

HOUSE OF COMMONS TRANSPORT SELECT COMMITTEE
INQUIRY INTO WHIPLASH CLAIMS



Written evidence from the Association of Personal Injury Lawyers

April 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain the access to justice they need and deserve. Our 4,700 members 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.

We welcome the opportunity to provide evidence to the Transport Committee on the number and cost of whiplash claims. While this written evidence includes elements from other documents written on this issue (such as the Ministry of Justice consultation *Reducing the number and costs of whiplash claims*, and the *APIL Whiplash Report 2012*) it has been developed specifically for the Transport Committee.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Is the Government right to describe Great Britain as the ‘whiplash capital of the world’?

1. The Government’s only source for this assertion appears to be a report from the Comité Européen des Assurances (CEA) which is nine years old and relies on figures which are even older than that. The figures were compiled from a survey conducted by a European insurance body using what appears to be largely estimated data provided by national insurance representative bodies. There are also basic factual errors in the report, including a reference to the legal mechanism of the reversal of the burden of proof in the Netherlands, which does not actually exist in that country.

2. A more recent report, from the World Bank in 2008, shows that the UK has 79 per cent more vehicles per kilometre of road compared with the European Union average. This is higher than Germany, the Netherlands, and almost twice the number than in France. Logic dictates that, if UK roads are busier, and towns more congested, low-speed accidents generating relatively minor injuries are much more likely to be prevalent than high-speed crashes causing catastrophic injuries and death.

3. The Government’s own Compensation Recovery Unit statistics on the number of whiplash-related claims show that claims fell by almost 24,000 during 2011-2012. While the figure may still be considered high, it is important to recognise that the number has decreased on the previous year which suggests that the situation is not ‘spiralling out of control’ as is often claimed.

4. The assertion that Britain leads the world in whiplash claims has been made popular by the insurance industry, in its efforts to restrict these claims, cut costs, and increase profits for insurers and their shareholders. It is extremely disappointing that the Government appears to have accepted wholesale an argument which is based entirely on an outdated, inaccurate and biased report.

Is it correct to say 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’?

5. Obviously, APIL has no access to this data, which is held by the Association of British Insurers (ABI) so we cannot comment on its accuracy. We do, however, query the way this figure is often interpreted.

6. According to the ABI’s recent report *Lifting the bonnet on car insurance – what are the real costs?* the average car insurance premium in 2011 was £440. Twenty per cent of the premium cost was accounted for by whiplash claims according to the report, which equates to £88, a figure which is usually rounded up to £90. We would submit that this is not, in fact, an ‘additional’ cost but an integral part of the insurance premium which is, in actual fact, perfectly reasonable. The largest proportion of road traffic claims for personal injury are for whiplash which reflects, as already discussed, the state of the UK’s roads, the impact of improvements in car design and the compulsory use of seat belts. All these factors contribute to the fact that whiplash injuries far outweigh catastrophic injury claims (which account for nine per cent of the premium). No-one could argue that this is a bad thing. £88 is, therefore, a reasonable proportion of the premium to pay for the likelihood of suffering a whiplash injury. This reflects what the premium is designed to be used for: to pay compensation for injuries and damage.

7. The figure which we submit should be subject to real opprobrium is the £242 (ie more than half) of the average premium which is used to pay for repair costs and replacement vehicles (an aspect of claims which the Office of Fair Trading has branded ‘dysfunctional’) combined with staffing and overhead costs, which account for 29 per cent and 26 per cent of the premium respectively. Having found evidence that insurers’ approach to car repair and replacement “may push up premiums for drivers by £225 million a year”, the Office of Fair Trading referred the UK’s private motor insurance market to the Competition Commission for investigation.

8. The OFT also said there are “features of the private motor insurance market that prevent, restrict or distort competition” and that the market would work better if insurers were to stop focusing “on gaining the competitive edge through raising rival insurers’ costs and increasing their own revenues”.

9. We do not have statistics about what proportion of the £90 is related to fraudulent claims. We accept that there are some fraudulent cases although, according to the ABI’s own assertions, 93 per cent of road traffic cases are genuine (see paragraph 22).

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

10. We are highly sceptical about the extent to which these proposals would result in lower motor premiums for several reasons outlined below. It is also worth noting at the outset that insurance premiums can go up or down for many reasons other than the claims picture in itself: the nature of the market, the impact of petrol prices on the length and number of journeys etc.

11. The Government has recently announced that lawyers’ fees for handling road traffic claims through the special electronic process known as the ‘RTA portal’ are to be reduced by more than half, following negotiation with the insurance industry. At an insurance summit held with the Prime Minister in February 2012, it was noted that insurance companies would pass on savings of approximately £1.5-£2 billion from reforms to legal fees and whiplash claims. Yet in an email exchange between the ABI and the Cabinet Office just five days earlier¹ the ABI said “We absolutely cannot commit to a percentageFurthermore, we cannot agree to a timeframe”.

12. In February this year, Direct Line published its annual financial statement which was widely reported to say “the effect of the package of civil justice reforms should be at least “net neutral” for the group in the medium term”. This does not generate confidence that Direct Line premiums will fall.

¹ R on the application APIL and MASS v Secretary of State for Justice [2013] CO/904/2013

13. At broadly the same time, John O’Roarke, managing director of the insurance company LV=, was reported warning the public not to expect vastly reduced premiums as a result of the new fixed costs. In the *Law Society Gazette* on 6 March he was reported as saying: “[I expect] a 3% reduction in premium, but generally we have already seen reductions in premiums of 12% and I am not hopeful there will be much more to come.”

14. With this lacklustre level of commitment from the insurance industry, claimant representatives surely cannot be blamed for being sceptical that any savings made from the Government’s proposed changes to whiplash claims will be passed on to the public.

15. Furthermore, while the ABI pays lip service to the need to compensate people with genuine injuries, its agenda is clearly more focussed on cutting as many claims out of the system as possible, as became clear in a note of the insurance summit from February 2012 which said: “The ABI responded thatinsurance companies wanted to continue to pay out for genuine injury, butif minor personal injury claims were taken out of the equation, more than 10 per cent could be taken off premiums.”²

16. The biggest incentive the Government is offering to challenge fraud is to force whiplash claimants into the small claims court on the basis that it would be more economically viable for insurers to challenge claims in a system in which both sides bear their own costs. The idea that this will be effective is, frankly, ridiculous.

17. Once fraud is alleged in the small claims court, the judge will be obliged to tell the claimant and the case will be allocated to a different court which has the facility to deal with claims of fraud, so a fraudulent claim would not be dealt with in the small claims court in any event.

18. We believe there is a strong likelihood that allegations of fraud could be used tactically by insurers to drive up costs and deter the genuinely injured claimant from proceeding with the case at all.

² Ibid

19. Furthermore, people who cannot afford to pay for independent legal advice may shy away from taking a claim through fear of the court system. Alternatively, they are highly likely to turn to claims management companies (CMCs) to conduct their claims. A window of opportunity will therefore be opened to CMCs.

20. Representing people in the small claims court will become their next business model, as work representing people who claim for the mis-selling of payment protection insurance (PPI) starts to decrease. The texting and advertising which is an intrinsic part of CMCs' approach will focus on encouraging people to make claims for whiplash. This has the potential to drive up the number of fraudulent claims, rather than help to reduce them.

21. It should be remembered, as well, that there are already checks and balances in the system to help prevent fraud, but these are not always used by insurers. It is now routine practice for insurance companies to make offers of compensation without even seeing medical reports, which is clearly inviting abuse of the system.

22. We are, of course, used to reading insurance industry rhetoric about whiplash being the 'fraud of choice' but no evidence has, to date, been offered to support this. In September 2012, the ABI issued a press release saying that seven per cent of road traffic claims had been found to be fraudulent. This included so called 'crash for cash incidents' among other types of fraud. APIL does not condone fraud and we believe it must be tackled, but the way it is dealt with must be proportionate. Most claimants are honest and do not deserve to have to deal with the problems which they would encounter in the small claims court.

23. We put great value on good, independent medical advice, but we believe the Government's proposal for the creation of a panel of medical experts would create more problems than it would solve. The panel clearly could not be controlled by any insurer representative, such as the ABI, as this would lead to bias. But who would control the panel? Who would register experts to it and control entry to the panel? What would the appeal process be?

24. To ensure that a monopoly of service providers is not created, and to allow the claimant a free choice of which medical expert to use, accreditation is preferable as a method of regulating those who offer to provide medical reports. If claimants do not have legal advice, it is even more important that the medical expert is wholly independent and the process is transparent.

25. As a method of ensuring that experts are not incompetent or fraudulent, APIL supports the idea of a register of accredited medical practitioners. There are already accreditation schemes in place and we have no objection to accredited schemes being adopted for the benefit of all parties; but we are concerned that these schemes should be independently run.

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

26. APIL has been very clear about its views on the impact of these proposals for injured people. Hundreds of thousands of cases would be forced through the small claims system, and this is a court which is designed for people to represent themselves. The small claims court is traditionally used for settling disputes about faulty goods and services. Personal injury cases are different. They all require an ability to gather the right evidence and, at the very least, have a knowledge of the value of their claim.

27. Injured people will have to choose whether to pay for legal representation out of their own pockets (which they don't have to do at the moment) or face the defendants (who usually do have legal representation) in court themselves, or not claim at all.

28. APIL's independent research found that 70 per cent of claimants would not want to pursue a whiplash claim without the help of an independent solicitor.³ The Ministry of Justice published a review in June 2011, on research into litigants in person in the civil and family courts which found that "litigants in person could face problems in court, such as understanding evidential requirements, identifying legally relevant facts and dealing with forms. It was suggested that the oral and procedural demands of the courtroom could be overwhelming." Further, "the weight of the evidence indicates that lack of representation negatively affected case outcomes", and there was also evidence that litigants in person create extra work for court staff and the judiciary.⁴

29. In cases dealt with in the small claims track the claimant would have to prepare for the disclosure of relevant documents and prepare a witness statement. A claimant would not know when and if to disclose the documents. APIL's independent research also found that 70 per cent of people who provided a definite answer would not know how much to claim for their whiplash injury⁵, and so would be at an immediate disadvantage arguing their cases against an experienced defendant representative.

30. APIL has also conducted research to investigate by how much insurers are likely to under-settle claims where there is no independent legal representative involved. The research clearly shows that for claims involving whiplash, instructing a lawyer ensures that the claimant receives, on average, 200 per cent more than if the injured person had accepted the first offer made to him. The converse of this is that unrepresented claimants risk accepting offers of around £1,000 from insurers rather than the average sum of £3,173 to which they are entitled, to ensure they are adequately compensated.

³<http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf>

⁴ Ministry of Justice Research Summary 2/11 "Litigants in person: a literature review" June 2011

⁵ <http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf>

31. Furthermore, there are likely to be unintended consequences in any move to increase the small claims court limit. A potentially huge influx of unrepresented claimants could cause the small claims system to grind to a halt. Evidence from family law cases, where there has recently been a huge increase in people representing themselves, shows that so-called 'litigants in person' can cause serious delays to the system. Without a legal 'buffer' to help people understand the system, litigants struggle to comply with court rules and judges are frequently obliged to halt proceedings to explain the legal process.

32. In addition, and as mentioned earlier in this evidence, the gap in legal advice is highly likely to be exploited by CMCs which have a reputation for marketing through intrusive and unwelcome cold calling and text messaging. These practices are likely to become more prevalent, reflecting what has recently been seen in relation to the mis-selling of PPI. The Government's proposal effectively represents a business opportunity for CMCs to run claims for injured people in the same way they have taken on PPI claims - the fact that CMCs involved in the PPI scandal account for the vast majority of consumer complaints received by the Ministry of Justice speaks for itself.

33. CMCs are not, of course, bound by the Solicitors' Code of Conduct, so there is likely to be an influx of people who are unqualified seeing a cash bonanza in unrepresented people. They will do what they do best – openly tout for claimants, run very large numbers of what could be potential dubious claims, and engage in negotiations with insurers on claimants' behalf when they are not qualified to do so. The result will be an increase, rather than a decrease, in fraudulent claims and a haphazard, slapdash way of dealing with the claims which injured people, who represent the vast majority of claimants, do not deserve.

Are there other steps the Government should be taking to reduce the cost of motor insurance?

34. The Government has already taken a significant step in terms of cutting lawyers' costs, which is said will lead to lower premiums although, for reasons mentioned earlier in this document, whether and when any savings resulting from this move remains to be seen. For reasons already expressed, forcing injured people to use the small claims court is not an appropriate way to reduce costs while maintaining access to justice.

35. There are better ways to tackle fraud, which could help to cut costs, and what is required now is a universal commitment to this. APIL has developed a series of ideas for reducing fraud as follows:

- 1** Free and prompt exchange of information between the road traffic accident (RTA) claims portal and the Insurance Fraud Bureau to facilitate identification of fraudulent behaviour at the earliest possible opportunity.
- 2** Claimants to be subject to a standard, written statement of truth which must be explained to them by their solicitors. A document to be signed by either the claimant or the solicitor to confirm that the claimant understands the commitment behind the statement of truth. Breach of the statement may amount to fraud and may make the claimant liable to prosecution.
- 3** Insurers to be banned from making offers of compensation before a medical report has been seen: the medical report is a critical factor in ensuring a claim has merit and that accurate compensation is paid.
- 4** The rules governing the conduct of solicitors, insurers and claims management companies to be amended and standardised to prevent offers of gifts or cash inducements being made to potential clients.
- 5** Robust enforcement of the imminent ban on the sale of claimants' personal details by the defendants' insurers.
- 6** Any party who instructs an expert to give the other party a list of the names of one or more experts he considers are suitable to instruct beforehand, to ensure the expert is accepted as credible by both sides.
- 7** Development of guidance to assist medical experts to identify and understand whiplash claims. The guidance should be developed in conjunction with the relevant medical organisations.

8 Photographic identification of the claimant to be required by the medical expert: if this cannot be produced, the omission will be included in the expert's report.

9 The claimant's solicitor to organise access to relevant medical records where a medical expert is to be instructed.

10 'Spam' or 'cold' texting to be banned.

- Ends -

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