



## Association of Personal Injury Lawyers

### Briefing: Government proposals to reform low value personal injury claims

April 2016

#### Introduction

In November, the Chancellor announced in his Autumn Statement the Government's intention to remove the right to general damages for minor whiplash, and to transfer personal injury claims with a value of up to £5,000 for pain, suffering and loss of amenity ('general' damages) to the small claims court.

The Government's reasons are, apparently, to crack down on fraud and reduce motor insurance premiums. It 'expects' the insurance industry to pass an average saving of £40 to £50 per motor insurance policy on to customers.

#### The basis for change

1. The basis for the Government's proposals is that car insurance premiums are too high and that this measure will help to bring them down. **The figures on which it bases this assumption have been provided by the insurance industry, without independent verification. They are both out of date and meaningless.** The Autumn Statement said whiplash claims cost the country £2 billion a year – the equivalent of £90 per motor insurance policy. This figure was first used by the Association of British Insurers in 2008<sup>1</sup>.

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<sup>1</sup> ABI press release: *ABI reveals whiplash epidemic* available at <https://www.abi.org.uk/News/News-releases/2008/11/ABI-reveals-whiplash-epidemic>.

2. Since then, according to the Government's own figures<sup>2</sup>, the number of whiplash claims has fallen by more than 22 per cent; the portal for road traffic claims has been established, and then extended; claimant lawyers' fees for portal work have been slashed; medical reporting for whiplash claims has been completely overhauled; 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'. And in 2013 the price of premiums fell by 9 per cent.<sup>3</sup>

So how can the cost in premiums possibly be the same as in 2008? And if that figure in itself is spurious, how credible is the Government's expectation that £40 to £50 will be saved on each policy?

3. The Government's determination to cut insurance premiums at the expense of injured people is at odds with a parliamentary answer of 5 January 2016 in which treasury minister Harriett Baldwin said: "**The pricing of insurance products is a commercial matter for individual insurers** in which the Government does not seek to intervene...the Government expects that the insurance industry will pass on savings to consumers."

This is not the first time the Government has had high expectations of insurers. In recent years (see previous point) a raft of legal reforms has been introduced yet the insurance industry has failed to live up to its promise to pass on savings to customers through reduced premiums.

Following the Autumn Statement very few of the dozens of companies which offer car insurance have made public promises to pass on savings, as far we are aware. Removing the availability of justice for people who have been injured through no fault of their own is too high a price to pay for an expectation which will never be realised.

4. If the Government is so concerned about car insurance premiums, it should exempt those premiums from the **insurance premium tax**, which increased by 58 per cent on 1 November and a further 0.5 per cent in the recent Budget. Or perhaps it should investigate the standard insurance industry procedure of over-pricing renewal premiums to take advantage of customers.

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<sup>2</sup> Figures available from the Compensation Recovery Unit.

<sup>3</sup> <http://www.lawgazette.co.uk/practice/insurers-press-for-whiplash-reform-despite-premium-fall/5039609.fullarticle>

5. The fact that whiplash claims have fallen for the fourth year in a row is conveniently ignored. According to the Government's Compensation Recovery Unit (CRU) **the number of whiplash claims has fallen by more than a third since 2010/2011**, yet still the insurance industry has been unable to deliver on its promise to reduce premiums. The idea that the Government can hold injured people to ransom on this issue just because insurers cannot get their premiums under control is unconscionable.

6. **The insurance industry routinely misrepresents figures for fraud.** In 2012 the Association of British Insurers said seven per cent of motor claims were fraudulent. This figure was repeated by the Government the following year. Yet the ABI's own statistics (which can be purchased for a few hundred pounds) clearly show that this figure includes both proven and what it calls 'suspected' fraud (ie, what the ABI thinks is fraud but which cannot be proven as fraud). It has long been the case in our justice system that one is innocent until proved guilty.

When the ABI separated the two figures for the first time in 2014 it became clear that proven fraud (even on their figures) was just 0.25 per cent of all motor claims. That includes policyholders over-egging their own claims, or making false declarations in applications for insurance. Personal injury fraud is a fraction of that figure, and fraudulent whiplash claims are a fraction of that. Nobody knows for certain the size of the fraction because there are, in fact, no reliable figures for personal injury fraud.

It is quite clear, then, that the proposal to remove compensation for some whiplash injuries, however 'minor', is both draconian and has absolutely no basis in evidence.

### **Removing the right to general damages for minor soft tissue claims**

7. The Government is considering removal of a right to **compensation for bodily injury which has been enshrined in common law for more than 130 years** [since *Livingstone v Rawyards Coal Co*, HL 1880]. Furthermore, it proposes to remove this right on the flimsiest of premises, relying on insurance industry figures which are hopelessly out of date. The payment of damages for pain and suffering is an acknowledgement that the injury inflicted was needless, it can also help to atone for the negligence which caused the injury, and it holds the wrongdoer to account.

8. 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. **The Government would do better to tackle the costs associated with repair and replacement vehicles** (an aspect of claims which the Office of Fair Trading has branded 'dysfunctional').

9. 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." Clearly the Government believes that a passenger's right to compensation if his train is more than 15 minutes late (also announced in the Autumn statement) is more important than compensation for needless injury.

### **Raising the small claims court limit to £5,000 for personal injury**

10. The small claims court is designed for 'litigants in person' – ordinary people unrepresented by a solicitor. Traditionally it is used for settling disputes about faulty goods or services. Personal injury cases are different. They all require, at the very least, an ability to gather the right evidence and the ability to identify the value of the claim before a claim can be successful.

11. Outside the small claims court a 'polluter pays' system operates in personal injury cases, which means that if the defendant who has caused the injury loses his case he pays the claimant's legal fees in the main (some of the cost is borne by the claimant). But in the small claims court the injured claimant can not recover his costs from the wrongdoer, even if the claimant wins the case.

12. The vast majority<sup>4</sup> of personal injury cases are worth £5,000 or less. If the Government increases the small claims court limit to £5,000, most people who have been injured through no fault of their own will be forced to bring their claims in this court. This leaves injured people with some very difficult choices:

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<sup>4</sup> According to research conducted by APIL in 2006 around 70 per cent of personal injury cases were valued at £5,000 and under. Damages have changed very little since then so there is no reason to assume this figure has changed, although we will be conducting new research to clarify this point.

- To represent themselves without the help of a solicitor - this leaves people extremely vulnerable because defendants are almost always represented by lawyers (paid for by the defendants' insurers) or, at the very least, professional insurance claims handlers employed to deal with the cases in the small claims court.
- In 2012, APIL commissioned research which found that, of 4,000 people surveyed, 70 per cent would not know how much to claim for a whiplash injury<sup>5</sup>. This means that they literally would not know where to start.
- To seek legal assistance from a solicitor – the small claims court does not allow for the injured person to claim the costs of his case from the losing defendant. So the claimant loses twice: once because he has been injured through no fault of his own and again because he will have to pay for the help he needs to bring his case out of his own pocket. This is the only place in the legal system where the injured person is required to do this.
- Abandon the claim altogether – many people with perfectly legitimate claims may not be able to afford legal help and will be forced to abandon their claims. In APIL's research about whiplash claims, 70 per cent of people said they would not want to pursue a whiplash claim without the help of a solicitor. They will receive no justice and the person whose negligence caused the injury will get away scot-free.

13. An unintended consequence of people not being able to afford legal advice is that unscrupulous claims management companies (CMCs) will move to exploit the situation. Cold calls and spam text messages encouraging personal injury claims are likely to become more prevalent, just as we've seen for mis-sold payment protection insurance claims. If these proposals go ahead CMCs will openly tout for claims, with the very real risk that unmeritorious claims may be brought – the opposite effect of what the Government says it is trying to achieve.

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<sup>5</sup> Survey undertaken by Canadean Consumer Research via its online omnibus panel, and published in APIL booklet *The Whiplash Report 2012*.

14. In 2013 the Government said the time was not right to raise the small claims limit because of the risk that it may deter access to justice for genuinely injured people, and the risk that such a move may encourage the growth of disreputable claims firms. It proposed deferring any increase until safeguards against these unintended consequences were in place. In the same year, the Government expressed concerns to the Transport Select Committee that raising the small claims limit at that time could have the detrimental effect of under-settling of claims.

As far as we are aware, none of these issues have been addressed so it would be useful to know why the Government is proposing the change now.

### **Examples of injuries which attract general damages of £5,000 or less**

The Judicial College publishes guidelines for the assessment of 'general' damages (ie damages for the pain and suffering caused by the injury). These are usually presented in bands, with the final amount being awarded on the merits of the case. For example, a young pianist would receive more in general damages for the loss of part of a finger than perhaps an older person who may not be so badly affected. The guidelines can be very wide to allow for such flexibility but the following are examples of injuries which could attract general damages of £5,000 or less:

- Fear of impending death (eg your doctor has been negligent in giving you medication which will kill you and you are aware of the fact of your own imminent death)
- Collapsed lung
- Food poisoning causing hospital admission
- Crush injuries to the hand
- Loss of part of the finger
- Fractured cheekbone, where reconstruction surgery is required
- Minor facial scarring

### **The system now**

At the moment, claimants are able to fund their claims with conditional fee agreements (also known as CFAs or 'no win no fee'). If the claimant wins his case the losing defendant pays the claimant's costs and expenses (such as the medical report or a police accident report). If the claimant loses he has to pay the winning defendant's costs in certain circumstances.

Claimants are able to protect themselves from this risk by taking out after-the-event (ATE) insurance<sup>6</sup>. The cost of this insurance is borne by the claimant.

Sometimes claimants have legal expenses insurance, which they may have taken out as part of their car or home insurance cover, so they don't need to buy ATE insurance unless the legal expenses insurance does not provide enough cover.

If a case is worth damages of £25,000 or less, and liability has been admitted, the case will go through a different route called the 'claims portal' where the costs of bringing the claim are fixed. Some types of case, such as disease and fatal claims, are exempt from the portal. Claimants who win their cases can recover their costs from the losing defendant.

### **Example**

As a result of someone's negligence at your workplace a heavy box falls on your hand, causing crush injuries. Perhaps you are a young mother who will be unable to hold your baby until your hand recovers. You may be extremely worried about whether your hand will heal properly. Or perhaps in your spare time you are a keen golfer and are unable to play as a result of the injuries to your hand.

At the moment, you would be able to bring your case through the claims portal with the help of a solicitor, whose fees would be paid by the defendant if you could prove the defendant was negligent in causing your injury.

If the Government increases the small claims court limit, you will have the options outlined at point 11 in this briefing, all of which will result in you losing part of your damages because you either won't be able to recover your costs or you will abandon any idea of making a claim.

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<sup>6</sup> Following the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act a mechanism was introduced which means that in addition to being able to claim his costs from the losing defendant, the claimant is also protected from paying the defendant's costs if the claimant loses. If, however, the defendant makes a formal offer to settle the case and the claimant fails to accept the offer and then loses, or wins less than the defendant offered, the claimant is liable to pay some or all of the defendant's costs up to a limit of the amount of damages actually awarded. The need for protection from that risk is the reason many claimants still choose to buy ATE insurance.

People who have been injured through no fault of their own are entitled to be put back, so far as damages can achieve this, in the position they were prior to the negligent act. They should not be forced to accept less than that to which they are entitled. They especially should not be forced to accept less on the basis of flimsy and unsubstantiated 'evidence' from the insurance industry, whose primary duty is to take care of its shareholders.

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