

PRISONS AND COURTS BILL

PART 5 - 'WHIPLASH': BRIEFING FOR SECOND READING



A parliamentary briefing from the Association of Personal Injury Lawyers (APIL)

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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.

The aims of APIL are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

Introduction

The reforms in this Bill have been created to tackle a 'compensation culture' which does not exist, and deliver on a promise of lower car insurance premiums which won't be kept.

There can be few aspects of personal injury law which are as misrepresented as whiplash. The tiny minority of people who claim for whiplash injuries they don't have are fraudsters. They should be caught and punished. But the measures in this Bill, and other proposed reforms to the small claims court which sit alongside the Bill, will not reduce fraud. In fact, they will almost certainly encourage it. The Government's proposals will only serve to make it harder for people with genuine injuries to claim the compensation to which they are entitled.

Insurance industry representatives have already said that savings from these reforms will not be passed on to policyholders because of changes introduced elsewhere in the personal injury system. So, hard-pressed motorists will receive less compensation when they are injured, but at the same time they will be forced to pay higher insurance premiums.

A false premise for reform

The reasons given by the Government for these reforms include tackling what it describes as the 'continuing high number and cost' of whiplash claims; lowering insurance premiums, and reducing fraud.

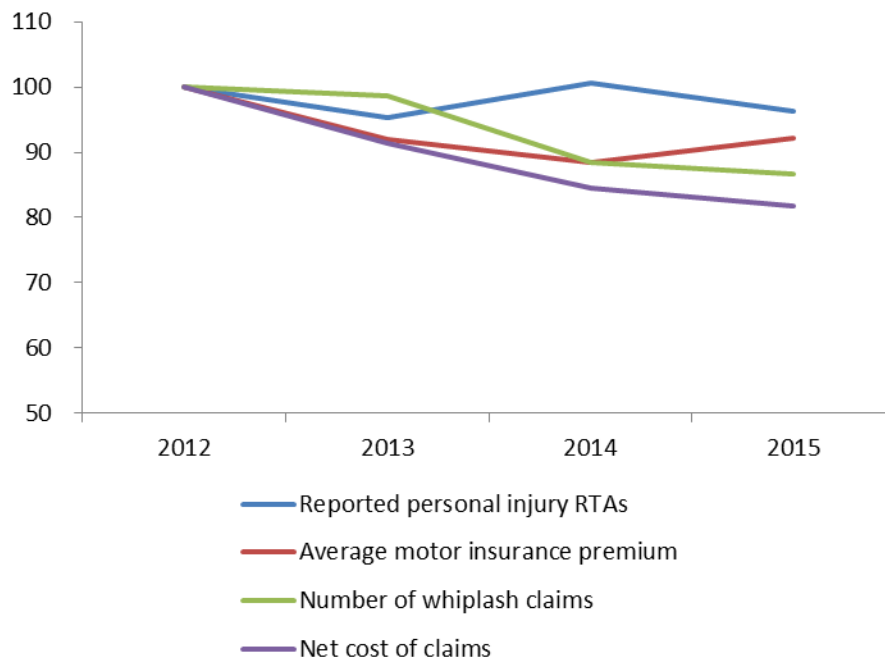
In recent years a whole series of reforms has been introduced which have cut the cost of claims, yet premiums have continued to increase.

In 2013 the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act came into effect, reducing the costs which claimants could recover from defendants. In addition to this, the portal for road traffic claims (which is an online streamlined system) was extended to include more cases; claimant lawyers' fees for portal work were slashed by more than half; medical reporting for whiplash claims has been completely overhauled and a system of accreditation introduced; there is greater collaboration between insurers and claimant lawyers in terms of fraud data; the Criminal Justice and Courts Act means a claim can be thrown out if even a part of the claim is found to be 'fundamentally dishonest'. Furthermore, according to the Government's own figures^[1], the number of whiplash claims has fallen by 41 per cent since 2010/11. This is the fifth consecutive fall, indicating a very definite downward trend. Even if whiplash statistics are combined with the number of injuries registered by insurers as 'neck and back' injuries, there has been a significant fall of 11 per cent since 2011/2012.

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.

^[1] Figures available from the Compensation Recovery Unit.

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.¹” (Compass Lexecon analysis)

¹ 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>.

Insurance premiums

In 2012, at a summit meeting with the Prime Minister, it was noted that insurance companies would pass on savings of approximately £1.5-£2 billion from the reforms of 2013. In reality, the opposite is true, as premiums have risen dramatically. Recent statistics, purchased from the Association of British Insurers (ABI) show that the number of motor-related personal injury claims settled by insurers has fallen by eight per cent since 2013, while the average cost of these claims has fallen by five per cent. This means the average annual cost of these claims has fallen by £536 million (or 13 per cent) since 2013. Over the same period, the average motor insurance premium has risen by 10 per cent, according to the ABI.

When these figures were first exposed in the national press, insurers were quick to explain that whiplash claims are just one of many factors affecting insurance premiums. Others include insurance premium tax; the rising cost of vehicle repair due to technological developments; an increase in uninsured vehicles; an increase in property damage claims; an increase in accidental damage claims and lower investment returns. Only recently, David Brown, from the auditor KPMG UK said in the press that "the cost of accidental damage is rising fast - and I believe it's becoming a much bigger threat to motor policy price inflation than whiplash. As of a year ago, insurers were seeing 20 per cent rises in the cost of average repairs for damage to their policyholders' cars."

It is ironic that compulsory motor insurance was introduced to pay compensation for injury, yet it is this which will be restricted by the reforms, while no limit is placed on the cost of repairing high-tech car bumpers and light units.

During an oral evidence session held by the Justice Committee on 7 February the ABI's witness rowed back from the suggestion that premiums would fall as a result of these reforms, saying "you cannot view personal injury compensation reform in isolation from the wider market and economy".

It is clear that, year after year, insurers have been unable to keep motor premiums under control and are using injured people as scapegoats for their own commercial failings. It is difficult to understand why a vulnerable group of consumers has 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.

Fraud and cold calling

Restricting the damages available for injured people will have no impact on fraud. We support the concerns raised by Louise Ellman MP, Chair of the Transport Committee, in her published letter to Lord Keen, in which she wrote:

“The Government should demonstrate how the proposals to reduce levels of compensation will deter fraudulent claims while allowing those with a genuine claim to get appropriate restitution. It is important that, in responding to the consultation, the Government shows how genuine claims will be protected.”

APIL has repeatedly called on the Government to ban the practice of cold calling for personal injury claims rather than attack the rights of innocent, injured people. Solicitors are already banned from this practice but commercial claims management companies (CMCs) are not. These commercial organisations are free to contact people provided they adhere to certain rules. The problem is that the rules are often ambiguous and difficult to navigate. Recent attempts to curtail the worst excesses of CMCs appear to have had limited impact.

Almost everyone has received cold calls and spam texts trying to persuade them to claim compensation for an injury – often when they are not even injured. In fact, the number of complaints received by the Information Commissioner’s Office (ICO) about personal injury-related nuisance calls and spam texts rose by 22 per cent between 2014 and 2016, when more than 26,000 complaints were received.

The situation will almost certainly reach epidemic proportions if the Government introduces its related reform of forcing all road traffic claims which attract damages of £5,000 or under into the small claims court, which is designed for people to represent themselves. This is a perfect business opportunity for claims management companies who will tout for claims by cold calling and texting just as they do for people who have been mis-sold payment protection insurance.

Cold calling for personal injury claims exploits vulnerable people. It is tasteless and intrusive. It generates the false perception that obtaining compensation for whiplash injuries is easy, even when there is no injury. The Chancellor has announced plans to ban cold calling for pensions to help prevent fraud so there is no reason why the same measure could not be implemented for personal injury.

The problem of cold calling prompted chairman of the Justice Committee, Robert Neill MP, to say in a recent oral evidence session: “the Ministry of Justice is firing in entirely the wrong direction; it is seeking to limit the ability to get general damages for a particular type of tort, whereas in reality it should be knocking these claims companies out of business completely and it has ducked it.”

Tariffs

The payment of fair 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.

One of the Government’s proposals is to fix the amount of compensation for pain and suffering for minor claims at levels which are derisory, offensive and certain to result in under-compensation. Even the Government’s consultation document acknowledged that the average award based on Judicial College guidelines is £1,750. Current compensation payments are set in brackets for different types of injury.

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. To remove judicial discretion from awards will inevitably lead to under-compensation in many circumstances. Tariffs are appropriate for mobile phone contracts and taxi fares, not injured people.

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."

In most cases where the symptoms last up to three months, the Government's proposed compensation of £225 will not be anywhere near an appropriate level of compensation. A train passenger can receive almost double that amount if his train from London to Glasgow is delayed by two hours. A train delayed by two hours is an inconvenience, but it is nothing compared to three months of pain, three months of sleepless nights, or three months of not being able to look after a young child properly.

If the Government is absolutely determined to go ahead with tariffs, it should at least involve the judiciary in setting them at levels which are fair and which take into account not only duration of the symptoms, but also the type and intensity of the injuries, as well as individual personal circumstances.

Association of Personal Injury Lawyers

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