

OFFICE OF FAIR TRADING

PRIVATE MOTOR INSURANCE CALL FOR EVIDENCE



A response by the Association of Personal Injury Lawyers

October 2011

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 access to the justice they need and deserve. We have over 4,500 members committed to supporting the association's aims, all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

David Bott – President

Karl Tonks – Vice President

Muiris Lyons – Immediate Past President

Additional officers: Stuart Kightley, John Spencer, Nigel Tomkins, Cenric Clement-Evans, Martin Hanna.

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

Abigail Jennings

Head of Legal Affairs

APIL

Unit 3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

E-mail: abi.jennings@apil.org.uk

Introduction

We welcome the OFT's call for evidence on private motor insurance. It will provide an impartial view as to the reason behind rising car insurance premiums. All too often insurers place the blame for rising premiums upon those pursuing genuine personal injury claims. Yet it seems patently unjust that the very people motor insurance was established to protect are now being almost solely blamed for the rise in premiums. We are therefore concerned about many of the misconceptions about the system for claiming compensation in England and Wales. We hope the OFT's wider examination of the system will provide a true position. We would ask the OFT to look at the data behind the insurer spin.

We have attempted below to address some of the common ongoing misconceptions.

Personal injury claims

Personal injury makes up only a small percentage of insurance payouts. We know from the Minor Cervical Trauma claims paper published in 2004¹ that in terms of the split between bodily and material claims of the 2.9 million claims, only 17% relate to personal injury claims². Car insurance covers theft and fire as well as accident related claims. Accident related claims can be damage only claims where there is no other party involved and a claim is made against the party's own policy. Where a third party is liable for the accident the claim might be for vehicle damage or hire. It might also include a claim for personal injury which is made up of many different heads of claim, for example, compensation for pain and suffering, recovery of past and future losses such as loss of earnings, care and treatment. There may also be a payment back to the Government as a result of treatment received following a fault accident³. Additionally there may be payments to the Compensation Recovery Unit where there has been payment of a state benefit as a result of a road traffic accident.

It is common to hear insurers blame the cost of personal injury claims for the rise in insurance premiums, with the aim of restricting the availability of independent legal

¹ Comité Européen des Assurances (CEA) and the Association for the Study and Compensation of Bodily Injury (AREDOC, FR).

² <http://www.cea.eu/uploads/Modules/Publications/Minor%20Cervical%20Trauma%20Claims.pdf>

³ Road Traffic (NHS charges) Bill 1999.

advice and ultimately restricting a claimant's damages. This is a very serious proposition for those people who are vulnerable and who need, and have a right, to claim proper redress. It is not the role of the injured person to subsidise an insurer, who has received premiums for the very purpose of paying claims, should they arise. Indeed the very reason why motor insurance is compulsory is to ensure that those injured by other road users are properly compensated.

In every personal injury claim, as in every other type of civil claim, the burden is upon the injured person to prove their claim. To be successful the claimant must prove that the other party is at fault. The claimant must provide evidence to show the defendant has been negligent, namely that there was a duty of care owed by the defendant, that the defendant breached that duty and that the breach caused the injury. If the claimant proves this then they must also prove each head of damage that they are alleging resulted from the accident. This can include pain and suffering as a result of the injury received (for which expert medical evidence is obtained), past losses that have arisen as a result of the accident, for example hire charges, loss of earnings, vehicle repair costs and future losses including for example the provision for ongoing future care.

Insurers continue to suggest that legal costs are increasing and are disproportionate to damages recovered. The Association of British Insurers (ABI) frequently says that "for every pound paid in compensation, a further 87 pence is paid in legal costs"⁴. We know from the last UK Bodily Injuries Award Study⁵ that legal costs as a percentage of total payouts by insurers⁶ have remained constant at 30 per cent for many years. We also know that damages for pain suffering and loss of amenity (the physical injury) remain below the levels that the Law Commission suggested they should be at in 1999 when the commission suggested an increase in damages for pain, suffering and loss of amenity. This suggests that legal costs are probably at about the right level but that, in fact, general damages need to increase. It should also be borne in mind that the cost to insurers regarding loss of earnings claims, treatment costs and care cost will all have increased due to inflation. As wage inflation has been in excess of general inflation indices, this aspect of personal injury awards has gone up in accordance with that wage

⁴ ABI research, cited in The cost of Motor Insurance, Transport Select Committee HC 2010-11 591 EV50 paragraph 2.4.

⁵ ABI and IUA 4th Bodily Injury Awards Study 2007.

⁶ Ibid (damages to costs ratio in private car comprehensive claims).

inflation. This cost will be passed on to the insurance company as an entirely legitimate part of the claim.

Where injuries do occur it is imperative, both for the welfare of the injured person and in order to limit legal costs, that claims for compensation are dealt with quickly and efficiently and here the remedy is very much in the insurers' own hands. Research conducted by APIL⁷ has shown that defendants (and, therefore, their insurers) indulge in behaviour which inevitably prolongs cases and results in increased costs. In more than 2,000 cases relating to lower value claims which ultimately settled for general damages of £5,000 or less:

- The final offer made to a claimant by a defendant's insurer was more than 50% higher than the first offer;
- 63% of defendants' insurers who subsequently admitted liability failed to do so during the so-called 'protocol period' (the first three months of the claim).

In England and Wales road traffic accident (RTA) claims under £10,000 are the subject of two fixed costs regimes. The fixed recoverable costs (FRC) or predictable costs regime has been in force since October 2003, and a new claims process came into force in April 2010. The FRC regime did not change the process for dealing with RTA claims under £10,000. The costs were fixed by examining the costs recovered on a sample of completed RTA cases and then taking a legal cost of settling a standard low value RTA claim. The review of the scheme conducted by professors Fenn and Rickman after four years concluded that the regime had reduced legal costs⁸.

In April 2010 a new process for dealing with road traffic claims under the value of £10,000 was developed with the co-operation of claimant representatives and insurers. The process reduces the amount of work and time involved in pursuing a personal injury claim. The fees recoverable under this process were set by agreement with both sides of the industry at a level to reflect the work involved. The process was costed from the bottom up: namely the average amount of time reasonably taken to deal with each element of the fixed process was costed according to the appropriate level of fee earner

⁷ APIL research - 'Potential impact of the threshold limit for personal injury cases within the small claims court being raised to £5,000'. The research was done between January and February 2005 with 782 APIL members responding.

⁸ Monitoring of the predictable costs regime 2007 part I Fenn and Rickman.

needed to conduct the work. The hourly rates⁹ for the appropriate level of fee earner was then averaged out and applied to the amount of work involved. The rates applicable at the time of the exercise were applied, namely the rates for 2009. Additional time was then built in for supervision by an appropriate level of fee earner, and this was costed in the same way according to the applicable hourly rate. No actual or notional sum was included in these costs in relation to any referral fee that may or may not have been paid by the solicitors concerned.

Professor Fenn is currently conducting an initial review of the process for road traffic accident claims up to £10,000 to see if the objectives set by the MoJ have been met. His report is expected to show that the cost and time taken to resolve cases has reduced and that damages have stayed the same. Rob Cummings, the ABI's policy advisor, stated that the "scheme had been successful in reducing costs, bringing down average legal costs from around £2,000 to around £1,200."¹⁰ According to the MoJ the scheme deals with 75% of all personal injury cases. The RTA scheme shows promising results in reducing legal costs for low value road traffic personal injury cases; however, with it only having been running for 18 months, the full picture is still unknown.

Where cases do not fall into either of these two fixed cost regimes it is important to note that only reasonable costs are recovered from the losing party and that legal costs are subject to assessment by the court if the parties disagree over the sums claimed.

In some cases, where the claimant has a Conditional Fee Agreement with their solicitor, a success fee is currently payable by the losing party to the claimant's solicitors. The level of success fees are fixed in motor claims by court rules. The level of success fees were fixed following research by Fenn and Rickman and were fixed at a level to be cost neutral. The success fees can be 100% but only if the losing side, the insurer, fails to make a proper offer in settlement requiring the case to go to a court hearing. In some cases insurers fail to attend at court, causing a 100% success fee to be paid by them. In other words poor conduct by insurers and their representatives can and does add considerably to the legal costs they have to pay.

⁹ Guideline hourly rates are set by the Advisory Committee on Civil Costs.

¹⁰ 'It can't go on like this! An interim report into affordable case insurance', David Ward MP, page 18.

Costs are also fixed in Northern Ireland for all county court work set by the Northern Ireland Court Service. These are currently being consulted upon at the moment.

For High Court work there are two guides, one set by the Belfast Solicitors Association following consultation with Cost Drawer Paul Kerr. He considered data from closed cases where costs had been assessed by the taxing master. The second guide is that used by the defendant insurers. Typically solicitors and insurers will agree to settle somewhere in between. There has been no streamlining of the process for dealing with RTA claims in NI.

Fraud

There is no place for fraudulent conduct in the legal system. We support the Transport Committee's call for the insurance industry to take a lead on tackling insurance fraud. The UK's financial services industry has the highest estimated private sector fraud loss at £3.6 billion, with approximately £2.1 billion of this relating to the insurance industry¹¹. £1.7 billion is estimated to be undetected fraud loss – *"of which about half ... is motor"*¹² – and £350 million in organised staged motor vehicle accidents.

Fraud is a problem on both sides of the industry in both England and Wales and in Northern Ireland. There will always be dishonest claimants and defendants who try to defraud the insurance industry. It is inherently difficult to assess the cost of fraud to the industry. There is a temptation on the part of insurers to exaggerate fraud for political purposes. We invite the OFT to analyse the different types of fraud in the market which could include:

- Fraudulently purchasing a policy by lying about points driving convictions;
- Exaggeration of a hire or repair costs by others with an interest in ancillary services¹³;
- Staged accidents.

¹¹ National Fraud Authority, Annual Fraud Indicator, January 2011 - <http://www.homeoffice.gov.uk/publications/agencies-public-bodies/nfa/annual-fraud-indicator/annual-fraud-indicator-2011?view=Binary>

¹² Nick Starling (ABI – Director of General Insurance & Health) – Oral Evidence (9 November 2010) The Cost of Motor Insurance.

¹³ *Fallows v Harker Transport* [2011] EW Misc16.

APIL has actively sought dialogue with the Insurance Fraud Bureau and Forum of Insurance Lawyers. It is essential that insurers report any suspicions of fraud to claimant lawyers immediately when they arise. There is all too often a tendency to deny liability and wait for the claimant to issue his case and then ambush him before trial. A lawyer can only advise his client on the basis of the evidence available. Our members are far from complacent about fraud but cannot fight fraud without the information to which the insurance industry has easy access.

Whiplash

A whiplash injury is a soft tissue injury sustained to the neck as a result of a road traffic collision, often a rear end shunt. Usually, if whiplash is the only injury, there is no obvious pain immediately following the accident but stiffness and pain comes on gradually some time after the accident occurred. Pain and significant stiffness can present as late as the following morning. Most people will fully recover from this injury but in a small number of cases the symptoms can be severe and/or permanent.

Whiplash claims are the latest target of the insurance industry. The ABI claims that in England and Wales there has been a 25% rise in whiplash claims in the last five years¹⁴ and that around 70% of motor insurance personal injury claims arise from whiplash injuries¹⁵. Of greater concern is the fact that there is an implication that claiming for whiplash is fraudulent and that it does not represent a genuine injury. It must be emphasised that whiplash is a universally medically recognised condition and genuine claimants should not be prevented from bringing a claim.

APIL, as an organisation concerned with health and safety, also views the increasing number of whiplash injuries with concern; it indicates an underlying safety issue which needs to be tackled. In this vein APIL is supportive of some of measures outlined in the ABI's report – *'Tackling Whiplash: Prevention, Care, Compensation'*. In particular, we feel that improving driver training, encouraging car manufacturers to focus on making car seats safer and making people aware of how to adjust their headrests property would

¹⁴ Tackling Whiplash: Prevention, Care, Compensation ABI 2008.

¹⁵ ABI research cited in The Cost of Motor Insurance, Transport Select Committee HC 2010-11 591 EV 51 Paragraph 3.7.

help reduce the number of incidences of whiplash, and therefore the number of whiplash claims. As the title of the report suggests, if you tackle the first two – ‘prevention’ and ‘care’ – the third one – ‘compensation’ – takes care of itself.

It is worth highlighting that one of the reasons for the increase in the number of whiplash injuries is in fact due to the reduction in fatal and serious injuries; indeed whiplash can be seen to be a symptom of cars getting safer. The ABI itself recognises that “Vehicle bodies have become stiffer since the late 1980s, increasing crashworthiness in high speed rear-end crashes. This helps reduce the incidence of serious injuries, but may increase the incidence of whiplash, due to higher relative transfer of energy in a crash”¹⁶. This suggests that the increase in whiplash claims is a result of improved car safety. Where in the past victims would have perhaps died or sustained serious injury, they are now receiving less severe injuries such as whiplash, which must, surely, be welcomed.

In fact an increase in whiplash injuries was observed following the introduction of seatbelt legislation in January 1983. Galasco *et al.* (1993)¹⁷ found that while serious head injuries had reduced significantly, “*there was an increase in all forms of neck sprain after the introduction of seat belts*”. They concluded with the finding that “*soft tissue injury of the cervical spine is the major site of injury after road traffic accidents*”, a fact borne out by the earlier statistics that 70% of RTA claims relate to whiplash.

Figures taken from the Department for Transport for road traffic accidents in Great Britain support this argument. They show that from 2003 to 2009 there was a 37% decrease in the number of deaths and a 34% decrease in the number of serious injuries on Great Britain’s roads. Whilst in the same period slight injuries, which includes whiplash, reduced by only 23%.¹⁸ These figures show that Britain’s roads have overall become safer since 2003 and car manufacturers have been successful in reducing death and serious injury.

The ABI frequently quotes the Department for Transport figures stating that they show the number of accidents has fallen by ten per cent over the past three years. Yet, in the

¹⁶ Tackling Whiplash: Care, Prevention, Compensation, ABI 2008, page 9.

¹⁷ [Neck sprains after road traffic accidents: a modern epidemic](#) (1993) 24 Injury No. 3 pp.155-157.

¹⁸ Datamonitor, UK Personal Injury Litigation 2011, Page 32, Table 11.

same period, the number claiming for an injury suffered in a car accident has increased by 43%¹⁹. The ABI uses these figures to support its claims of fraud. It is important to note here that the ten per cent figure is based on the drop in total injuries rather than the number of accidents over the three year period²⁰. Also, the 43% figure is based on an increase over four years instead of the stated three years. The figure for three years would be an increase of 27%²¹.

The figures presented by the Department for Transport do not give a complete representation of the number of accidents and the number of injury claims resulting from car accidents. The decrease in road accidents does not take into account the large amount of unreported minor incidents and should therefore be lower. The majority of the statistics obtained by the Department for Transport are obtained through STATS19 forms²², which are filled in at the scene of a reported accident. However, a vast majority of minor car accidents are not reported and do not require police attendance. The figure of 10% would therefore not take into account such 'bumps' and potentially should be lower.

Furthermore, the STATS19 form allows for the documentation of the number of injured passengers²³ but not the number of passengers in total. This would not take into account passengers involved in the accident who had no noticeable injuries at the time but later presented symptoms of an injury some time after the event. This would have an effect on the projected figures that the DfT would obtain through police reports.

Insurance investment and income issues

The insurance industry's business model is such that their income has not been only from premium income. They have used premium income to fund their investments from which they have received an income. The global economic downturn has seen their investments and investment income shrink; greater capital solvency requirements mean that they have to be less risky and not invest as much money; and they have less money

¹⁹ Why motor premiums are so high and what to do about it, BBC News, 24 August 2011.

²⁰ http://en.wikipedia.org/wiki/Reported_Road_Casualties_Great_Britain.

²¹ All figures calculated using RTA accident figures from the CRU.

²² <http://www.dft.gov.uk/statistics/series/road-accidents-and-safety/>.

²³ <http://assets.dft.gov.uk/statistics/series/road-accidents-and-safety/stats19-road-accident-injury-statistics-report-form.pdf>.

to invest due to having lower reserves²⁴. In turn this has required them to raise premiums, irrespective of any other variable. Reducing the time taken to settle claims will also impact on their ability to invest in the long term. One of the objectives of the new RTA process for cases up to £10,000 is to reduce the time taken to settle claims. All these issues need to be examined in the round as it cannot simply be personal injury claims that are increasing premiums.

There has also been an absence of transparency in terms of referral fees. Insurers have been benefiting financially from referral fees for years whilst claiming that the reason lawyers can pay referral fees is because legal costs are too high. In 2010 over half of Admiral's, the Cardiff based specialist motor insurer and owner of Confused.com, UK car insurance pre-tax profit came from net ancillary income; a large part of which relate to referral fees. Indeed following the recent announcement of the referral fees ban, shares in Admiral plunged 5% in early trading due to the fact that it was perceived that *"the ban would impact profits at the group"*²⁵. Furthermore Admiral has suggested that rather than reduce premiums the removal of referral fees will actually *increase* premiums; Admiral chief executive Henry Englehardt said *"If referral fees are banned, the result would be car insurance going up."*²⁶

In Northern Ireland referral fees are banned. However the ban has been ineffective, is not enforced, and anecdotal evidence is that the referral market remains in all but name – payments often being called 'administration expenses', for example. In effect, the practices have been driven underground.

The common perception is that premiums in NI are high because of criminal terrorist activity. This is something that rarely happens now, yet premiums remain high. Post coding is also very relevant for certain areas in NI and they are generally identified as areas of high crime.

²⁴ See the British Insurance Brokers' Association (BIBA)'s written evidence to the Transport Committee (CMI19) (see <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtran/591/591we12.htm>).

²⁵ <http://www.telegraph.co.uk/finance/personalfinance/insurance/8751683/Motor-insurer-Admiral-hit-by-ban-on-referral-fees-from-personal-injury-lawyers.html>

²⁶ <http://www.thisismoney.co.uk/money/cars/article-2036472/Car-insurance-referral-fees-crackdown-force-premiums-higher-claims-Admiral-boss.html>

Ancillary services

The OFT should examine in detail the agreements that insurers have with garages, hire companies and medical agencies. There is often substantial income generated from such agreements. We also know from the recent case of *Fallows v Harkers Transport*²⁷ that insurers themselves are adding to the increase in cost of RTA claims. The case involved an RTA where Royal Sun Alliance (RSA) sent the claimant's car to be repaired by its own repair company, which is called DWS. The 'administration' for doing this was sorted by a wholly owned subsidiary of RSA, called RSAARL. When RSA sought to recover the costs of the repairs, by submitting an invoice from RSAARL, the defendant insurer Equity Red Star questioned the amount as the VAT and the hourly labour rates did not add up correctly. Essentially the court discovered that RSAARL was being invoiced for one hourly labour rate by DWS, but was then inflating the cost of repairs, increasing the labour rate and invoicing its parent company for a higher amount.

Such agreements often limit a claimant's choice of repairer, hire company and medical agency.

We would also invite the OFT to examine the cost of repairs to vehicles. Some cars can cost as much as £6,000 to repair for a 6mph crash²⁸. Modern cars can be expensive to repair and this cost will in turn affect premiums paid by motorists. For instance, modern cars include air bags, which if deployed are very expensive to replace and reset.

Insurer practices

The insurance industry has developed a growing practice of generating claims against itself. This distorts the claims market. Insurers are 'capturing' claims from people who might never have claimed compensation. They do this through direct telephone calls, text messages and e-mails. Many people who are approached in this way may not have claimed compensation at all if they have not been approached by the insurer. It is very difficult for anyone to ignore repeated and persistent offers of compensation, often made without the requirement for medical examination.

²⁷ [2011] EW Misc 16.

²⁸ Thatcham research news, special edition 09/No.2 'What's the damage?', page 2.

The ABI gave evidence to the Transport Committee about “third party assistance”. However, what this actually means is that the insurer of the defendant driver approaches the injured claimant and offers to settle the claim directly. The insurer then acts as judge and juror about what level of compensation is appropriate. APIL has serious concerns about this practice, not least because of the lack of transparency.

The insurance industry has also recently campaigned against referral fees despite receiving referral fees themselves. Some solicitors firms will use referrals instead of large scale marketing as an alternative means of obtaining business. It is therefore slightly hypocritical of the insurance industry to complain about how lawyers choose to advertise and market themselves when the top 20 UK motor insurance advertisers spent over £180 million on marketing and advertising in 2010.

Uninsured drivers

The Government estimates that up to 1.5 million drivers on Britain’s roads are uninsured. Mike Penning, the Road Safety Minister, stated that, “Currently every responsible motorist pays an average £30 each year within their premiums to cover crashes involving uninsured and untraced drivers.”²⁹ However, Motor Insurers’ Bureau (MIB) figures indicate that the number of uninsured drivers nationally has decreased by 20 per cent in the past four years.³⁰ Yet, in the same period this decrease has not been reflected in insurance premiums. It is important to determine by what extent motor premiums are being affected by uninsured drivers.

Additional questions to ask insurers

We would propose that the following additional questions are raised with the insurance industry:

- Over the last five years how many claimants’ details have been sold for a fee?
- How many non-policyholders have they contacted about potential claims?

²⁹<http://nds.coi.gov.uk/clientmicrosite/Content/Detail.aspx?ClientId=202&NewsAreald=2&ReleaseID=417373&SubjectId=36>

³⁰http://www.mib.org.uk/NR/rdonlyres/E675DE3F-C26F-415B-8B4F-1C85D47D8C42/0/Hotspots_national_release_2010_FINAL.pdf

- What is the number of people claiming immediately after an accident or further down the line?