

Justice Select Committee

Small claims limit for personal injury Inquiry

Thompsons Solicitors' written evidence

December 2017



STANDING UP FOR YOU

About us

- 1.1. 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.
- 1.2. 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.

Inquiry

- 2.1. We note and welcome the Justice Select Committee's renewed inquiry into the government's plans to raise the small claims limit for personal injury.
- 2.2. In particular we note that the Committee wishes to examine:
- 2.3. *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 and the potential impact of this policy on the role of claims management companies and on the operation of the market for 'before the event' legal expenses insurance.*
- 2.4. Thompsons made a written submission to the previously constituted Justice Select Committee in March 2017¹. A copy of that submission is attached for ease of reference. We make additional/updated points as follows:

The impact of inflation

- 3.1. Inflation is the reason given by government for increasing the small claims limit in non-RTA cases to £2,000. In their Response to the consultation they say:

In addition, having considered the submissions of stakeholders in relation to non-RTA PI claims, the small claims limit for all other types of PI claims will be increased to £2,000 in line with inflation.
- 3.2. But, in fact, this proposal has no inflationary or other logic.
- 3.3. Jackson LJ in his 2009 Review of Civil Litigation Costs set out the position clearly. At paragraph 3.3 of chapter 18, he stated that:

If a satisfactory scheme of fixed costs is established for fast track personal injury cases (both contested and uncontested) and if the process reforms bed in satisfactorily, then all that will be required in due course will be an increase in the PI small claims limit to reflect inflation since 1999. A series of small rises in the limit would be confusing for practitioners and judges alike. I therefore propose that the present limit stays at £1,000 until such time as inflation warrants an increase to £1,500.

¹ <https://www.thompsonstradeunion.law/news/briefings-and-responses/justice-select-committee-inquiry-into-personal-injury-whiplash-and-the-small-claims-limit>

- 3.4. No reason has been given by the government to depart from this conclusion.
- 3.5. The question therefore, to follow Lord Justice Jackson's lead, is whether *inflation warrants an increase to £1,500*. The short answer is that it doesn't.
- 3.6. Jackson LJ correctly set 1999 as the starting point for the calculation of the impact of inflation, because that is when special damages were removed from the calculation of what cases fall within the small claims limit and, it was re-set at £1,000 for general damages only.
- 3.7. Inflation calculators² dealing with price changes from 1999 to the present day show that £1,000 would now be worth either £1,440 applying CPI or £1,620 based on RPI. Applying CPI and the recommendation in the Jackson Review would mean no increase is justified at this time. Applying RPI would mean an increase to £1,500. Whichever is applied, there is no justification for the £2,000 proposed. Given that the government applies CPI to the pensions and benefits paid to injured workers pursuing EL claims, the logic must follow that if there is to be any increase the same measure should be applied to the small claims limit applicable to those claims.

Increased differential between tariff and conventional damages

- 4.1. Since our previous submission, the Judicial College has in September 2017, produced the 14th Edition of its Guidelines for the Assessment of General Damages in Personal Injury Cases.
- 4.2. There is now an even wider gulf between the damages which would be awarded under the government's proposed tariff scheme and those that are recommended to be awarded by a judge. For instance:

Duration of injury	Proposed Tariff Award	Judicial College Guidelines: Recommended range of awards
0-3 months	£225	Up to £2,190
4-6 months	£450	
3-12 months		£2,150-3,810
13-15 months	£1,820	
12-24 months		£3,810-6,920

- 4.3. That means that a firefighter or ambulance worker, injured in a road traffic accident in the course of their work would receive as little as 10% of the damages which a colleague would be awarded for an injury that occurred in the fire or ambulance station.
- 4.4. There is no evidence or even a suggestion that people injured on the roads in the course of their employment (such as bus drivers, HGV drivers, paramedics and firefighters), or vulnerable road users (such as cyclists and pedestrians), are engaged in fraudulent or frivolous injury claims.

² E.g. <http://www.swanlowpark.co.uk/inflation-calculator.jsp> ; <https://goodcalculators.com/inflation-calculator/>

- 4.5. We suggest that as in Scotland with the introduction of the Simple Court Procedure in September 2015³, workers injured on duty should be excluded from the proposed new RTA small claims limit and from the scope of the Civil Liability Bill and, in our view, the same should apply to vulnerable road users.

Continued decrease in workplace injury - Employers' Liability (EL) - cases

- 5.1. In our previous submission, we showed that EL cases had reduced by 12% in a decade. Since then, the 2016/17 CRU figures have been published and they show yet another fall⁴. The extract below shows that the reduction in EL claims is accelerating rapidly, with a fall of 30% in the last four years.

Year	EL claims
2016/17	73,355
2015/16	86,495
2014/15	103,401
2013/14	105,291

- 5.2. The statistics make clear that there is no problem of increasing or excessive workplace injury claims.
- 5.3. Given workplace injury claims are important as the threat of litigation helps to ensure there is pressure on employers to maintain health and safety in every workplace, and given the dramatic fall in their numbers there is every good reason to maintain the status quo as suggested by Jackson LJ.

Continued decrease in RTA claims costs

- 6.1. Probably the most significant driver of these proposals has been the acceptance by government of the complaint by motor insurers that they are on the receiving end of a tsunami of RTA personal injury claims, the bulk of which they say are trivial, exaggerated and/or fraudulent.
- 6.2. We explain below why that is not correct but, even if it were true, it is of no relevance to workplace injury claims and other non-RTA cases.
- 6.3. In relation to motor claims, the insurers' assertion is that the rise in the frequency and cost of claims has led to increased premiums.
- 6.4. Instead of adopting an evidence based approach as we have urged, the government appears to have accepted the insurers' premise that there is a crisis as well as their argument that the best way to reverse the trend and reduce premiums is to remove claims and therefore cost from the system.

³ <http://www.scottishciviljusticecouncil.gov.uk/news/2015/09/14/courts-reform-rules-to-come-into-effect-at-beginning-of-new-legal-year>

⁴ <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>

- 6.5. When a market leader Aviva just this week trumpeted that – apparently despite a burgeoning problem with fraud - it had paid out in 99.8%⁵ of all motor claims, and when the insurers’ own figures show that since 2010, the annual cost of road traffic accident claims have dropped by 42%⁶ one might ask: ‘Crisis, what Crisis?’
- 6.6. The drop in claims costs is unsurprising given the raft of changes which have been made in recent years in order to reduce legal costs in personal injury; however, noticeably, those savings have not been passed on to consumers and premiums have continued to rise.
- 6.7. Combined with high premium revenue, motor insurers have enjoyed an average surplus of £1.8 billion every year since 2011⁷. The government’s proposals would hand the insurers, on the government’s own estimates, additional hundreds of millions of pounds each year.

Clash with the introduction of the online court

- 7.1. It makes no sense for the government to consider raising the small claims limit and, in RTA cases, press ahead with the tariff of general damages when work is still proceeding on the online court emerging from the Civil Courts Structure Review begun under Lord Briggs.
- 7.2. Major changes to the structure of personal injury litigation as proposed including a substantial increase in the number of Litigants in Person (LiPs) make no sense at the best of times but particularly where to do so will undermine the emerging online court.

A Claims Management Company (CMC) explosion

- 8.1. We remain concerned that CMCs will fill the vacuum left by solicitors no longer able to recover costs in the cases below the new small claims limit(s).
- 8.2. The Financial Guidance and Claims Bill will, if passed, move regulation of CMCs from the Ministry of Justice to the Financial Conduct Authority. The more stringent regulation which should ensue is welcome but, we would suggest, is entirely in conflict with the introduction of proposals which would open up huge opportunities for CMC expansion. Significantly, such expansion would be into areas allowing CMCs to work directly and solely with LiPs and not via regulated firms of solicitors.

⁵ <https://www.aviva.com/newsroom/news-releases/2017/12/aviva-uk-accepted-96-percent-of-claims-in-2016/>

⁶ Calculated using ABI’s ‘Annual general insurance overview statistics 2017’: <https://www.abi.org.uk/data-and-resources/industry-data/free-industry-data-downloads/>

⁷ Calculated using ABI’s ‘Annual general insurance overview statistics 2017’: <https://www.abi.org.uk/data-and-resources/industry-data/free-industry-data-downloads/>

The Effect of the Changes on the Before the Event (BTE) Insurance Market

- 9.1. If claimants are no longer able to recover legal costs in large swathes of claims where they previously could, they are likely to seek to recover on existing or new insurance policies. Previous experience and that of other jurisdictions indicates that such policies would need to be expensive in order to be of any value to consumers. Expansion of BTE would lead to insurers being in control of both ends of the process, i.e. the formulation and negotiation of claims on behalf of injury victims and the defending and settlement of those claims on behalf of those responsible.
- 9.2. We note the recent CJC report on BTE⁸ and in particular, the following findings:

pp 105-106: *The UK market in BTE is historically small and weak. The UK is a comparatively non-litigious society and it has been difficult to create commercially viable insurance products.*

p132: *The question of conflict as in Sarwar v Alam [2002] 1 WLR 125 (CA) has not yet been fully resolved.*

p150: *There is also the question of whether the rise in the small claims limit will increase BTE premiums. Some commentators have expressed this view, on the basis that BTE insurers will no longer be able to recover costs in the band of cases that will fall within the small claims limit. This impact may however be counter balanced, at least to some extent, by a reduction in claim numbers following the whiplash reforms.*
- 9.3. Now and in the past, BTE insurers could pass claims to solicitors for free or even (until recently) sell them. But if the proposals are brought in, BTE insurers would have to pay for these small claims to be handled either by their own or outsourced staff or by external lawyers. The cumulative impact of the proposals would make it even less likely that BTE could be made viable.

A pilot

- 10.1. If, contrary to our submissions, the changes were to be introduced, we would urge that the Committee recommend there be no immediate changes in relation to workplace injury cases but rather an initial pilot of RTA cases to test and then ameliorate the impact of any unanticipated and undesirable consequences.
- 10.2. One option for this pilot would be to change the limit in relation to RTA claims only by CPI inflation from 1999 in the first instance.
- 10.3. This form of phased introduction would allow for the impact to be reviewed on an evidence based approach with consultation at that stage on whether to proceed with the remaining proposals and, if so, whether that should be some or all of them.

⁸ <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf>

An Evidence Based Approach

- 11.1. We hope that the Committee will underline to government the need for an evidence-based approach to these proposals.
- 11.2. As the Committee reported on its pre-legislative scrutiny of the draft personal injury discount rate clause⁹:

53. An adequate evidence base for policy changes is important: in 2012, the then Government introduced reforms to the legal aid system, in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Our predecessor Committee was critical of the failure to carry out adequate research. It may be reasonable to change the assumptions upon which the discount rate is currently calculated if they are indeed no longer representative of “real world” behaviour. However, we do not believe the evidence presented on this point so far is adequate. We recommend that clear and unambiguous evidence is gathered about the way claimants invest their lump sum damages before legislation changes the basis on which the discount rate is calculated.

Conclusion

- 12.1. We would urge the Committee to conclude that there is no evidence justifying any increase to the small claims limit, whether to £2,000 for EL/PL claims, or to £5,000 as is suggested for RTA claims. Neither is there evidence to justify the proposed tariff or including RTAs in the course of employment or vulnerable road users in that tariff or the £5,000 limit.

For more information please contact:

Tom Jones, Head of Policy
Thompsons Solicitors
Congress House
23-28 Great Russell St
Bloomsbury, London
WC1B 3LW

02072 900009
tomjones@thompsons.law.co.uk

⁹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/374.pdf>