insurance.pdf>

25. Major insurers should list all material risks in their financial returns, yet they consistently fail to mention fraud in motor claims as such a risk<sup>4</sup>. If fraud were as rampant and damaging as it is often claimed, then the insurers themselves or their regulators would require them to identify this risk to shareholders<sup>5</sup>.
26. If insurers were being overwhelmed by fraudsters, how have they been able to continue to pay their chief executives such high remuneration figures? Direct Line's chief executive, Paul Geddes, enjoys a salary of £4.82m. Aviva's Mark Wilson is on £5.67m.
27. If fraud was such a problem, then why in 2015 did Admiral increase its UK motor insurance profit before tax by 11% to £443m and why have Direct Line and Admiral between them paid out £1.65bn in dividends in the last three years? Meanwhile, as always, it is the policy holder who loses out - premiums have risen by 14% in the last year alone.
28. Over the last five years, motor insurers have saved at least £8bn in claims costs due to legislative changes since 2010, yet premiums are higher now than they were in 2010<sup>6</sup>. The suggestion that insurers will pass on the savings that these proposals will bring therefore appears fanciful.
29. Notably, the RAC told its policyholders in its commentary on the 2015 Autumn Statement when these reforms were first mooted that: '...the organisation is concerned that they will not achieve savings for motorists as only a small number of insurers have so far committed to passing the savings on'.
30. The government is on record as stating it will not intervene in the market to force insurers to pass on savings<sup>7</sup> despite its announcement<sup>8</sup>, to coincide with the consultation launch, that motorists 'could' see 'about' £40 in premium reductions.

### **The likely efficacy of the reforms**

#### Whiplash claims

31. The reforms may reduce the number and size of claims for whiplash but it is their impact on other types of injury claims that concern us most. We are particularly concerned that workplace injury claims are being swept up in these reforms.

#### Workplace injuries

32. Happily, the numbers of employers' liability (EL) claims have been falling for many years. The risk is that the positive trend may be reversed should poor employers, knowing that those who are injured at work will no longer be able to call on lawyers to represent them for free or at low cost, calculate that paying low levels of compensation to unrepresented workers will be cheaper than providing decent health and safety standards to avoid accidents in the first place.

<sup>4</sup> For example, there is no mention of fraud in the 'Emerging risks' section of Direct Line's 2016 financial results (p. 21) -

<http://www.directlinegroup.com/~media/Files/D/Direct-Line-Group-V2/reports-and-presentations/fy-2016-results-announcement.pdf>

<sup>5</sup> See also <http://www.thompsons.law.co.uk/personal-injury/leading-car-insurer-making-inconsistent-statements.htm>

<sup>6</sup> <https://www.politicshome.com/news/uk/economy/financial-sector/opinion/thompsons-solicitors/81675/government-whiplash-plans-will>

<sup>7</sup> See for example the Minister's response to a Written Question tabled by Andy Slaughter MP on 16 December 2016 -

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20373/>

<sup>8</sup> <https://www.gov.uk/government/news/new-crackdown-on-whiplash-claims-set-to-cut-insurance-premiums>

33. The government, in responding to its consultation on these reforms, conceded that: “of those that supported the increase, the majority, mainly from the insurance sector, argued that any increase should be limited to RTA claims, at least in the short-term”.
34. The insurers’ own spokesman conceded to the Justice Select Committee that the increased small claims limit should not apply to workplace cases<sup>9</sup>.
35. There has never been any suggestion of fraud in workplace claims.
36. EL claims have nothing to do with whiplash.

#### Pre-medical offers

37. The ban on pre-medical offers should apply to all injury claims and have robust enforcement. As the Bill stands, any party who contravenes Clause 64 would only be held accountable for doing so by the regulator. Given the nature of such agreements, it is difficult to see how they would come to the attention of even the most vigilant regulator. It is therefore a regulation without adequate teeth.
38. We would suggest amendments to the Bill which specify that for evidence to be accepted before an offer of compensation is made, it must be ‘medical evidence’ supplied by an appropriate professional.
39. We also suggest an amendment which aims to ensure that any settlement reached in breach of the ban on pre-medical offers is ‘void and unenforceable’, save that a claimant would be entitled to retain any payment they have already received under the agreement.

#### **Our view of the provisions in Part 5 of the Bill to introduce a tariff to regulate damages for RTA-related whiplash claims (with an uplift in exceptional circumstances); and to ban the settlement of claims without medical evidence.**

40. We are concerned that the government’s approach to the tariff is to set a rate using a measure of severity - and therefore of compensation – based almost exclusively on the duration of an injury. This vastly underplays the huge range of complexities that are and should in our view continue to be taken into account.
41. We disagree that the proposed increments are appropriate. They have no basis in any evidence and would see swingeing reductions on current levels of damages – as set, appropriately, by judges – from 78% in the lowest band to 20% in the highest band.
42. The proposed tariff amounts for psychological injuries would be insulting to the victims of those injuries. Even in the highest band, claimants would receive just £100 uplift for the psychological element of an injury lasting up to two years.
43. At present, judges are able to adjust awards to reflect cost of living increases as set out but it is noticeable that there is no provision for an inflationary increase in the tariff as it stands and the risk is that the real value of the (already very low) awards proposed will dwindle over time.
44. We believe those injured in road traffic accidents while at work should be excluded from the ‘whiplash tariff’, as should vulnerable road users such as cyclists.

<sup>9</sup> Q105 - James Dalton: "The Ministry's consultation paper has proposed increasing the small claims track court limit for road traffic accident claims as well as employment liability – employers' liability and public liability claims. At the moment, I would support increasing the small claims track limit for road traffic accident cases only." <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/government-consultation-on-soft-tissue-injury-claims/oral/46873.html>

**Our view on the impact of raising the small claims limit to £5,000 for RTA-related whiplash claims, and of raising the small claims limit to £2,000 for personal injury claims more generally, taking account of the planned move towards online court procedures.**

45. There is no justification for increasing the small claims limit to £5,000 for road traffic-related personal injury claims.
46. The suggestion that this will lead to a reduction in insurance premiums flies in the face of all the evidence. The vast majority of insurers have not committed to reducing premiums and nor have they passed on a windfall of over £8bn from previous changes in 2011.
47. We urge the Committee to consider Jackson LJ's test for any increase in the small claims limit. In his Review of Litigation Costs: Final Report of December 2009, Jackson LJ proposed that the PI small claims limit should remain at £1,000 until inflation, since April 1999, justified an increase to £1,500.
48. An approach that provided for periodic review by the Lord Chancellor and increases, if justified by inflation, in £500 steps would be transparent and verifiable.
49. As Jackson LJ confirmed in his Final Report, the relevant reference point is 1999, not 1991. Since a review of the threshold in 1999, only general damages (for pain and suffering) were taken into account in calculating if a case had a value of, or greater than, £1,000.
50. The current arrangements for funding personal injuries cases, including the specific small claims limit in personal injury is widely seen as working well<sup>10</sup>.
51. The government's reforms, if enacted, would do precisely that which caused three separate judicial groups (the Civil Executive Team<sup>11</sup>, the Association of District Judges<sup>12</sup> and the Civil Justice Council<sup>13</sup>) to oppose the government's reforms: active encouragement of many more litigants in person or, for many injured people lacking the confidence to go it alone or concerned about the cost consequences of engaging a lawyer, not making a claim at all and going without access to justice entirely.

Damages inflation

52. In evidence given before the Justice Select Committee on 7 February 2017 by the ABI's Director of General Insurance, James Dalton, it was claimed that "damages inflation has increased by about 500% in the same time horizon [i.e. since 1999]. That is the reason why I think £5,000 is the appropriate limit... damages inflation is the real reason why you would put a limit at £5,000."
53. This is factually wrong. Damages inflation would only see an increase in the small claims limit to just over £1,500.
54. In calculating the appropriate award for any given injury, the courts require lawyers (for both sides) to provide details of reported cases with similar injuries. An inflation multiplier (provided for in Kemp & Kemp on Quantum of Damages) is then used to get its current day value and would see about a 60% uplift.

<sup>10</sup> As recently as January 2016, Jackson LJ said in his speech to the Insolvency Practitioners Association that 'the fixed costs regime for fast track personal injury cases is working reasonably well.' In Lord Justice Briggs' 'Civil Courts Structure Review: Interim Report' (January 2016) he identified personal injury as being one of the few remaining 'significant areas where the cost of legal representation does not lead to the result that individuals are forced either to litigate in person or to forgo access to justice.'

<sup>11</sup> <http://leedslawsociety.org.uk/wp-content/uploads/2017/02/CET-response-to-Whiplash-Consultation-Final-as-sent.pdf>

<sup>12</sup> <http://www.legalfutures.co.uk/latest-news/pi-reforms-make-justice-system-unworkable-district-judges-tell-government>

<sup>13</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/reforming-the-soft-tissue-injury-claims-process-consultation-response.pdf>

55. If a claimant's lawyer sought to argue that an award should be increased by 500% because of "damages inflation", the submission would be summarily dismissed as wholly lacking any legal or evidential basis.

**The role of claims management companies in respect of these matters.**

56. We support an outright ban on all CMCs in personal injury cases. The current proposals will have the opposite effect and will positively drive injury victims into the hands of the claims farmers.