

Ministry of Justice

Reforming the Soft Tissue Injury ('Whiplash') Claims Process

**A consultation on arrangements concerning personal injury claims in
England and Wales**



A response by the Association of Personal Injury Lawyers

January 2017

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 justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which 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.

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1. Introduction

- 1.1 The Association of Personal Injury Lawyers rejects entirely both the premise of, and assumptions made in this consultation paper. The over-emphasis on insurance industry-based arguments and statistics suggests a fundamental imbalance in the Government's approach which is profoundly unfair to people who have been injured through no fault of their own.
- 1.2 It is difficult to understand why a vulnerable group of consumers has, uniquely, been singled out for special treatment at the behest of the insurance industry just because that industry states, without any independent evidence, that the law should be changed.
- 1.3 Why are the requests of the insurance industry being given higher priority than the rights of injured people? The Government is beholden to the insurance industry and it is profoundly wrong. It is not the role of injured people to subsidise the insurance industry. The rights of the many are being sacrificed for the privileged few and this flies in the face of the promises made by the Prime Minister at her speech in Downing Street on the 13th July 2016.¹
- 1.4 Injured people currently face further and perhaps the most damaging erosion of their rights to date. Latest proposals will fundamentally undermine the rule of law: a key tenet of our constitution which ensures everyone is treated fairly. The latest reforms will discriminate between those suffering the same injury by different acts of negligence.
- 1.5 The Government has an obligation to preserve access to justice for the genuinely injured. It is unjust to compare someone who has been negligently injured through no fault of their own with someone who seeks compensation for damage to their reputation. Negligent actions will unfortunately happen and when they do, those affected must have a system which provides access to care, rehabilitation and full redress to ensure, so far as possible, that the injured person – harmed through no fault of their own – is put back in the position that they would have been in, but for the wrong committed against them (Lord Blackburn in *Livingstone v Rawyards Coal*, 1880).
- 1.6 In the last ten years injured people have seen extensive reforms to their legal rights. On average they are now paying £445 towards their legal fees in personal injury fast track cases², with insurers benefiting from previous reform to the tune of at least £500 million³

¹ <https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may>

² APIL analysis of *Personal injury litigation: the impact of LASPO on costs, damages and disbursements - A report for the Association of Personal Injury Lawyers*, Professor Paul Fenn, April 2016

³ The annual cost of motor related personal injury claims has fallen by £500 million since 2013, according to ABI data

- 1.7 In 2014 the Competition and Markets Authority (CMA) found that insurers' own practices, particularly with regards to credit hire, have given rise to excessive costs and increased private motor insurance premiums⁴. The Government's proposals do not deal with these problems.

2. Executive Summary

2.1 Premise of reforms

- The premise of the government's reforms is flawed.
- Insurers have a record of failing to pass on savings to consumers. The vast majority of insurers have not committed to pass savings onto premium holders if these reforms are introduced.
- There is no evidence to support the compensation culture myth, and little evidence of actual fraud. Whiplash claims are, in reality, declining.
- For those willing to bring a fraudulent claim in the first place, there is still nothing within these proposals which will stop them from exaggerating a claim in order to secure higher damages.

2.2 Defining RTA soft tissue injuries to be excluded from PSLA or paid a fixed amount

- The current protocol definition should not be used to identify the claims to be affected by the reforms proposed nor should it be widened to include psychological trauma cases.
- The seriousness of an injury should not be defined by reference to duration of symptoms only.

2.3 Reducing the number and cost of minor RTA soft tissue injury claims

- Removal of general damages for all "minor" RTA soft tissue injury claims is unlawful.
- It is also a vastly disproportionate action to take to justify the aim of reducing the cost and number of these claims. People who have been needlessly injured by the negligence of others should be entitled to full and fair compensation, a principle which is enshrined in common law.
- There are more proportionate measures to tackle fraudulent claims than introducing a fixed sum of compensation, including the banning of pre-medical offers and prohibition of cold calls by claims management companies.
- A £25 additional payment for the psychological element of a "minor" claim is derisory, has no logical basis, and is insulting to an injured person.
- If the proposal were introduced, a person would be able to claim more for the inconvenience of a train delayed for 30 minutes, than they would for weeks of travel anxiety caused by the negligence of another.

2.4 Introduction of a fixed tariff scheme for other RTA related soft tissue injuries

- There must be judicial discretion in awards. A tariff approach to damages which is based solely on the duration of an injury will lead to under-compensation because:

⁴ Private motor insurance market investigation: final report, Competition & Markets Authority, September 2014

- This method fails to take into account the impact that the injury has had on that specific individual. A mother may be unable to pick up her child, or a plasterer may be unable to carry his load. Failure to take into account the true impact of the injury will inevitably lead to undercompensation.
- Tariff systems rarely take account of the full extent of an injury.

2.5 Raising the small claims track limit for personal injury claims

- The small claims limit should not be increased. An increase to £5,000 or above would severely restrict access to justice for genuine claimants, but would not stop fraud.
- Genuine claimants would be deterred by a daunting claims process and prospect of having to run a claim without legal representation against an experienced and knowledgeable insurer who will be legally represented. There are complexities in personal injury claims that are not common to other types of claims in the Small Claims Court. Unrepresented claimants may also be deterred by upfront costs that would ordinarily be initially paid by their solicitor.
- Even if people do decide to run a claim, there will be a risk of under-compensation.
- There will also be unintended consequences such as:
 - Courts inundated with claims that would have been dealt with efficiently under the portal system. Delays and increased workload would be further exacerbated by the increase in litigants in person (LiPs).
 - A rise in unmeritorious claims
 - A failure to reduce fraud due to a rise in cold calling by Claims Management Companies.
- The practices of Claims Management Companies need tackling. The Government should consider criminal sanctions directly against the directors of a CMC should they be found in breach of the regulations.
- Fee charging McKenzie Friends should be banned. Evidence from family cases highlights the dangers of McKenzie Friends exploiting the vulnerable for their own agenda, charging for services that the McKenzie Friend cannot even provide, and giving advice that the client wants to hear but that is not necessarily true.

2.6 Introducing a prohibition on Pre-medical offers to settle RTA related soft tissue injury claims

- There should be a ban on pre-medical offers in all personal injury cases.
- These offers create an environment of easy money, allowing fraudulent claims to be settled without the necessary checks and balances.
- There is also a risk of undercompensation for the claimant, as they settle without knowing the full extent of their injuries.
- The ban should be policed by the Financial Conduct Authority (FCA), and there should be a significant monetary fine for those insurers that do not comply.

2.7 Implementing the recommendations of the Insurance Fraud Taskforce

- The CNF should be amended to include the source of the referral of the claim
- The QOCS provisions do not need to be amended so that the claimant is required to seek the court's permission to discontinue less than 28 days before trial.

2.8 Call for evidence on related issues

- Credit hire is an area that must be examined if the Government is serious about reducing costs in RTA claims
- Credit hire must not be looked at in isolation however. There are other areas of the system, such as vehicle repair, where insurer practices are driving up the cost of premiums.
- APIL does not support a system of early notification of claims. This would act as a driver for CMCs to hound potential claimants to pursue their claim.
- There are also many legitimate reasons why an injured person chooses not to pursue a claim immediately.
- Proposals to reform rehabilitation are based on misconceptions and risk undermining the work of the International Underwriting Association (IUA)'s rehabilitation working party and their Rehabilitation Code.
- The proposals would create an environment where rehabilitation is difficult or impossible to access, even where early access to rehabilitation could mean that the genuine claimant has a quicker route to recovery.
- We strongly disagree that the recoverability of disbursements should be restricted. This proposal is purely designed to make all "minor" whiplash claims unattractive to pursue – those with genuine claims will be deterred from bringing a claim.
- The Bareme approach should not be introduced – ultimately, the claimant will be under-compensated.

2.9 Before responding to the specific consultation questions, we set out below why the assumptions underpinning much of the consultation are misconceived. APIL also suggests other areas where reforms could be introduced which would actually achieve the objectives of the Government in this area.

3. Correcting misconceptions

Savings for motorists

3.1 The consultation is premised in significant part on the promise that motorists will benefit from a £40 reduction in their premium. However, this will only be the case, if the insurance industry pass the vast majority of savings onto their customers. Instead, the proposals are likely to result in a significant windfall for the insurance industry, at the expense of both motorists generally, and those that are injured, for the following reasons:

- Insurers have a record of failing to pass on savings to consumers. Data published by the Association of British Insurers (ABI), which represents the collective interests of the UK's insurance industry, shows that the annual cost of personal injury claims to motor insurers has fallen by over 12% (£500 million) since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) - from £4.1 billion in 2013 to £3.6 billion in 2015⁵. However, consumers have not benefited from lower

⁵ APIL analysis of ABI data covering insurer spend on settled bodily injury (motor) claims. The cost figures referred to include insurer spend on damages and legal costs (claimant and defendant)

motor insurance premiums. By 2016, the average car insurance premium had already reached levels not seen since before the introduction of LASPO⁶. The reforms, which involved cutting the costs which could be recovered from defendants in lower value RTA claims, led to lower claims costs for insurers, but not lower car insurance⁷.

- The vast majority of insurers have not committed to pass savings onto premium holders. Even some leading insurers have stated that the Government's proposed reforms will 'not achieve savings for motorists as only a small number of insurers have so far committed to passing the savings on'⁸.
- Suggesting the proposed reforms will lead to significant savings for motorists is highly misleading in light of the Government's recent announcement to increase Insurance Premium Tax (IPT) to 12% in June 2017. The ABI estimates that the Government's three recent IPT increases will add, on average, £26 to the cost of a comprehensive car insurance policy⁹. This will eat into any savings which insurers, and therefore motorists, make at the expense of genuinely injured people.

3.2 Given this evidence, how does the Government propose to deal with insurers who fail to pass on savings? It is simply not enough for Ministers to suggest that if savings are not passed on they will take action. Harriett Baldwin, in response to a written parliamentary question on 5 January 2016 already confirmed that the Treasury has no intention of intervening in such matters.¹⁰

Number of whiplash claims

3.3 The consultation is based on the assumption that RTA-related soft-tissue injury claims are "too high" and are increasing. This is not correct.

⁶ ABI data on average motor insurance premiums (private car) published in October 2016 <https://www.abi.org.uk/Insurance-and-savings/Industry-data/Industry-data-downloads>. This data shows that the average motor premium has increased by over 8% since the introduction of LASPO. Premiums have risen by 13.5% over the past year alone, according to Consumer Intelligence. Accessed December 2016; <http://www.consumerintelligence.com/articles/motor-premiums-rise-again>

⁷ A number of changes were made to the personal injury claims process in 2013. Success fees and ATE premiums were made non-recoverable and the amount of costs recoverable from defendants in RTA portal claims were reduced. In addition, the RTA portal, which operates a system of fixed recoverable costs, was extended to cover claims valued at up to £25,000. The RTA portal had previously covered claims valued at up to £10,000. Accessed November 2016; <http://blogs.lexisnexis.co.uk/dr/the-winners-and-losers-of-the-fixed-costs-regime/>, <http://hsfnotes.com/litigation/jackson-reforms/conditional-fee-agreements-cfas-after-the-event-ate-insurance/>

⁸ In November 2016, Mark Godfrey, Director of Insurance at the RAC, said "the government's whiplash reforms, while welcomed, will not achieve savings for motorists as only a small number of insurers have so far committed to passing the savings on" (Accessed November 2016; <https://www.lawgazette.co.uk/news/autumn-statement-stealth-tax-places-40-premium-cut-in-doubt/5058918.article>).

⁹ Accessed November 2016; <https://www.abi.org.uk/News/News-releases/2016/11/A-hammer-blow-for-the-hard-pressed-insurers-reveal-impact-of-Autumn-Statement-IPT-rise-on-policies>

¹⁰ Written question 20350 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20350/>

- 3.4 Since 2010/11, the number of whiplash claims registered by the DWP's Compensation Recovery Unit (CRU) has fallen by 41 per cent. These claims are at their lowest level since CRU started producing data on their numbers¹¹. See table one¹².
- 3.5 Research shows that the UK has 50% more cars per kilometre of road than the European average, with more than twice the number of cars per kilometre than in France¹³. Given that UK roads are busier and more congested, low speed accidents generating soft tissue injuries are more likely to occur than in other jurisdictions.

Road accidents

- 3.6 A further significant premise on which the consultation is based, is that the number of road accidents is decreasing, while the number of claims increases, despite improvements in vehicle safety.
- 3.7 A considerable proportion of non-fatal casualties are not reported to the police. The Department for Transport has also acknowledged that increasing under reporting of non-fatal accidents is a possibility¹⁴. As a result, the number of people injured in road traffic accidents does not necessarily correspond with the number of reported accidents. This is particularly likely to be the case where people sustain more minor soft tissue injuries.
- 3.8 In reality, UK road casualty levels over recent years "have, at best, plateaued", according to the OECD¹⁵. A number of recent trends point to an increased likelihood of injury. The number of people who hold a full car driving licence has increased by 10% since 2006¹⁶. Indeed, UK roads have never been busier. A record 320 billion vehicle miles were travelled on Great Britain's roads over the past year – 6% higher than five years ago¹⁷. In spite of this, the number of motor related personal injury claims has fallen by 7% since 2011/12¹⁸.

Lack of evidence of fraud

- 3.9 There is no evidence that a high proportion of personal injury claims are fraudulent, as is claimed in the consultation. Nor is there any data on the value or incidence of fraud in personal injury claims.

¹¹ The CRU's data on the number of personal injury claims, broken down by liability type (e.g. motor, public liability) covers the period prior to 2008/09. However, CRU data covering the period prior to 2008/09 is not broken down by injury type (e.g. whiplash, neck, back).

¹² Appendix one on page 47

¹³ Road traffic density per network length, 2014 or latest available year, Organisation for Economic Co-operation and Development (OECD)

¹⁴ Reported road casualties in Great Britain: main results 2015, Department for Transport, September 2016

¹⁵ Road Safety Annual Report, OECD, 2016

¹⁶ Full car driving licence holders by age and gender: England, 1975/76 to 2015, Department for Transport, September 2016

¹⁷ Provisional Road Traffic Estimates Great Britain: October 2015 - September 2016, Department for Transport, November 2016

¹⁸ Number of motor cases registered to the CRU

- 3.10 Data published by the ABI relates to the level of motor and liability insurance fraud *in general*. An analysis of this data shows that, contrary to the Government's account in the 2015 autumn statement, the incidence of general motor insurance related fraud is extremely low. In 2014, and again in 2015, just 0.25 per cent of all motor claims were "proven" (or "confirmed") to be fraudulent¹⁹. As this data relates to *all* motor insurance claims, including, for example, theft and repair claims, only an unknown fraction of these 0.25 per cent of motor claims will relate specifically to a personal injury claim.

Compensation culture

- 3.11 The consultation perpetuates the most common myth that there is a "compensation culture" in the personal injury claim sector. In the last six years alone, there have been two separate Government-commissioned reports which have poured cold water on the idea that such a culture exists in this country.
- 3.12 In 2010, after being asked by Prime Minister David Cameron to review health and safety practices, Lord Young of Graffham said in his report that "the problem of the compensation culture prevalent in society today is...one of perception rather than reality"²⁰.
- 3.13 Over a year later in November 2011, another Government-commissioned report found no evidence for the existence of a compensation culture. Having been asked to carry out an independent review of health and safety legislation, Professor Ragnar E Löfstedt published his report *Reclaiming Health and Safety for All: An independent review of health and safety legislation*. In this report Professor Löfstedt said "the 'compensation culture' (or the perception of it) in the UK has been the subject of several reviews over the last few years, but no evidence has been presented for its existence"²¹. Lord Dyson when he was Master of Rolls recommended that there should be a "substantive educative effort on the part of government, the courts and the legal profession to counter-act the media-created perception that we are in the grips of a compensation culture"²².
- 3.14 Evidence from a recent YouGov survey shows that a clear majority of adults never claim for compensation after an accident²³. The survey found that 64 per cent of adults who suffered a personal injury did not make a claim.

¹⁹ APIL analysis of ABI fraud data

²⁰ *Common Sense Common Safety*, Lord Young of Graffham, October 2010, Page 19

²¹ *Reclaiming Health and Safety for All: An independent review of health and safety legislation*, Professor Löfstedt, November 2011, Page 87

²² Lord Dyson MR Compensation culture: fact or fantasy? Holdsworth Club lecture 15 march 2013

²³ *YouGov Personal Injury 2016, April 2016*

(<https://reports.yougov.com/clients/reportaction/personalinjury16/Marketing?CategoryFilters=&ViewMode=list&IncLicensed=True&IncUnlicensed=True&IncNormal=True&IncPrivate=True&IncArchive=False&IncPreview=False&IncNorm=True&IncLss=True&IncPdf=True&IncExt=True&IncPpt=True&IncXls=True&IncWord=True&IncNews=True&IncDb=True&IncFigures=True&IncTables=True&IncAllText=True&IncBodyText=True&IncTitleDesc=True&IncHeadings=True&IncQuotes=True&IncBullets=True&StartSince=ANY&Language=ANY&NumberContentTypesToInclude=7>)

4. How to realistically reduce costs for motorists

- **Ban cold calling through legislation**

4.1 This should be a priority for the Government. It has already provided a commitment in other areas, such as cold calling targeting pensioners and the same should be done for PI claims. At present the Claims Management Regulator is toothless: unable to get its own house in order. Passing regulation to another body does not go far enough and an outright ban should be implemented as soon as possible. A ban would tackle the 'mining' of claims and reduce the incentive and potential for fraudulent claims.

- **Outright ban on all pre-medical offers**

4.2 APIL welcomes this move to crackdown on 'pre-med' offers but it must be implemented across the board – for claims of all kinds and all values. The practice gives the impression of easy money and a ban would deter opportunistic claimants.

- **Tackle credit hire, repair costs and storage charges**

4.3 It is common knowledge that insurers are engaged in deals with hire companies and repairers which allow such companies to deliberately over-inflate costs payable by the at fault party.

Case Study 1

One consumer reported that following an accident, which was not her fault, she was instructed by her insurers to get a quote for the repair of her vehicle. She took her vehicle to an insurer approved garage that quoted £1,700 for repair to the damaged bumper and said there was damage to the back of the lights that would also need repairing. The at-fault insurer offered £1,200 towards the repair.

Despite raising arguments that she just wanted the vehicle repairing and did not want the money, insurers increased their offer and sent her a cheque for £1,500. The vehicle was taken to a local garage which assessed the damage and said it would cost her £120 plus VAT for a new bumper and there was no damage to the lights.

4.4 Referral fees are still paid to insurers from credit hire transactions. Insurers used to provide a courtesy car to drivers at their own expense. Now, they automatically refer drivers to expensive credit hire companies in return for a referral fee. The high costs of the credit hire then have to be paid by the at fault insurer. This has pushed motor premiums up across the industry. Indeed, the CMA has estimated that the net detriment to consumers from credit hire amounts to £84 million per year²⁴.

4.5 Credit hire is only part of the problem, inflated tow charges and storage cost, high component costs and inappropriate commercial practices all contribute to this toxic

²⁴ Private motor insurance market investigation: final report, Competition & Markets Authority (CMA), September 2014

process. All of these practices contribute to increasing premiums, and innocent injured people should not be the scapegoat.

- ***Third party capture***

4.6 This insurance industry practice which generates claims against itself should be banned. At-fault insurers contact the injured party and offer to settle (and potentially under-settle) the claim directly with the injured party who is left without recourse to independent legal advice on the claim. Medical examination of the client is rarely, if ever, undertaken. It is a murky and unregulated practice that fuels the perception of easy money and deals to be done.

- ***Prevention of accidents***

4.7 We are surprised that nowhere in the consultation is the issue of accident prevention addressed by Government. The UK Government has failed to produce an effective prevention strategy. This could be done by adopting more variable speed limit areas on our motorways allowing smoother traffic flow or more 20mph zones in our towns and cities. Prevention of tailgating on dual carriageways and motorways would also prevent accidents occurring. APIL has campaigned for such measures to be introduced.²⁵

4.8 Proper research is required into prevention of RTAs. This would reduce the number of accidents, producing fewer injuries which in turn would reduce the burden on our already over-stretched NHS services. It would also take into account the impact upon local businesses following particular traffic delays.

5. Part 1: Defining RTA soft tissue injuries to be excluded from PSLA or paid a fixed amount

Definition of RTA related soft tissue injury claims

Q1) Should the definition in paragraph 17 be used to identify the claims to be affected by changes to the level of compensation paid for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and the introduction of a fixed tariff of proportionate compensation payments for all other such claims?

5.1 We assume by 'definition in paragraph 17' that the Government means the definition provided at paragraph 23 of the consultation document. This is the definition found within the Pre-action Protocol for Low Value Road Traffic Accident Claims at paragraph 16(A).

5.2 If the definition at paragraph 16(A) of the protocol is used to identify the claims to be affected by the changes within this consultation document (should they be introduced), it would benefit from being tightened up. The wording identified was drafted for a different purpose, namely Medco. This was to ensure that a certain type of medical report was obtained. It was deliberately drafted to be wide enough to cover other types

²⁵ See our tailgating campaign: <http://www.apil.org.uk/safetywatch-campaigns>

of soft tissue injury aside from whiplash, including injuries to the wrists, arms, knees and ankles.

- 5.3 In relation to the latest reforms the Government is particularly keen to address whiplash claims²⁶ and intends to use the definition in the Protocol at 16 (A) for a different purpose, namely to identify claims to be affected by changes to the level of compensation. In this case we would suggest that it is tightened up to reflect the Government's intention limiting the impact to whiplash claims only.

Q2) Should the definition at paragraph 17 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim?

- 5.4 There is no evidence to support the assertion at paragraph 27 of the consultation document that there will be future claims inflation/displacement in the area of primary psychological injury following implementation of the new reforms. We object to the further broadening out of the definition to incorporate primary psychological injuries. Whether there will be an increase in claims for primary psychological injury is subjective, and claimants with genuine psychological injuries should not be prevented from being able to obtain compensation. The burden of proof remains on the claimant to produce compelling medical evidence.

Definition of "minor" claims

Q3) The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims. Should the scope of minor injury be defined as a duration of six months or less?

Q4) Alternatively should the government consider applying these reforms to claims covering 9 months duration or less?

- 5.5 We believe that the premise for recommending such a reform is flawed, for the reasons set out at section three of this response. Reducing the level of compensation is most likely to dis-incentivise genuine claimants for whom pursuing a claim will not be worthwhile. We do not consider that dis-incentivising minor, but otherwise valid personal injury claims to be a legitimate objective for the Government to pursue. Moreover, for those willing to bring a fraudulent claim in the first place, there is still nothing to stop them exaggerating that claim in order to secure higher damages. See section 6 below in respect of our objection to this proposal
- 5.6 We do not agree with defining claims simply by the duration of the injury. The seriousness of an injury should be determined by a number of factors, including the impact that the particular injury has had on the individual's daily life.

²⁶ Paragraph 22 of the consultation document.

- 5.7 As an indication of what is currently taken into account when calculating damages for “minor” claims, the Judicial College Guidelines state that whilst the duration of symptoms will always be important, the level of award will also be influenced by:
- the severity of the injury;
 - the intensity of pain and consistency of symptoms;
 - the presence of additional symptoms;
 - the impact of the symptoms on the injured person’s ability to function in everyday life and their ability to work;
 - the extent of any treatment required, and;
 - the need to take medication to control symptoms of pain and discomfort.
- 5.8 The effect that a whiplash injury has on a person very much depends on that individual’s own circumstances, and only when all these factors are considered can damages for pain, suffering and loss of amenity be calculated to ensure that the person is put back, as closely as possible, to the position they were in prior to their accident. A “minor” whiplash injury may result in a mother being unable to pick up her child, a plasterer being unable to carry his load, a surgeon being unable to operate on her patients or a soldier being incapable of carrying out his duties. An individual may be particularly affected by a “minor” whiplash injury because they live in a block of flats, and their injury means that leaving and coming back home via stairs causes them pain and discomfort.
- 5.9 Innocent people who have been injured through no fault of their own should not have their pain and suffering dismissed, or be “fobbed off” by a derisory amount, because their injury does not reach a set threshold of duration.

Case study 2

- **Impact of “minor” whiplash, factors taken into account to ensure full compensation**

***Rolfe v Rohman*²⁷**

Mr Rolfe was correctly proceeding along a road when the defendant pulled out of a side junction and collided with the rear of Mr Rolfe’s car. Mr Rolfe suffered soft tissue injuries to his neck, shoulders and left elbow, lasting 5-6 months. The injuries caused him discomfort at work for six weeks in relation to lifting objects. He was unable to take part in any leisure activities for six weeks, and suffered from sleep disturbance as a result of his pain. The compensation he was awarded took into account the effects that the soft tissue injury had on the individual, and his daily life

Final award for pain, suffering and loss of amenity: £4,306

²⁷ Rolfe v Rohman, unreported, Sunderland County Court, 22 July 2016

6. Part 2: reducing the number and cost of minor RTA soft tissue injury claims

Removal of compensation for PSLA for all minor RTA related soft tissue claims

Q5) Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation?

- 6.1 Throughout the consultation document, the Government stresses that the aim and driving force behind the proposals is to reduce the number and cost of minor RTA related soft tissue injury claims. As explained above, whiplash claims are declining, there is little evidence of actual fraud and there is no compensation culture. The starting premise of this section is therefore fundamentally flawed.
- 6.2 We strongly disagree with the proposal to remove compensation for pain, suffering and loss of amenity for “minor” claims. To do so would take English²⁸ law back centuries, undermining the fundamental principle that claimants should be fully compensated for their injuries. The right to claim general damages for a tort has been recognised in English law since at least *Livingstone v Rawyards Coal* (1880) 5 App Cas 25, 39, per Lord Blackburn²⁹.
- 6.3 The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in Clerk & Lindsell on Torts, 18th edition, para 1-25, as observed by Hale LJ (as she then was) in *Parkinson v St James and Seacroft University Hospital NHS Trust*³⁰. “The fundamental principle, plain and incontestable, is that every person’s body is inviolate” (*Collins v Willcock*³¹). Hale LJ went on to explain that included within this right are two others. One is the right to physical autonomy: to make one’s own choices about what will happen to one’s own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interferences with them.”
- 6.4 Throughout the consultation document, the Government stresses that the aim and driving force behind the proposals is to reduce the number and cost of minor RTA related soft tissue injury claims. The removal of damages for all “minor” RTA soft tissue injury claims is disproportionate to this aim, and would be contrary to EU law. In the case of *Petillo v Unipol*, Advocate General Wahl explained that if the Italian system for compensating minor physical injuries resulting from motor accidents had provided for “insignificant or minimal” general damages, it would have been incompatible with the relevant Directives governing motor insurance³². This was also accepted by the full Court. Moreover, in the view of the European Court of Justice, “it is for the national court to determine and possibly to limit the compensation in each case with due regard

²⁸ Where we refer to English law throughout this document we mean the law in England and Wales

²⁹ See McGregor on Damages, 19th Ed, para 2-002.

³⁰ [2001] EWCA Civ 530

³¹ [1984] 3 All ER 374

³² Para AG81.

for the circumstances, on the basis of the general principles concerning civil liability,³³ and the amount of a victim's compensation may be limited 'only in exceptional circumstances... on the basis of an assessment of his particular case.'³⁴

- 6.5 People who have been needlessly injured by the negligence of others should be entitled to claim compensation to put them back in the position that they would have been in, but for the wrong committed against them— the majority of genuine claimants should not be denied this right in order to prevent the very few dishonest claims that are made. The Transport Select Committee, in its report of 15 July 2013, set out that “innocent victims of motor accidents should be able to claim compensation for injuries which they have suffered through no fault of their own”.
- 6.6 The Transport Select Committee's 2013 report also pointed out that there are more proportionate measures available to tackle fraudulent claims. Banning pre-medical offers is one such measure and we are pleased that the Government is considering this proposal in the consultation document. Prevention Claims Management Companies from cold calling for personal injury claims is also an obvious step to curtail fraudulent and exaggerated claims. We are extremely disappointed that the Government has not put forward proposals to ban this tasteless and intrusive practice.
- 6.7 Accordingly, we would invite the Government to reconsider its position and abandon the proposals to abolish or standardise and severely curtail the compensation that can be awarded for minor RTA-related soft tissue injury.

Introduction of a fixed sum of compensation for minor RTA related soft tissue injury claims

Q6) Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation.

Q7) Please give your views on the government's proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and at £425 if the claim contains a psychological element.

- 6.8 We do not agree that there should be a fixed amount of compensation for pain, suffering and loss of amenity for minor claims. For the reasons set out above, we believe that these proposals are a disproportionate response to the issue that the Government seeks to resolve, namely the allegedly high number and cost of personal injury claims.
- 6.9 To introduce a fixed sum for all “minor” claims will result in under-compensation in the vast majority of cases (the consultation itself states that the average award, which is based on the Judicial College Guidelines and therefore reported cases and judicial

³³ Para 48, *Candolin and others v Vahinkovakuutusosakeyhtiö*
Opinion of Advocate General Geelhoed delivered on 10 March 2005
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=54103&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=538471>

³⁴ *Candolin and Others* (cited above, see paragraph 30 of the judgment)

discretion, is £1,750). To say, at paragraph 41 of the consultation, that the measure will protect against under-settlement by making claimants aware in advance of the appropriate level of compensation they are due, is nonsensical. £400 or £425 will not be an “appropriate” level of compensation in most “minor” cases, particularly if the sole determining factor of “minor” is the duration of the injury.

- 6.10 The figures proposed are derisory, minimal and wholly inappropriate. To add further insult, the figures quoted in the consultation document are based on the Judicial College Guidelines 12th Edition, published in September 2013. This is out of date: the 13th edition was published on 17 September 2015 – this up to date version is used by the judiciary and practitioners to ensure that those who are injured receive the appropriate levels of compensation. The figures in the 13th edition were subject to a 3.4 per cent increase on the 12th edition figures – a decision taken by the working party chaired by The Hon. Mr Justice Langstaff, to ensure that claimants continue to receive sufficient compensation for their injuries. The figures in the consultation document, therefore, have already been considered by the very judges who hear these cases, as being too low.
- 6.11 The Judicial College Guidelines also demonstrate the variation in awards for injuries lasting 0-6 months – there is no “one size fits all” amount of compensation awarded in these cases. Sometimes, a few hundred pounds is deemed the appropriate compensation for pain and suffering in the particular case. However after listening to evidence as to how the injury has affected the claimant, judges can and have awarded compensation of around £3,630. This compensation has been judged to be fair and just in the circumstances and has allowed the claimant to be put back in the position they were in prior to the accident. Soft tissue injuries can have an impact on many aspects of the injured person’s life, for varying amounts of time. Only once all these impacts are taken into account can a person receive full and fair compensation for the injuries they received through no fault of their own³⁵. To take away judicial discretion and set a single figure, particularly one as low as £400, will lead to under-compensation in the vast majority of circumstances.
- 6.12 The public recognise that such a level of compensation is unfair. In a Consumer Intelligence poll, 64% of respondents said that legitimate whiplash claimants deserved to receive over £500 in compensation³⁶. Does the Government truly believe that it is fair to award someone who has suffered a three hour delay to their flight from Manchester to Barcelona the similar level of compensation to those suffering pain as a result of a six month soft tissue injury?³⁷

³⁵ See paragraphs 5.5 – 5.9 and Case Study 2

³⁶ Accessed December 2016; <http://www.consumerintelligence.com/press-releases/consumers-doubt-premiums-will-fall-from-whiplash-reforms>

³⁷ Flight delay compensation awards € 400 for a three hour delay when travelling more than 1,500Km in the EU.

Case Study 3

- **Importance of judicial discretion**

In *Donnelly v QBE Insurance*³⁸, the claimant was a front seat passenger in a car. A van driven by the defendant collided with them, and jolted her within the confines of her seatbelt. The medical expert reported that the claimant suffered soft tissue injuries to her neck and right shoulder. Symptoms were of moderate severity and were at their most acute for two months post-accident. The claimant's ability to attend to her own personal care and to that of her children was restricted for three weeks. Her ability to carry shopping was restricted for one month. Her sleep was disturbed, on account of pain, for six weeks, and her social life and capacity to undertake chores was restricted for the same period. Taking into account the full effect of the injury, the judge awarded £2,500 for pain, suffering and loss of amenity.

- 6.13 As is demonstrated by the above case, soft tissue injuries can have an impact on many aspects of the injured person's life, for varying amounts of time. Only once all these impacts are taken into account can a person receive full and fair compensation for the injuries they received through no fault of their own.

Claims containing a psychological element

- 6.14 We question the reasoning behind the addition of £25 to the amount of damages awarded for "minor" claims where there is a psychological element. The sum of £25 has no logical basis and we fail to see how the figure was arrived at. It is derisory and insulting to the injured person. This is particularly so when it is taken into account that people can claim compensation if their train is half an hour late, and that the Government announced in its 2015 Autumn Statement that the late train compensation scheme was to be extended, so that people will be able to claim if their train is 15 minutes late ("Delay Repay 15").
- 6.15 A person whose train from London to Glasgow is 30 minutes late can currently be compensated up to £91 under the scheme³⁹. If "Delay Repay 15" is rolled out across all rail providers, a person whose train to Glasgow from London is delayed by 15 minutes would be compensated £45. It is absurd that a person who has to wait for 15 minutes, or even half an hour longer on a train station platform should be deemed worthy of more compensation than, for example, a person who suffers a period of travel anxiety in addition to soft tissue injuries, as a result of another person's negligence. A late train may be an inconvenience, but the injured individual has to deal with the impact of the anxiety on their daily life – they may be unable to drive their car for a number of weeks, or they may become irritable and upset which then has an effect on their home life. A £25 additional payment will certainly not take into account the effects that the associated psychological injury will have on the individual, and will

³⁸ *Donnelly v QBE Insurance*, unreported, Birmingham County Court, 5 June 2016

³⁹ Virgin Trains London Euston to Glasgow Central, Anytime Single is £182.50

not ensure that there is compliance with the general principle of full and fair compensation.

- 6.16 If a solicitor were to knowingly under settle a case at present they could be accused of negligence. This proposal seeks to promote under settlement in every case and should not be pursued.

Process for assessing injury duration

Q8) If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the “diagnosis” approach should be used.

Q9) If either option to tackle minor claims is pursued, please give your views on whether the “prognosis” approach should be used.

Q10) Would the introduction of the “diagnosis” model help to control the practice of claimants bringing their claim late in the limitation period?

- 6.17 The existing model – the prognosis approach - should be used, to ensure that claimants have early access to rehabilitation which will assist in a quicker recovery. This model works to remove the treatment burden from the overworked NHS and places the responsibility on the negligent party. The prognosis model fits in entirely with the work that has been carried out to date to establish a system to accredit suitable experts. If the diagnosis model is used, the claimant will have to wait six months before obtaining a medical report so will have to wait at least six months to access rehabilitation. Early rehabilitation is key in helping the claimant to recover as quickly as possible, limiting the impact that the injury has on their life, and potentially reducing the sums payable in compensation as a direct consequence of their quicker recovery.
- 6.18 We do not see how the diagnosis approach would deter those who exaggerate their claim. Because the diagnosis of whiplash tends to rely largely on the credibility of the claimant, having to wait until the 6 month mark is not likely to deter those who were going to exaggerate their claim anyway. We also fail to see how the introduction of the diagnosis approach will help to control the practice of claimants bringing claims late but within the limitation period, and in any event do not see that this is a “practice” which needs to be “controlled”. There are numerous reasons why a person may bring a claim late, but within the limitation period, and this does not automatically mean that the person is fraudulent. These include a concern about suing an employer (and the risk to their employment as a consequence), a reluctance to make a claim against a relative or friend who caused their injury (as the driver in a RTA, for example), a genuine desire to ‘not make a fuss’ until it becomes clear the injury is more serious than first thought, being dissuaded from making a claim for fear of being part of a perceived ‘compensation culture’ – a perception driven by both press stories and government statements.
- 6.19 We also query whether the cost of the medical report in the diagnosis approach would remain recoverable, even if the report concluded that the symptoms had subsided.

7. Part 3: Introduction of a fixed tariff scheme for other RTA related soft tissue injuries

- 7.1 A fixed tariff scheme for other RTA related soft tissue injuries fails to take into account the ways in which the same injury can affect individuals in different ways. We strongly disagree with this proposal: the court must be free to award compensation to genuine claimants by taking into account all of their circumstances.

Q11) The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided?

Tariff systems inherently pose a risk of under-compensation

- 7.2 Tariff schemes do not tend to allow for a full investigation of the injury, and claimants are often offered an award which does not adequately reflect the full extent of their injuries. The dangers of under-compensation when damages are assessed via a tariff are demonstrated by the Criminal Injuries Compensation Scheme (CICS) and the Armed Forces Compensation Scheme. In many cases under these schemes, the whole of the injury is not taken into account at first instance, and appeals are necessary to ensure that the right evidence is gathered and the claimant receives the correct amount of compensation for the injuries they have suffered.

Case Study 4

- **Risk of under-compensation through tariff – Criminal Injuries Compensation Scheme**

MB

An applicant under the CICS was initially offered £4,350. This did not take account of the brain injury and mental injury suffered. The applicant appealed, and once further medical evidence was obtained from a psychologist and neuropsychologist he was awarded £63,745. This further medical evidence was only obtained because the applicant had instructed a solicitor (whose fees were paid by the applicant) who noticed comments within a medical report written by an Accident and Emergency doctor that the applicant could suffer continuing medical problems in the future. As a result of these comments, the solicitors investigated further and persuaded the CICS Tribunal to direct further expert medical evidence, which then fully illustrated the severity of the injuries suffered.

Case Study 5

- **Risk of under-compensation through tariff – Armed Forces Compensation Scheme**

R

An applicant attempted to claim under the Armed Forces Compensation Scheme, without

legal representation, for a permanent back injury with neurological symptoms. Veterans UK would not accept that the back injury was permanent with extensive symptoms, and awarded £10,000. The applicant then instructed a solicitor, a proper investigation was carried out and the necessary medical evidence was obtained to demonstrate the full extent of the injury. The claim was successfully appealed and the applicant obtained a further £30,000 plus a guaranteed income payment of 30% of his final salary which is to be paid every year for the rest of his life.

- 7.3 If all the proposals in this consultation are implemented, it is likely that most claimants will be required to apply for compensation under the RTA tariff without legal representation. They will be required to obtain one medical report, which will focus solely on establishing that there has been a soft tissue injury and its likely duration. It is extremely unlikely that claimants will have the knowledge or even permission, to obtain any further reports to establish the extent of their injuries in more detail. Some claimants will not be able to afford a report if they are off work as a result of the accident. While there are meagre attempts within the proposed tariff to take account of “non-standard” soft tissue injuries – i.e. the proposed 20 per cent uplift, and the additional unacceptably low amount for psychological injury, it will be extremely difficult, particularly for claimants without legal representation, to prove that they qualify for these additional amounts.
- 7.4 Further, even if a full investigation of the injuries can be carried out, the proposed RTA tariff awards are solely based on the duration of the injury – as stated at question 3 and 4, this means that under-compensation is almost guaranteed, as the same injuries have different effects on different individuals.

Comments on RTA tariff figures

- 7.5 The sums itemised in the tariff are minimal and insignificant. They offer no comparison with awards currently made by the courts which always assess the individual claimant’s circumstances.
- 7.6 The tariff also features single figures, rather than banded amounts for each injury bracket. There must be variation in awards, because the same injuries affect people differently⁴⁰. The fact that the judicial college guidelines provide a range of awards demonstrates that there is not a one size fits all approach to compensating for this type of injury. There must be flexibility, and there must be judicial discretion. Again, there is the nonsensical reasoning within the consultation⁴¹ that single figures will provide protection against under-settlement – having a single figure is almost guaranteed to lead to under-settlement, as there is no room to tailor the award to the individual and reflect how the injury has affected them.

⁴⁰ See paragraphs 5.5 – 5.9 and Case Study 2

⁴¹ Paragraph 59 of the consultation

- 7.7 The consultation fails to offer any indication that the tariff will be reviewed and raised periodically to ensure awards keep pace with inflation. At present, the Judicial College Guidelines are reviewed every two years to keep pace with inflation, to ensure that claimants are awarded the compensation to put them as closely as possible back to the position they were in prior to their accident.
- 7.8 A tariff solely for RTA soft tissue claims is discriminatory because it singles out drivers and passengers in motor vehicles for less favourable treatment. There will be differences between compensation received for the same injuries but in different circumstances. Those injured in road traffic accidents will not receive full and proper compensation. Someone who has received an identical soft tissue injury in an accident at work, though, will be permitted to go to court and receive an amount of compensation that has been decided based on evidence of how the injury has specifically affected him. This is highly unjust. The person injured in the road traffic accident will effectively be penalised for the manner in which they acquired their injury – because of the assumptions made (by the Government and by society in general) about those who claim for soft tissue injuries in road traffic accident claims.
- 7.9 APIL is opposed to the introduction of the tariff and encourages the Government to maintain the current system of judicial guidelines combined with individual judicial discretion to ensure innocent victims of road traffic accidents can receive full and proper compensation.

Q12) Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?

- 7.10 If, despite the issues raised in paragraphs 7.1 – 7.9, a tariff is to be introduced, here must be a provision for an uplift in exceptional circumstances. The only means of ensuring that the injured person receives an appropriate award in the circumstance is to allow judicial discretion, without restriction of the judiciary's ability to make an informed decision by imposing an arbitrary limit. Imposing an uplift of up to 20% will inevitably mean that the maximum will only be possible if the case goes all the way to a final hearing. Including a standard limiting a discretionary uplift to 'exceptional circumstances' will create an impossibly high hurdle for claimants to overcome.

8. Part 4: Raising the small claims track limit for personal injury claims

Q13) Should the small claims track limit be raised for all personal injury or be limited to road traffic accident cases only?

- 8.1 The small claims court is no place for the personal injury litigant, and if the limit is increased it will severely restrict access to justice for genuine claimants. It will not stop fraud. We strongly disagree with the proposal that the small claims track limit should be raised for personal injury claims.

Deterring genuine claimants

Uneven playing field

- 8.2 Personal injury claims are unlike other claims in the small claims court, in that the defendant is almost always represented by a well-resourced insurance company, which will be a “repeat player” in the court environment and which will always fund representation for the defendant. In contrast, because there is no provision for costs to be recovered from the other side in the event that the claim is successful (CPR 27.14), small claims litigants tend to have to represent themselves, without the help of a legal professional. This creates an uneven playing field, which, in the case of personal injury, may deter the genuine claimant from seeking redress at all. Research for APIL’s 2012 whiplash report⁴² found that 70 per cent of people would not want to pursue a whiplash claim without an independent solicitor.

Daunting claims process

- 8.3 Unrepresented claimants will be daunted by the claims process. The process involves obtaining relevant documents, obtaining a medical report and proving special damages. It is doubtful that most claimants would know where to begin doing any of those things. The process is more complex than the Government might suggest. A lay claimant would need to prove his or her case against a well-resourced unsympathetic liability insurer whose sole duty is to restrict their exposure to risk and save money for its shareholders. In a meeting between APIL, FOIL and Her Majesty’s Association of District Judges in April 2016, the District Judges expressed concern about how litigants in person will cope with e-filing. There was discussion about litigants in person currently sending everything by recorded delivery to the court because they simply were not aware of how to file documents online. There was concern that unaided, litigants in person could fall foul of the strict rules in this area.

⁴² <https://www.apil.org.uk/files/campaigns/the-whiplash-report-2012.pdf>

Case study 6

- **Uneven playing field**
- **Daunting claims process**

TP

The claimant was working at the defendant's factory via a recruitment agency. He had an accident when a trolley he was pushing toppled over. He suffered soft tissue injuries to the spine and, as he was on a zero hours contract, had to decline offers of work on days when the pain was bad. After researching on the internet, he made a claim against the defendant for £4,500 representing general damages and loss of earnings. The third party insurer denied liability on the basis that the accident was the claimant's own fault.

The claimant then issued proceedings. On the claim form, he recited the accident circumstances and the damages he was seeking. He did not obtain a medical report to support his injuries. The defendant stated that the claim was not properly pleaded and was not supported by any medical evidence, and in any event, the defendant was not liable. It was at this point that the claimant decided to consult a solicitor, as he simply did not know what to do next. The claimant was reluctant to instruct a lawyer but ultimately felt that he had no choice.

Solicitors now acting for the claimant have viewed third party insurer documents as well as the locus of the accident, and take the view that there are numerous statutory breaches. Since starting the claim, the claimant has had to miss a total of 35 shifts and the injury is still effecting his daily living nine months post-accident. Solicitors acting for the claimant suggest that this is a case that a competent claimant solicitor would expect to win, but liability has been firmly denied.

Lack of help and support available

- 8.4 The Government accepts, at paragraph 100 of the consultation, that some claimants may not fully understand the process, but it submits that there is a significant amount of help and support to all claimants who act in person. This "help and support" is not a substitute for proper legal advice and, as evidenced by the problems in the family court, leaflets and guides are clearly not sufficient to help claimants navigate the court process alone. In 2014, the Commons Justice Committee heard evidence from, among others, the Family Law Bar, Resolution and the Association of Lawyers for Children, during an enquiry into the impact of the cuts to civil legal aid. The committee heard that litigants in person had difficulties understanding the law, preparing their cases and marshalling their information and arguments in court. Assistance given to unrepresented parties by the judge, opponents, law centres and others was called a "sticking plaster", as parties are denied the strategic support provided by a lawyer.

Complexities

- 8.5 We disagree that “most minor PI cases are straightforward enough to be brought without the need for legal representation”⁴³. One of the biggest problems is litigants in person being able to identify the correct defendant to sue. This will have a significant impact on the legal process. Claims up to £5,000 are not straightforward. In 2013, APIL carried out a survey of its members to find out the areas of complexity present in personal injury claims with a value of up to £5,000. The survey identified a large number of issues which regularly contribute to complicate “lower value” personal injury claims, such as a complete denial of liability, allegations of contributory negligence, a refusal to negotiate, disputes on the facts, pre-existing medical conditions. Almost by definition, those cases that reach Court are the most complex, because otherwise they are likely to be settled. Unrepresented claimants will be unable to deal with the majority of these complexities without the help of a solicitor.

Case study 7

- **Defendant behaviour**
- **Dispute on liability**
- **Arguments on causation**

SD

This is a highway tripping case accident 4 November 2013 which was submitted onto the portal 5 December 2013. Liability was denied 16 April 2014. Section 58 defence (regular inspection) was put forward and the insurers maintained that the Council had a robust system of inspection and were unaware of the defect prior to the accident occurring. Liability was fought on the grounds that inspection records and inspection regime demonstrated that not only should the Council have picked up upon the defect but also they may very well have employed the wrong frequency of inspection.

Eventually on 22 July 2015 the defendant responded on liability offering to apportion liability 50-50. After negotiation a 75-25% split on liability was agreed on the 30 June 2016 (almost three years post-incident and some 26 months after the initial denial of liability).

The claimant sustained a soft tissue injury to the knee, for which the orthopaedic expert confirmed recovery from by six months post-accident. The claimant required care and assistance from friends and family for three months post-accident as she could not carry out her normal household tasks, chores or attend to her own personal hygiene.

The medical report and schedule of loss were disclosed to the Insurers on the 12 May 2016 and the insurers then disputed the issue of causation and wanted sight of her medical records before considering the settlement. The matter eventually settled for £2,283 (following a 25% reduction) on the 18 November 2016 (just over three years post-accident) and following the issuing of proceedings.

Total Settlement: £ 2,283.

⁴³ Paragraph 98 of the consultation document

Case Study 8

- **Denial of liability**
- **Complex disclosure**
- **Issues of causation**
- **Requests for defendant expert**

CE

CE suffered blistering, erythema and scarring to her face following laser treatment at a beauty salon. The incident occurred on 2 February 2013. A letter of claim was sent on 21 May 2013 and liability was denied. The disclosure of documents was substantial and technical due to the allegations regarding use of the laser machine.

The defendant also raised issues of causation alleging that the claimant had received Botox treatment that had caused the scarring and not the treatment in question. The claim was issued 1 February 2016 and the defence filed 13 May 2016.

The defendant sought permission to reply on their own medical evidence. This will not be granted by the court.

The defendant made an offer to settle after trial was listed for £1,250. This was accepted.

Case Study 9

- **Denial of liability**
- **Failure to comply with the protocol**

AB

The claimant was a tenant in specialist accommodation for young parents. The window frames were in poor condition and routinely leaked. When it rained, rainwater penetrated through the frames. Electricity in the flat routinely cut out due to water and damp penetrating the electric sockets and plugs. The claimant was unplugging an electric baby monitor when she suffered an electric shock causing her to be thrown across the room. The accident occurred on the 10 December 2012

She suffered soft tissue injuries to neck and back lasting for 10 months. A soft tissue injury to head, burns to fingertips and 12 months anxiety about using electrical items. She also required assistance with getting in and out of the bath, dressing, looking after her 14 month old toddler, cooking, shopping and cleaning.

A letter of claim was sent on 8 January 2013. On 30 April 2013 liability was denied on the grounds that there had been no prior concerns or complaints. The claimant requested additional documents 3 May 2013 following protected discussions the claimant made a pre action disclosure application 25 September 2013. The defendant's final disclosed documents on 5 October 2013 showing complaint records, repair works etc which confirmed that the sockets were not fit for purpose and that condensation and water leaking were problems for several years prior to the accident.

Liability remained in dispute and court proceedings were issued on 30 January 2014, the defendant failed to respond and judgement in default was entered 14 March 2014. The claim eventually settled for £3,000.

Upfront costs

- 8.6 Litigants will also be deterred from bringing claims because they are unable to afford to pay upfront costs associated with running the case, such as court fees and medical reports. Not only do solicitors play a vital role in ensuring a level playing field and advising on the merits of a case, they are also able to pay the initial costs of running the case, which are recouped from the losing party. Without a solicitor, the litigant will be left to fund these costs upfront.
- 8.7 Paragraph 78 of the consultation states that court fees are not onerous. A claim valued at between £3,000 and £5,000 will have fees of up to £205 for a court issue fee, £335 for a hearing fee and £180 for a medical report. Litigants may decide that they are simply unable to afford to bring the claim. The paragraph also states that if the claim settles prior to the hearing date in favour of the claimant, then all or part of the court fee can be recouped. While this is the case currently, from 6 March 2017, the Civil Proceedings Fees Order 2014 will be amended so that it will no longer be possible to obtain a refund in a small claims, fast track or multi-track case in the High Court or county court where the case is settled or discontinued⁴⁴. If a claimant knows that they have to pay £335 upfront, and then they risk losing this if the case settles before there is a hearing, they are likely to be put off bringing a claim in the first place. Making the cost of the medical report and other disbursements unrecoverable (as is proposed at paragraph 147 of the consultation) would provide an even greater disincentive to claim and prevent access to justice.

Risk of under-compensation

- 8.8 Claimants who are not deterred and do decide to pursue their cases in the small claims court, will be at risk of undercompensation.
- 8.9 Unaided, litigants in person will be required to put together a schedule of loss. It is highly likely that without proper legal advice and assistance, claimants will struggle to do so, and are likely to miss items for which they would be entitled to claim. We remain concerned that if a litigant in person inadvertently overclaims they could have their claim dismissed and be found to be fundamentally dishonest. There are also pitfalls surrounding contractual sickpay and private healthcare treatment costs. The claimant, if successful, would usually be required to reimburse their employer contractual sick pay, and would also be required to pay back private healthcare costs. If they fail to include claims for these items in their schedules of loss, they will have to pay the costs out of their own pocket, leading to further undercompensation.

⁴⁴ <http://www.legislation.gov.uk/uksi/2016/1191/made>

- 8.10 In relation to RTA soft tissue injuries, the introduction of a fixed tariff is not the way to address under-compensation. As identified above⁴⁵, having a set amount for pain, suffering and loss of amenity means that the individual's circumstances are not taken into account and the claimant is more likely than ever to receive an amount that does not fully compensate them.

Unintended consequences

Impact of rise in small claims limit on the court system

- 8.11 The small claims track is simply unsuitable for personal injury litigants. Various sections of the CPR are excluded from the small claims track to simplify the procedure. These include disclosure and inspection, evidence (apart from at the court's discretion), experts (again, subject to discretion), part 18 further information requests, Part 36 offers to settle, general rules about hearings (Part 39). These rules help to incentivise settlement and if personal injury claims are forced into a system without these rules, cases that would not have gone to court in the current system will inevitably end up there. Before even taking into account the effects of a rise in litigants in person, and a rise in unmeritorious claims⁴⁶ there will already be huge delays in the small claims court purely because of the huge increase in claims that now end up in court which previously would not have done.
- 8.12 The current system, on the other hand, with road traffic accident, employers' liability and public liability claims proceeding through the portal, ensures efficiency, and access to justice at a proportionate cost.
- 8.13 We note that at paragraph 7.46 of the Impact Assessment, the Government proposes to use the existing portal to deliver the small claims system. We set out below at paragraph 12.22 why this is not a feasible solution.
- 8.14 District Judges have raised concerns that the current court system would be inundated with thousands of additional small claims if the proposals were to go ahead, and this would be exacerbated if in fact litigants are unrepresented. The burden on court resources will increase, in terms of boxwork and judicial time to hear cases, as claimants will be required under the Civil Procedure Rules to attend court in person to prove their case, rather than a short hearing on paper with just advocates present⁴⁷.
- 8.15 It is well documented that there has already been a rise in litigants in person in family cases since the 2012 legal aid reforms – the National Audit Office reported a 22% increase in cases involving contact with children (*Children Act 1989* private law matters) and a 30% increase across all family court cases (including those that remain

⁴⁵ Paragraphs 5.5 – 5.9 and Case Study 2

⁴⁶ See paragraph 8.17

⁴⁷ *The impact of raising the small claims limit for personal injury to £5,000 which will result in moving such claims from the RTA portal into the small claims court and thereafter the online court, and the necessity to consider the potential effect of the same upon HMCTS resources and the reform programme* written by District Judge Karen Doyle. Published in HM Association of District Judges Bulletin. Provided to APIL by HM Association of District Judges April 2016

eligible for civil legal aid) in which neither party had legal representation⁴⁸ in the family courts. In a meeting with APIL and the Forum of Insurance Lawyers in October 2011, HM Association of District Judges confirmed that the reduced eligibility for legal aid in family cases had seen a huge increase in Litigants in Person. As cases take longer because there is no “professional buffer” between the parties and the court, there has been a knock on effect on the listing of other cases.

- 8.16 Lady Justice King, in the Court of Appeal, recently commented on the “tortuous” progress in a dispute between two family members where neither party had representation. In the case, the judge and court staff were bombarded with applications and informal and unfocused emails, and both parties refused to accept any ruling or decision of the court. The court was eventually forced to make orders that neither party could file an application without the leave of the court. In a postscript to the judgment, Lady Justice King called for extra powers to curb the activities of litigants in person who inundate the courts with communications. If the small claims court limit is increased for personal injury cases, these problems will become more widespread.

Clogging up courts with “unmeritorious” claims

- 8.17 Solicitors and legal executives are “gatekeepers” to the claims process, ensuring that those with unmeritorious claims are deterred from ever starting them. Without an initial discussion with a legal professional who is able to advise on the merits of a case, the small claims court will be overwhelmed by litigants in person who believe they have claims, but do not, or who pursue aspects of a claim to which they are not entitled. For example claiming for the ‘stress’ of making a claim is quite a common enquiry as is the mention of ‘human rights’ without any understanding that these are unlikely to be aspects which can be pursued.

A failure to reduce fraud

- 8.18 In our view it is specious for the Government to assert at paragraph 90 of the consultation that “raising the small claims limit for all PI claims would be consistent with the Government’s aims to dis-incentivise minor, exaggerated and fraudulent claims”. The Government routinely equates minor whiplash claims with exaggerated and fraudulent claims. The three are not the same. People with minor claims are not fraudulent. If the Government wishes to address fraudulent and exaggerated claims, it must target the real mischief – cold calling.
- 8.19 Moving the majority of claims to the small claims track will reduce the number of *all* genuine PI claims, but it will not stop fraud in RTA claims. In order to obtain some assistance, people are likely to turn to Claims Management Companies (CMCs) to conduct their claims. CMCs will seize this opportunity, and there will be an increase in cold calling, texts, and adverts, encouraging people to make claims for whiplash. This is likely in our view to drive up the number of fraudulent claims, rather than help to reduce them. Further comments outlining our concerns about CMCs are below in response to question 16.

⁴⁸ House of Commons Library research briefing: ‘*Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales*’ published 14 January 2016: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113>

- 8.20 The small claims track is also an unsuitable forum for insurers to challenge suspected fraudulent claims. Once fraud is alleged the district judge will be obliged to tell the claimant of this and allocate the case to a different track in any event – usually the multi-track, where the procedure will be more involved and costs will be higher. The small claims track does not use statements of truth, and under CPR 27.8(4) evidence is not given under oath. A number of safeguards that are intended to prevent dishonesty are not present in the small claims system.
- 8.21 In relation to the proposed reform of general damages for “minor” soft tissue injuries, we have suggested other measures which could be introduced to tackle fraudulent claims without reducing the rights of those with genuine injuries. These include the ban on pre-medical offers, which we welcome and, most obviously, a ban on claims management companies carrying out cold calls for personal injury claims.

Q14) The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5,000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000.

- 8.22 The small claims court limit for personal injury claims should not be increased, and should certainly not be increased to £5,000 or higher. Cases up to £5,000 have complexities and are unsuitable for a person to run without legal representation – we have set out examples of the complexities arising in these cases at paragraph 8.5 and case studies 6,7 and 8.
- 8.23 It is no coincidence that the HMCTS Money Claims Online service excludes these types of claims: they can include areas of complexity which make it highly unsuitable for the small claims track.
- 8.24 If, despite the issues highlighted above in Q13, the government remains intent upon increasing the small claims track limit, the increase should be no higher than necessary to bring the limit in line with inflation.

Q15) Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

- 8.25 For the reasons set out in response to Q13 and 14, the small claims court is not a suitable environment for personal injury litigants, and particularly litigants in person. If the small claims court limit is increased, in spite of the issues that this would cause, it is extremely important that the claimant is able to access full and fair compensation.
- 8.26 While listening to evidence from stakeholders as part of the inquiry *Cost of Motor Insurance: Whiplash* in 2013, the Chair of the Transport Committee, Louise Ellman, questioned the safeguards that would be put in place to make sure that the new plans (an increase in the small claims limit) were fair and equitable to claimants as well as insurance companies. In response, David Powell of Lloyds Market Association stated that what is required is to give claimants the tools to fairly evaluate the offer they are being made, to see if it makes sense or not, and he suggested a tariff approach to

address this⁴⁹. We state above⁵⁰ the reasons why the tariff approach is not the correct way to prevent under-compensation. If the small claims limit was to be increased for all claims, we suggest that there should be a requirement that where a person is unrepresented, they should have their settlement “signed off” by a qualified lawyer. This is already an accepted practice in employment law claims.

Q16) Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector?

- 8.27 An increase in the number of CMCs and paid McKenzie Friends entering into the PI market is inevitable and will certainly have undesirable and dangerous consequences. There is very little analysis in the consultation and the impact assessment of the potential impact on CMCs and McKenzie Friends despite their obvious and well-known role in the market and the potential for that role to increase in light of these proposals.

Claims Management Companies

Lower standards and commoditisation of advice

- 8.28 CMCs will take advantage of the increase in litigants in person. CMCs will not deal with claims to the same standard as a trained and skilled legal representative, and even though they are required to have professional indemnity insurance, there is no requirement to act to the same professional standards as a solicitor. There are also doubts as to the effectiveness of the current regulatory regime for CMCs. A recent article in the *Law Society Gazette*⁵¹ revealed that only three per cent of the value of financial penalties levied has been paid since the Claims Management Regulator secured new fining powers almost two years ago. Despite levying fines of more than £2.2 million against seven individual CMCs, just £60,000 has been paid.
- 8.29 In the absence of professional obligations, CMCs are far more likely than solicitors to commoditise the nature of advice, preferring to deal only through writing and standard tick box forms to glean information from clients in order to deal with claims more quickly. The quality of advice in these circumstances is likely to be much lower than if the adviser met with the potential claimant, or even spoke to them on the telephone. If the only communication is through the completion of tick box forms, and the claimant has no other support or information to help him complete the forms, it is likely that potential heads of loss will be missed, and the claimant will be undercompensated. CMCs will miss heads of loss, such as loss of congenial employment, contractual sick pay and future medical care costs, and turn this into an administrative exercise. This is not the proper way to handle litigation.

Increase in cold calling and fraudulent claims

⁴⁹ Page 12 of the evidence to the Transport Committee

⁵⁰ See paragraphs 7.3 – 7.4, and Case Studies 4 and 5

⁵¹ <https://www.lawgazette.co.uk/exclusive-cmc-watchdog-failing-to-collect-fines/5058982.article>

- 8.30 A further consequence of an increase in CMCs will be an increase in cold-calling for personal injury claims. Texts and calls asking or telling people that they have been in an accident and are entitled to compensation will increase. Even with the requirement to obtain a medical report, and a ban on pre-medical offers, a climate which encourages people to “have a go” even if they are not injured is likely to lead to an increase in fraudulent and exaggerated claims, rather than a reduction. Cold calling is the biggest mischief of all, and is the driver of many of these proposals. It is universally detested, yet the government has failed to address it properly. It exploits vulnerable people. This practice is tasteless and intrusive and generates the false perception that obtaining compensation for personal injuries is easy, even if there is no injury. APIL continues to campaign for a change in the law and a ban on CMCs cold calling in the personal injury sector⁵².
- 8.31 Banning cold calling will tackle fraudulent and exaggerated claims at the very source of the problem. With the announcement in the Autumn Statement of a ban on cold calling in pensions claims, we fail to see why the government cannot also introduce a ban on cold calls for personal injury claims.

Tackling CMCs

- 8.32 In the Budget 2016, George Osborne announced that CMC managers would be held personally accountable for the actions of their businesses⁵³. In light of the threat that claims management companies pose both to vulnerable genuine claimants, and to the government’s aim of reducing fraudulent claims, we suggest that the government should consider criminal sanctions directly against directors of CMCs should they be found in breach of the regulations. At present, CMCs that are caught in breach of the rules simply close down and open up under another name without recourse.
- 8.33 Alternatively, the government should consider introducing a requirement that the regulator take a financial bond from the CMC when starting up to ensure that there is financial compensation available if needed, mirroring the MedCo qualifying criteria. In order to comply with the qualifying criteria for MedCo, all medical reporting organisations must pay a financial bond of at least £20,000, demonstrating that the MRO has sufficient funds available to remunerate medical experts from whom it has commissioned medical reports in the case of its failure.
- 8.34 If, despite the issues we raise in this paper, the government presses on with reforms to the small claims limit, the increase should not be implemented until regulation has moved to the FCA, and the measures associated with this move have been implemented to ensure injured people are protected from rogue CMCs. These measures include re-authorisation of claims management companies wishing to carry on trading, and that managers (those performing “controlled functions”) of claims management companies will become personally accountable for the actions of their business.

⁵² <https://www.apil.org.uk/press-release/call-for-ban-on-personal-injury-cold-calls>

⁵³ Paragraph 1.206 Budget 2016

McKenzie Friends

- 8.35 APIL welcomed the judiciary’s proposal to prohibit fee charging McKenzie Friends, and it is vital that this proposal becomes a reality. A voluntary system of McKenzie Friends, which includes charities providing support and assistance to those who are unable to instruct solicitors, can be a helpful tool in ensuring that litigants in person can access justice. McKenzie Friends should not, however, be allowed to develop further into an unregulated branch of the legal profession through a rise in “professional” McKenzie Friends.
- 8.36 “Professional” McKenzie Friends present a real risk to litigants in person. Vulnerable litigants in person are in danger of being overcharged for services that – in the end - the McKenzie Friend may not even be permitted to provide, or exploited for the McKenzie Friend’s own agenda. Unlike solicitors, “professional” McKenzie Friends are not covered by any form of professional indemnity insurance, so the litigant in person will have no recourse if things go wrong. Simply, there are no consumer safeguards in place to prevent vulnerable people being exploited by McKenzie Friends who are holding themselves out to be legal professionals.
- 8.37 The Lord Chief Justice has recently raised concerns about “professional” McKenzie Friends, particularly where clients are vulnerable. Lord Thomas of Cwmgiedd, speaking at his annual press conference, said that there is no objection to unpaid McKenzie Friends, providing their role is defined, but that he was “very, very cautious about payment to non-lawyers who try and assist vulnerable people”. He said that “there is a real risk of exploitation or of giving advice the person that the person wants to hear, not advice that they do not want to hear.”

Case study 10

- **The dangers of “professional” McKenzie Friends**

***Re Baggaley*⁵⁴**

An ex-nightclub bouncer with no relevant professional training or qualifications was prohibited indefinitely from representing anyone in court. Mr Baggaley threatened other lawyers, swore at ushers and “faced up” to opposing counsel.

His Honour Judge Bellamy said of Mr Baggaley’s behaviour “Mr Baggaley has served this mother very badly. As I said earlier, she has in truth been nothing more than a puppet in his hand. Mr Baggaley is not an asset to a litigant in person. He is a serious hindrance.”

- 8.38 The risks and dangerous consequences of the rise in “professional” McKenzie Friends will simply be repeated in the personal injury sector should the small claims limit increase.

⁵⁴ [2015] EWHC 1496 Fam

9. Part 5: Introducing a prohibition on pre-medical offers to settle RTA related soft tissue injury claims

Q17) Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries?

- 9.1 APIL supports a ban on pre-medical offers in *all* cases. The medical report is a critical factor in ensuring a claim has merit and that accurate compensation is paid. The Government, in paragraph 106, recognises that pre-medical offers can “lead to under-settlement for claimants and possible future litigation if the accident actually causes serious long term health issues to a client whose lawyer did not arrange for an appropriate medical examination and report”. APIL has consistently called for a ban on these offers, as the practice has the potential to create an environment of “easy money”, allowing fraudulent cases to be settled without the necessary checks and balances that medical examination provides.

Q18) Should there be any exemptions to the ban, if so, what should they be and why?

- 9.2 We suggest that the ban on pre-medical offers should apply to all personal injury claims, not just those involving road traffic related soft tissue injuries. The offer of a settlement before any medical evidence has been obtained means that the injury suffered by the claimant cannot be validated or accurately quantified. Pre-medical offers are sometimes made before an independent solicitor has been instructed by the claimant, or sometimes without the instructed solicitor’s knowledge. The injured person will be offered a sum without knowing whether it is reasonable or not. This practice can be seen as fraudulent against the claimant, as the injured person will be offered a sum without knowing the extent of their injuries, and therefore without knowing whether the offer is reasonable or not. This could lead to under-settlement of the claim. It also has the potential to create an environment of “easy money”, allowing fraudulent cases to be settled without the necessary checks and balances that medical examination provides.
- 9.3 In cases involving serious injuries, untimely offers can frustrate and distract from the focus on rehabilitation. Defendants in these cases often make offers prior to any rehabilitation programme being completed, and before the claimant’s side is in a position to properly value the case. The claimant should be placed at the centre of the process, and this should mean that untimely offers should not be made before the case has been properly valued to ensure that there is not a risk of under-compensation.

Q19) How should the ban be enforced?

- 9.4 The ban should be enforced by the relevant regulators for example the FCA. A significant monetary fine should be imposed upon insurers that do not comply with the ban.

- 9.5 If the ban were to be ignored by rogue insurers and an offer made to the claimant, in absence of the rules, we suggest that any offer should not be binding and the claimant should be free to go back at a later date for more should the claim have been under settled. Penalising a party in costs because they have made a pre-med offer does not go far enough to deter this practice, any steps to ban such practices need to be much tougher.

10. Part 6: Implementing the recommendations of the Insurance Fraud Task Force

Q20) Should the Claims Notification Form be amended to include the source of referral of claim?

- 10.1 APIL agrees that the claims notification form should be amended to include the source of referral of the claim. The data should, however, only go to the Insurance Fraud Bureau, which will be able to analyse the data and spot patterns, such as identifying unscrupulous CMCs selling batches of claims to different law firms. There is no reason why this data should be shared with the third party insurer.

Q21) Should the Qualified One-way Costs Shifting provisions be amended so that a claimant is required to seek the court's permission to discontinue less than 28 days before trial (Part 38.4 of CPR)?

- 10.2 APIL does not agree that the QOCS provisions should be amended so that the claimant is required to seek the court's permission to discontinue less than 28 days before trial. The defendant already has the power to apply for a finding of fundamental dishonesty, and the ability for defendants to force a trial already exists – defendants can apply to set aside a notice of discontinuance under CPR 38.4. The proposed amendment is therefore unnecessary.
- 10.3 Further, simply because a claimant decides to withdraw their claim does not mean that they are fraudulent. There are also many cases where the defendant admits liability or otherwise compromises the action at the door of the court without penalty. This causes distress to the injured claimant, yet there is no rule or proposed rule to impose a penalty for such behaviour.

11. Part 7: Call for evidence on related issues

Credit hire

Q22) Which model for reform in the way credit hire agreements are dealt with in the future do you support?

Q23) What (if any) further suggestions for reform would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market?

- 11.1 We agree that credit hire is an area which must be examined if the Government is serious about reducing costs in road traffic accident claims. David Powell, underwriting manager at the Lloyds Market Association urged the OFT to consider the underlying causes of rising costs. "The (insurance) industry must also re-structure to remove the unnecessary and inflated costs caused by credit hire, and further regulation should not be ruled out." ⁵⁵
- 11.2 Inflated charges and hire periods are clear issues which must be addressed. It is important, however, that the non-fault claimant should not have their right to choose restricted. APIL is concerned that a loss of freedom of choice of which insurer the claimant can use in a vehicle damage claim – as would be the case under the "first party model" - will also lead to a loss of freedom of choice in a subsequent personal injury claim, as both claims form part and parcel of the process following an accident. Limits on who can handle the vehicle damage claim may affect the claimant's decision on who should handle the personal injury claim.

First Party Model

- 11.3 We are concerned that this will lead to a loss of freedom of choice for the claimant as to who handles the claim. Limits on who can handle the vehicle damage claim may affect the claimant's decision on who should handle their personal injury claim.

Regulatory Model

- 11.4 We would welcome a ban on referral fees for replacement vehicle claims, which would reduce the incentive to refer for costly credit hire and hence reduce the overall cost of non-fault claims. We would also welcome the capping of rates for replacement vehicle provision.

Industry Code of Conduct

- 11.5 A Code of Conduct which sets out core principles on behaviour, honest, impartiality and reporting would be welcomed. We believe that this would help to cut costs, helping to ensure that non-fault drivers only use a replacement vehicle as long as they need one, and allowing the at-fault insurer to challenge the non-fault insurer's costs to make sure the final cost is reasonable and justified. It is important that any code of conduct is enforced across the insurance industry, and that the Government is committed to monitoring adherence to the code.

Competitive Offer Model

- 11.6 The "competitive offer model" would help to address potentially inflated costs for replacement vehicles provided by the non-fault party. It is important, however, that the claimant still has freedom of choice. Any ill-informed or daunted claimant would be likely to accept an offer to handle the claim from whoever may be dealing with the vehicle damage claim. The at-fault insurer would be incentivised to minimize the cost of the claim, and will most likely want to close the claim as quickly as possible, which could lead to a sub-standard service to the claimant. It is important, therefore, to ensure that the claimant has the freedom to choose the provider, to ensure fairness.

⁵⁵ Emmanuel Kenning, Insurance Age 28 Nov 2011

11.7 It is also important that the issue of credit hire is not dealt with in isolation. There should be further investigation of other contributing factors, such as vehicle repair, where artificially inflated costs are also driving up the cost of motor insurance. The Competition and Markets Authority, in its September 2014 final report, concluded that insurers and brokers are competing to find a way of earning a rent from their control of non-fault claims, rather than simply “competing on the merits”, and that there are inefficiencies in the supply chain⁵⁶, involving excessive frictional and transactional costs. The CMA added that these are not things that they would expect to see in a well functioning Personal Motor Insurance market, and that the effects result in higher insurance premiums to the detriment of consumers. They commented that provision of post-accident services to non-fault claimants is in a state of flux, and that the judgment in *Coles v Hetherington* might lead to substantial changes in the market for vehicle repairs, if more insurers decide to claim at retail rates rather than on the basis of costs actually incurred⁵⁷. The CMA stated that if the problems observed were to increase over time and the size of the consumer detriment were to increase, there would be a strong case for the CMA to revisit this industry and possibly reconsider some of the remedies which they had decided not to pursue at that time.

Q24) What would be the best way to improve the way consumers are educated with regards to securing appropriate credit hire vehicles?

11.8 It is important that claimants are provided with clear and concise information on their legal rights and choices, from the inception of the insurance policy through to the end of any claim. Greater transparency would also be welcomed. The Transport Select Committee, in its July 2013 report, called on insurers to be more transparent about their links with solicitors, vehicle repairers, credit hire firms and other organisations from which referral fees were received. There was concern that while referral fees have been banned, links between insurers and such firms still exist, and there are now legal mechanisms for bringing insurance firms and solicitors together under one roof. The committee concluded that “it is regrettable that the motor insurance sector ignored our recommendation that consumers are entitled to know more about the financial and other links between their insurer and any companies typically involved with each claim – transparency breeds trust and confidence in the market”.⁵⁸

11.9 As recommended by the Competition Commission in its Provisional Decision on Remedies, a statement of consumer rights and frequently asked questions should be provided when the policy is renewed annually; and also information on the claimant’s key tortious entitlements should be provided at the first notice of loss. Examples of insurer best practice should be made available to consumers.

Early notification of injury/intention to claim

⁵⁶ Paragraph 6.109 Competition and Markets Authority Private Motor Insurance Market Investigation Final Report

⁵⁷ Paragraph 10.166 Competition and Markets Authority Private Motor Insurance Market Investigation Final Report

⁵⁸ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmtran/117/117.pdf>

Q25) Do you think a system of early notification of claims should be introduced to England and Wales?

- 11.10 APIL does not support a system of early notification of claims. We believe that requiring early notification will act as a driver for claims management companies to hound the potential claimant to pursue their claim. There would be a potential injustice to claimants if changes to the limitation/notification periods were adopted for late notification, as there are many legitimate reasons why an injured person chooses not to pursue a claim immediately. For example, some claims result in deteriorating conditions and the extent of the damage only unfolds after a period of time. Some injured people may decide to “brave it out” and then once their symptoms worsen or remain for a long period of time, they decide that they should pursue a claim.
- 11.11 It would also be completely unworkable to have different limitation periods/notification periods for different types of personal injury claims, and would introduce further unnecessary complications and difficulties for genuine claimants.
- 11.12 The changes would also be unnecessary – defendants already have the opportunity to investigate and, where appropriate, repudiate claims received late in the limitation period. It is unlikely that a defendant would make a payment on a claim presented late without a reasonable explanation and supportive evidence being provided. We have seen no evidence that the late notification of claims is a significant on-going problem that would warrant these draconian steps.

Q26) Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be “minor”

- 11.13 There may be perfectly legitimate reasons why a person does not seek medical treatment straight away – they may decide to “brave it out” and only seek medical help when their symptoms remain for an extended period of time, or worsen. Further, requiring claimants to seek medical treatment within a set period will put unbearable pressure on the already stretched NHS resources, simply to avoid falling foul of the claims provision, even though it was not medically necessary for them to see a doctor.

Rehabilitation

Q27) Which of the options to tackle the developing issues in the rehabilitation sector do you agree with?

- 11.14 The rehabilitation section of this consultation is based on a number of misconceptions. The cross-industry Rehabilitation Code 2015 is working well to ensure that those who require rehabilitation can access it, and to ensure that the rehabilitation undertaken is reasonable. At paragraph 9.1 of the Rehabilitation Code, for example, requires an Immediate Needs Assessment by a suitably qualified expert but an insurer is only

obliged to pay for what it regards as reasonable⁵⁹. Reform as suggested in the consultation document risks undermining the work that the International Underwriting Association's cross-industry working party has put into the Rehabilitation Code. It risks creating an environment where rehabilitation is difficult or impossible to access, even where early access to rehabilitation could mean that a genuine claimant has a quicker route to recovery.

Misconception: rehabilitation is not necessary in lower value cases

- 11.15 The Rehabilitation Code recognises that rehabilitation is not a “one size fits all” approach, and claimant lawyers and insurers are encouraged to follow different procedures depending on the value of the claim. We agree that rehabilitation should not be routinely ordered for financial purposes, but rehabilitation should not be assumed to be unnecessary in all lower value cases.

Misconception: rehab providers are not independent

- 11.16 The Rehabilitation Code already addresses the issue of independence of rehabilitation providers. Paragraphs 7.8 and 7.9 of the Code set out that a rehabilitation provider's overriding duty is to the claimant, and that they should act totally independently of the instructing party. Assessment may be carried out by a person or organisation having a direct or indirect business connection with the solicitor or compensator, only if the other party agrees, and the solicitor and compensator must always reveal any business connection at the earliest opportunity. The need for independence is further reiterated by the accompanying *Guide for case managers and those who commission them*, which sets out the requirement for claimant lawyer and insurer to declare any financial ownership relationship, direct or indirect, that they have with any case manager or provider, as should the case manager and provider declare any relationship they have with the insurer or claimant lawyer.
- 11.17 Further, having contracts in place for trusted independent providers is a good way to guarantee provision of quality rehabilitation services at a fair price for those that need the service. Many insurers and claimant firms are “bulk buyers” of the service due to the number of clients they have, rather than occasional purchasers. Sound commercial arrangements with independent providers should not be misinterpreted as exploitation.

Comments on the various options

- 11.18 Option 1 would be burdensome from an administrative point of view. Vouchers would need to reflect the true cost of rehabilitation, which will vary from person to person, dependent on their requirements. Again, as emphasised by the Rehabilitation Code 2015, rehabilitation is not a “one size fits all” approach.

⁵⁹ 9.1 of the Rehabilitation Code 2015 provides that “The compensator is not required to pay for treatment that is unreasonable in nature, content or cost. The claimant will be under no obligation to undergo treatment.”

- 11.19 Option 2, where all rehabilitation is arranged and paid for by the defendant, is unsuitable. It is vital that the provision of rehabilitation does not rest solely in the hands of the compensator, otherwise rehab could be denied where it is legitimately needed. There are also inconsistencies between insurers, with some placing great emphasis on rehabilitation, and others failing to engage at all. It is extremely important that the injured person remains at the centre of the rehabilitation process.
- 11.20 Option 3 provides that there should be no compensation payment made towards rehabilitation in low value claims. This would be abhorrent, and is again based on the misconception that rehabilitation is not needed in lower value claims. This denies access to justice for the claimant, and means that the wrongdoer is not putting the person (as far as possible) back into the position they were in before the accident. The person should not have to pay out of their own pocket for treatment that is necessary because they have been injured through the negligence of another.
- 11.21 Option 4 would be a big expansion for Medco, and one on which the organisation would need to be consulted.
- 11.22 Option 5: Any capping of rehab damages would inevitably be unfair towards those more seriously injured, those who are older, or those who have a pre-existing condition that has been exacerbated, those disabled, etc. Simply, this option would have a discriminatory impact on the most vulnerable.

Q28) Do you have any other suggestions which would help prevent potential exaggerated or fraudulent rehabilitation claims?

- 11.23 As demonstrated by the Rehabilitation Code, parties and representative bodies in the sector are willing to collaborate to improve the provision of rehabilitation services. Rather than overhauling the provision of rehabilitation, which is a disproportionate approach to the perceived problems and would result in genuine claimants being deprived the rehabilitation that will allow them a quicker route to recovery, efforts should be focused on improving the quality of provision, through wider commitment to the Rehabilitation Code and accreditation of case managers and rehabilitation providers. There should also be a push to further educate the NHS and other state agencies about the workings of the Rehabilitation Code, and how it might be used to take pressure of the state and reliance on those publicly funded bodies.

Q29) Do you agree or disagree that the government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports?

- 11.24 We strongly disagree with the suggestion that recoverability of disbursements should be restricted. Again, this is a vastly disproportionate approach to address those who bring fraudulent claims. Paragraph 147 of the consultation states that £180 for a medical report may not be a deterrent to the *genuine* claimant with more significant injuries, but that it may act as a deterrent on claimants considering bringing a minor claim. The insinuation here is that minor claims are not genuine claims. This is simply untrue.

- 11.25 It is a sufficient deterrent that, under the proposals in the paper, claimants would have to pay disbursement costs upfront and then have them reimbursed by the defendant. To remove the claimant's right to recover disbursements completely would mean that genuine claimants will simply decide that they cannot afford to run their claim, and even if they do, they will suffer further under-compensation. For example, if a tariff system is introduced and the small claims court limit is increased, someone who has suffered whiplash for up to two years will see his damages reduced from the already inadequate amount of £3,500 to £2,950. The claimant would have to pay £180 for a medical report, £205 for a court issue fee, and £335 for a hearing fee. Claimants with whiplash lasting up to 6 months are likely to decide that their cases are not worth pursuing at all, as even if there is no hearing, as they would have to pay £180 for a medical report, and £50 for a court issue fee, leaving just £170 in damages.
- 11.26 This proposal creates an access to justice issue, in breach of Article 47 of the Charter of Fundamental Rights of the European Union. Claimants who cannot recover their disbursements are effectively barred from accessing the courts if their income is insufficient to allow them to fund disbursements needs to pursue a claim. It is yet another attempt to make claiming for "minor" injuries as unattractive as possible, and is based on the misconception that "minor" injuries are not genuine.

A potential future option – a points based/Barème approach

Q30) A new scheme based on the "Bareme" approach could be integrated with the new reforms to remove compensation from minor road traffic accident related soft tissue injury claims and introduce a fixed tariff of compensation for all other road traffic accident related soft tissue injury claims. What are the advantages and disadvantages of such a scheme?

- 11.27 We do not believe that a system based on the Bareme approach should be introduced, for the same reasons that a tariff system should not be introduced. Ultimately, the claimant is under-compensated. Lord Justice Jackson discussed the French and Spanish systems in his 2009 preliminary report. He stated that a leading claimant personal injuries practitioner in Paris expressed concern that percentage points allocated to claimants by medical experts are often too low and it is effectively impossible to challenge the court expert's assessment before the judge⁶⁰.

12. Part 10 impact assessment

Overview

12.1

- The Government's preferred package of reforms will result in a net negative impact to consumers and the taxpayer (i.e. consumers and taxpayers will be worse off as a result of the reforms).

⁶⁰Paragraph 3.12 <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>

- Consumers are unlikely to benefit from falling car insurance premiums.
- The cost of the reforms to injured people, the NHS, the courts service and insurers has been underestimated.

Savings passed onto motorists

- 12.2 Given their past record, insurers are unlikely to pass on the vast majority (85%) of savings to motorists, as assumed by the Government. Data on how insurance premiums changed following 2013 provides the Government with concrete evidence on how insurers respond to reform which cuts the cost of personal injury claims.
- 12.3 In 2013, reforms to the personal injury claims process were introduced which successfully cut the annual cost of motor related personal injury claims by 12%⁶¹. In 2013 these claims cost insurers £4.1 billion – by 2015 this had dropped to £3.6 billion⁶². However, the average motor premium has increased by over 8% since the introduction these reforms⁶³. This track record suggests that premium holders will not benefit from lower insurance premiums, even if the cost of personal injury claims to insurers falls as a result of the Government's proposals.

Overall costs and benefits of the proposals

- 12.4 According to the Government's impact assessment, the benefits of the proposals outweigh the costs. However, this is only achieved by taking insurers' profits into account. From the perspective of consumers and taxpayers, the net impact of the Government's preferred package of reforms is negative (i.e. consumers and taxpayers will be worse off as a result of the reforms)⁶⁴. This essentially means that insurers gain from the proposals at the expense of consumers and taxpayers.
- 12.5 Once insurers' costs and benefits are excluded from the impact assessment, the net benefits of most of the proposals are negative. The net costs to consumers and tax payers for the preferred options (5.1a and 5.2a) are greater than £100 million, as outlined in the table below.

⁶¹ A number of changes were made to the personal injury claims process in 2013. Success fees and ATE premiums were made non-recoverable and the amount of costs recoverable from defendants in RTA portal claims were reduced. In addition, the RTA portal, which operates a system of fixed recoverable costs, was extended to cover claims valued at up to £25,000. The RTA portal had previously covered claims valued at up to £10,000. Accessed November 2016; <http://blogs.lexisnexis.co.uk/dr/the-winners-and-losers-of-the-fixed-costs-regime/>, <http://hsfnotes.com/litigation/jackson-reforms/conditional-fee-agreements-cfas-after-the-event-ate-insurance/>

⁶² APIL analysis of ABI data covering insurer spend on settled bodily injury (motor) claims. The cost figures referred to include insurer spend on damages and legal costs (claimant and defendant)

⁶³ ABI data on average motor insurance premiums (private car) published in October 2016 <https://www.abi.org.uk/Insurance-and-savings/Industry-data/Industry-data-downloads>.

⁶⁴ Proposed reforms to the soft tissue injury claims process and increase in the small claims court limit. Comments on the Government's impact assessment, Compass Lexecon, December 2016, p5-6.

Table two: Net benefit to consumers and tax payers assuming an 85% pass-through rate (£ million)⁶⁵

Proposal	Costs to consumers and taxpayers	Benefits to consumers and taxpayers	Net benefit to consumers and tax payers
Whiplash proposal (1.1a)	486	497	11
Whiplash proposal (1.1b)	884	892	8
Whiplash proposal (1.2a)	455	471	16
Whiplash proposal (1.2b)	834	848	14
Whiplash proposal (2a)	630	543	(87)
Whiplash proposal (2b)	377	325	(52)
Small claims proposal (3)	422	393	(29)
Medical reports (4)	138	96	(42)
Combination (5.1a)	1,407	1,300	(106)
Combination (5.1b)	1,495	1,422	(73)
Combination (5.2a)	1,375	1,272	(102)
Combination (5.2b)	1,441	1,376	(65)

Source: Compass Lexecon (see appendix)

- 12.6 Even this net cost to consumers and taxpayers is based on the Government's optimistic assumption that insurers will pass the vast majority of savings on to consumers, in the form of lower motor insurance premiums. As discussed, this assumption is not supported by insurers' previous response to falling personal injury claim costs⁶⁶. If insurers fail to pass the vast majority (85%) of savings on, then consumers and taxpayers will be disadvantaged to an even greater degree.
- 12.7 With pass through rates of 90% or below, the government's preferred policy options lead to a net loss to consumers and taxpayers⁶⁷. Insurers will therefore need to pass on a greater level of savings than that anticipated by the Government if the preferred policy options are to benefit consumers and the taxpayer.
- 12.8 In a number of places, the Government has underestimated the cost of the proposals to consumers and taxpayers⁶⁸. Again, this means that consumers and taxpayers are

⁶⁵ Proposed reforms to the soft tissue injury claims process and increase in the small claims court limit: comments on the Government's impact assessment, Compass Lexecon, December 2016, p7 (see appendix). Figures in brackets indicate a negative impact.

⁶⁶ See paragraphs 12.2 and 12.3

⁶⁷ Proposed reforms to the soft tissue injury claims process and increase in the small claims court limit: comments on the Government's impact assessment, Compass Lexecon, December 2016, p19-20.

⁶⁸ See paragraphs 12.9 - 12.19

likely to be negatively affected by the reforms to an even greater degree than that anticipated by the impact assessment⁶⁹.

Costs to injured people

- 12.9 Claimants receive significantly lower settlements from compensators when they are not legally represented – this is not taken into account by the impact assessment. Data provided by APIL members indicates that RTA claimants receive offers which are at least 42% lower when they are not legally represented, with unrepresented EL/ PL claimants receiving offers which are at least 28% lower⁷⁰.
- 12.10 There is likely to be an increase in unrepresented claimants if the proposals are introduced (see paragraph 12.13). As a result, by failing to consider the lower settlements which such claimants receive, the impact assessment underestimates the cost of the reforms to injured people.

⁶⁹ The figures in table two are based on the assumptions used in the Government's impact assessment. As a result, the net negative impact of the reforms is likely to be greater as the impact assessment fails to take into account the full costs of the reforms to consumers and taxpayers.

⁷⁰ The figures are based on a survey of APIL members who were asked the question "*Please indicate the initial and highest offers made to your client both prior to, and with, legal representation*" for cases where the initial offer was between £1,000 and £5,000. For RTA, this included two cases where whiplash was the only injury and two cases where there were multiple injuries. For EL and PL, this included four cases where personal injuries were being claimed. The figures represent an average across all cases where the settlement was between £1,000 and £5,000.

Figure one: Settlement before and after legal representation (RTA)

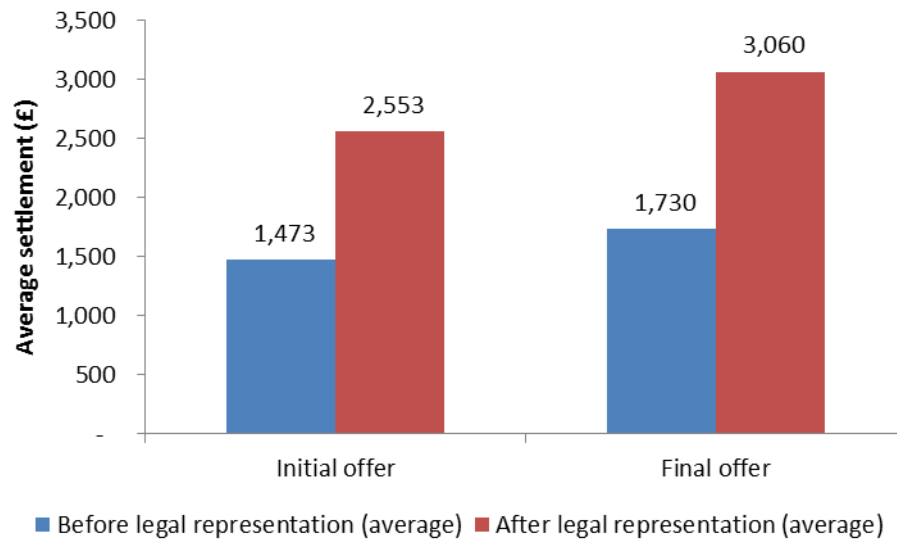
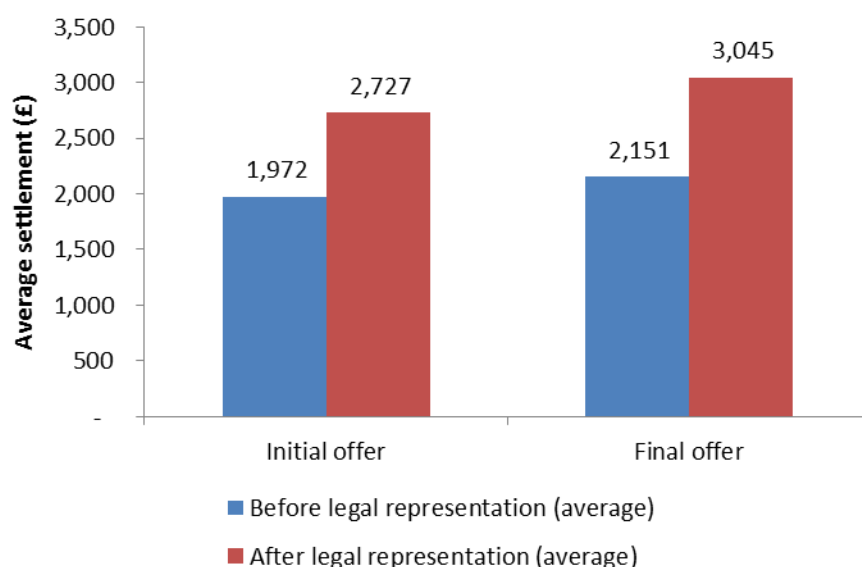


Figure two: Settlement before and after legal representation (EL and PL)



12.11 In addition, the costs to EL, PL and clinical negligence claimants of raising the small claims limit for all personal injury claims has not been established – the impact assessment only considers the costs to RTA claimants⁷¹. Again, this means that the cost of the reforms to injured people will be greater than that set out in the impact assessment.

Unrepresented claimants – impact on insurers costs

12.12 The impact assessment does not take into account the costs to defendant insurers of increased litigants in person (LIPs). Insurers are likely to incur more expenses for LIPs, with evidence from the family courts indicating that, on average, LIP cases take 50% longer to conclude⁷².

12.13 The degree to which there will be an increase in unrepresented claimants is uncertain, however even the impact assessment recognises there will be a significant increase in such claimants⁷³. As a result, the impact assessment is likely to exaggerate the net savings made by insurers as a result of the reforms and, therefore, any reduction in motor insurance premiums.

Costs to HMCTS

12.14 The impact assessment assumes the reforms will have a cost neutral impact on HM Courts & Tribunals Service (HMCTS)⁷⁴. This is unlikely to be the case. Claims

⁷¹ IA, p41 and 42

⁷² The Judicial Executive Board, in a submission to the House of Commons Justice Committee, estimated that cases in the family courts where both sides are unrepresented (by solicitors), on average, take 50% longer to conclude. Judicial Executive Board (2013) *Written evidence from the Judicial Executive Board (MSC 84)*, paragraph 5.4.

⁷³ IA, p40

⁷⁴ IA, p43

involving a LIP, rather than a solicitor, are likely to increase as a result of the proposals⁷⁵. These claims will be more costly for the courts to process, given that they are likely to take a significantly longer time to conclude⁷⁶.

- 12.15 Essentially, less costly cases involving solicitors will be replaced by more costly cases involving LIPs, with no corresponding increase in court fee revenue to cover these increased costs. In terms of revenue from court fees, HMCTS will also lose any surplus it makes on personal injury claims which are no longer made as a result of the reforms. The impact assessment therefore fails to recognise the negative financial impact which the reforms will have on HMCTS.

Costs to NHS

- 12.16 The cost to the NHS of the proposals is likely to be greater than that estimated by the impact assessment. When it considers the impact on NHS income from compensation recoveries, the impact assessment only takes into account dropped RTA claims with an injury duration of under six months⁷⁷. However, EL, PL and clinical negligence claims, as well RTA claims with an injury duration of above six months, will also be dropped as a result of the Government's preferred package of reforms⁷⁸.
- 12.17 The NHS will incur costs for all these dropped claims, as they will no longer be able to make recoveries on these claims. As a result, the cost of the proposed reforms to the NHS is likely to be greater than that set out by the impact assessment.

Savings for motor insurers

- 12.18 The proportion of personal injury claimants who are currently legally represented is likely to have been overestimated by the Government. Data provided by the Compensation Recovery Unit (CRU) states that 24% of RTA claimants are unrepresented⁷⁹, while the Government, in its impact assessment, assumes 8% of RTA claims settle without a medical report and without a solicitor⁸⁰. Essentially, the CRU data suggests that the number of pre-medical offers made by insurers to unrepresented RTA claimants is higher than that assumed by the Government. These claims will not involve the recovery of legal fees from the defendant insurer.
- 12.19 This means the impact assessment is likely to exaggerate the total legal costs currently associated with RTA claims. The savings which insurers will make as a result of

⁷⁵ See paragraph 12.13

⁷⁶ See paragraph 12.12

⁷⁷ IA, p21, 60 and 65. According to the impact assessment, 20% (£13 million) of the NHS's compensation recovery income (outpatient) is derived from RTA claims with an injury duration of under six months. As a result of the Government's preferred package of reforms, 65% of such claims are expected to be dropped, resulting in a net annual cost to the NHS of £9 million, according to the IA.

⁷⁸ The Government is proposing to increase the small claims limit to £5,000 for all personal injury claims. This will make it more costly for injured people to pursue RTA, EL, PL and clinical negligence claims valued at under £5,000, given that successful claimants will no longer be able to recover costs from the defendant. As a result, some RTA, EL, PL and clinical negligence claims are likely to be dropped as a result of the preferred package of reforms.

⁷⁹ CRU response to APIL FOI request, 2016. This response states that in 2015/16, 24% of RTA settlements involved an unrepresented claimant.

⁸⁰ IA, p18 and 19

reduced spend on claimant legal costs is therefore likely to have been inflated by the impact assessment. This has the effect of exaggerating the likely savings for premium holders.

Implementation

12.20 If these reforms are to be implemented then the Government must ensure that it is done gradually and in such a way to ensure that unintended consequences are avoided. We would suggest that changes to behaviours must coincide with changes to the economics. Therefore, the regulation of CMCs must pass to the FCA before further reforms are implemented to minimise the risk of generating activity that is against the intentions of the Government.

Claims process

12.21 At paragraph 7.46 of the impact assessment, it is assumed that claims will continue to proceed on Claims Portal, but with small claims track cost provisions (no fixed recoverable legal costs). The government suggests that this will prevent the small claims court from becoming clogged with claims.

12.22 The portal would not be fit for purpose for small claims because:

- It deals with pre-litigation settlement of liability admitted claims only. Liability denied claims currently drop out into the courts system. There would still be a huge increase in the volume of claims in the small claims court system, and the associated problems that this would cause⁸¹.
- The system is designed for a few thousand registered users, not a million different users a year. If the portal were used for all small claims, each time a person wanted to bring a claim, they would have to set up an individual registration. The registration system would be unable to support an increase from an occasional registration to a million registrations per year. Similarly, the helpdesk could not support the demands of up to a million litigants in person.

12.23 The portal could not simply be adapted to deliver what is required. There would either need to be a radical rework, which would take at least 2 years, or a completely new portal. Issues which would need to be rectified include:

- The CNF and the special damages forms are designed for represented parties, and are not suitable for completion by litigants in person. The protocol itself is also written for represented parties, and is not suitable for litigants in person
- There are no direct links to the Medco system to allow a LIP to directly instruct a medic
- The portal would need to integrate with any online court – this will not be built until 2020.
- Portals exist for RTA, EL, PL claims at the moment, but there are currently no portals for other areas of personal injury that could be caught if the government proceeds as planned.

⁸¹ See paragraphs 8.11 – 8.16, above.

- 12.24 If the intention is to proceed with this proposal, the Government must give Claims Portal Ltd enough time to build, test and implement any system. Lessons must be learned from previous rushed implementations. Whilst it might be feasible to ask law firms to use “work arounds”, this is not an option for a system which is to be used by the public without advice.
- 12.25 The current system also does not permit CMCs to run cases. There is a presumption that a future solution should also exclude CMCs as litigation is a reserved activity. CMCs should be excluded because, as set out at paragraph 8.29, the standard of advice given is much lower than that given by a qualified legal professional, and the presence and behaviour of CMCs (i.e. cold calling) encourages fraudulent claims. If this presumption is rebuffed, CMCs must be regulated to the same standard as solicitors and any costs/funding rules should be comparable (i.e percentage deductions from damages).

Appendix one

Table one: Whiplash claims registered by the Compensation Recovery Unit (CRU)⁸²

2008-09	486,194
2009-10	518,563
2010-11	571,111
2011-12	547,405
2012-13	488,281
2013-14	410,215
2014-15	376,513
2015-16	335,365

⁸² CRU FOI responses

REPORT FOR APIL, MASS AND TLS

Proposed reforms to the soft tissue injury claims process and increase in the small claims court limit

Comments on the government's impact assessment

22 December 2016

Privileged and Confidential

Justin Coombs, Alina Goad, Krishna Nandakumar

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Section 1

Introduction and summary

Introduction

- 1.1 We have been asked by [the Strategic Alliance¹] to comment on the impact assessment (“IA”) published by the government on its proposals to reform the soft tissue injury (“Whiplash”) claims process.²
- 1.2 The government is proposing to:
- a. reduce or remove the right to cash compensation for ‘minor’ soft tissue Whiplash injuries (with ‘minor’ defined under two alternative proposals as either all injuries where recovery takes less than six months or, alternatively, as all injuries where recovery takes less than nine months);
 - b. reduce compensation for those soft tissue injury cases where recovery takes longer than those in (a) (i.e. non-minor cases);
 - c. raise the upper limit for the small claims track for either all road traffic accident (“RTA”) claims, or possibly all personal injury claims, from £1,000 to at least £5,000;
 - d. ban the use of ‘pre-medical’ offers to settle a Whiplash claim to ensure that only those with a genuine injury receive compensation.
- 1.3 These measures are intended to crack down on minor, exaggerated and fraudulent Whiplash claims in order to reduce insurers’ costs by about £1billion a year, which the government asserts will reduce the average motor insurance premium by around £40 per year.
- 1.4 Whilst the consultation has multiple potential outcomes, the government has stated a preferred option. This is to remove or reduce compensation for minor Whiplash claims where the injury is resolved within six months, and to limit the increase in the small claims track to £5,000 for all personal injury cases, whilst banning pre-medical offers for Whiplash claims.

¹ MASS, APIL and TLS

² <https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process>

- 1.5 Compass Lexecon has been asked to review and comment on the Government's impact assessment of these policies as independent economic experts.

Summary

- 1.6 Our findings are as follows:
- a. The methodology employed by the government in its impact assessment is designed in such a way as to always yield a net benefit from the policy being considered.
 - b. The government's methodology is also biased towards insurance companies by including their increased profits as a benefit to the policy, but against solicitors by not including their losses as a cost.
 - c. The impact assessment yields a positive result for the preferred policies only due to the increase in insurers' profits. Consumers and tax payers are actually worse off as a result of the preferred policies. This implies that the preferred options benefit insurers at the expense of a cost to consumers and tax payers.
 - d. The estimated benefits to consumers depend crucially on the assumed 'pass-through' rate: the proportion of any cost savings to insurers that are passed on to consumers through a reduction in insurance premiums.
 - e. The actual pass-through rate is uncertain and difficult to estimate. However, the government did not carry out any sensitivity analysis of its results to different assumed pass-through rates.
 - f. Even at a 90% pass-through rate (which we consider to be implausibly high), the government's preferred policy options result in net costs to consumers and tax payers.
 - g. At a more realistic 80% pass-through rate, all of the proposed policy options result in net costs to consumers and tax payers.
 - h. The critical pass-through rate, i.e. the pass-through rate above which the net benefits exceed the net costs of the policies for consumers and tax payers, is above 85% for most policy options and more than 90% for the preferred policy options. This implies that for any plausible pass-through rate, consumers and tax payers will lose out if the preferred policy options are implemented.

Structure of report

- 1.7 In the remainder of this report we comment on the methodology used in the IA (Section 2) and the assumptions the government makes regarding the impact of the policy proposals on insurance premiums (Section 3). Lastly, we examine the sensitivity of the IA's conclusions to alternative assumptions on the pass-through rate (Section 4).

Section 2

Methodology used

2.1 According to the IA, the objectives of the proposals are to:³

“disincentivise minor, exaggerated and fraudulent claims so as to reduce the number and cost of claims, leading to savings which insurers can pass back to policy holders in the form of reduced motor insurance premiums.”

2.2 It is clear that the proposals will lead to some reduction in insurers’ costs and a reduction in insurance premiums to the extent that insurers pass on these costs.

2.3 The IA assumes a pass-through rate of 85%.⁴ Whilst this pass-through rate in itself is questionable (as we argue further below), it implies that 15% of any net benefit to insurers is retained by them as profits. This increase in insurer profitability is included in the government’s cost/benefit analysis as a benefit of the policy being considered.

2.4 However, the losses of other corporate stakeholders such as solicitors, medical reporting organisations and claims management companies as a result of the policies are not included.⁵ Excluding the costs to these other corporate stakeholders, but including insurer’s profits, implies that, by construction, the total benefits will always exceed the total costs of the policies.

2.5 The IA methodology used by the MoJ is designed in such a way as to yield a net benefit from the policy, regardless of the policy measure being assessed. It includes the increase in insurers’ profits as a benefit, which is a function of the reduction in legal fees, but does not include the loss of legal fees suffered by law firms as a cost.

2.6 The IA makes the implicit assumption that solicitors, and the civil justice system as a whole, produce no benefits to society so that any reduction in solicitors’ revenues is a benefit to society. Using this approach, any policy that reduces use of the civil court system appears to

³ IA, p. 1.

⁴ IA, para. 2.4.

⁵ The IA specifically states that costs and benefits to lawyers, medical experts and CMCs is not taken into account for the NPV calculation. See, para. 2.6.

produce a net benefit to society. For example, a proposal to abolish all employment law or abolish the law of tort would lead to a net benefit under this approach since the reduction in costs to defendants (including both compensation paid and legal costs) would, by construction, exceed the loss of compensation received by claimants.

- 2.7 Table 1 below shows the total cost to consumers and tax payers, and the total benefit to consumers and tax payers for each proposal assuming an 85% pass-through rate, but without taking into account either profits made by insurers or the loss in fees to solicitors.
- 2.8 The table shows that, once insurers' costs and benefits are excluded from the impact assessment, the net benefits of most proposals are negative and where the net benefits are positive they are only marginally so. The net costs to consumers and tax payers for the preferred options (5.1a and 5.2a) are greater than £100 million.
- 2.9 This implies that the net impact, as presented in the IA, is positive only because insurers' profits are taken into account, i.e. insurers gain from the proposals at the expense of consumers and taxpayers.

Table 1: Net benefit to consumers and tax payers assuming an 85% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' costs (C)	Defendants' benefits (D)	Costs to consumers and taxpayers (E = A – C)	Benefits to consumers and taxpayers (F = B – D)	Net benefit to consumers and tax payers (F - E)
Whiplash proposal (1.1a)	486	577	0	80	486	497	11
Whiplash proposal (1.1b)	884	1,034	0	142	884	892	8
Whiplash proposal (1.2a)	455	547	0	76	455	471	16
Whiplash proposal (1.2b)	834	984	0	136	834	848	14
Whiplash proposal (2a)	630	630	0	87	630	543	(87)
Whiplash proposal (2b)	377	377	0	52	377	325	(52)
Small claims proposal (3)	422	456	0	63	422	393	(29)
Medical reports (4)	138	96	0	0	138	96	(42)
Combination (5.1a)	1,411	1,505	4	205	1,407	1,300	(106)
Combination (5.1b)	1,498	1,649	3	227	1,495	1,422	(73)
Combination (5.2a)	1,379	1,473	4	201	1,375	1,272	(102)
Combination (5.2b)	1,444	1,596	3	220	1,441	1,376	(65)

Notes: The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes). "Defendants' costs" and "Defendants' benefits" in the table above refers to the costs and benefits not passed on by insurers to consumers.

Source: CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.

Section 3

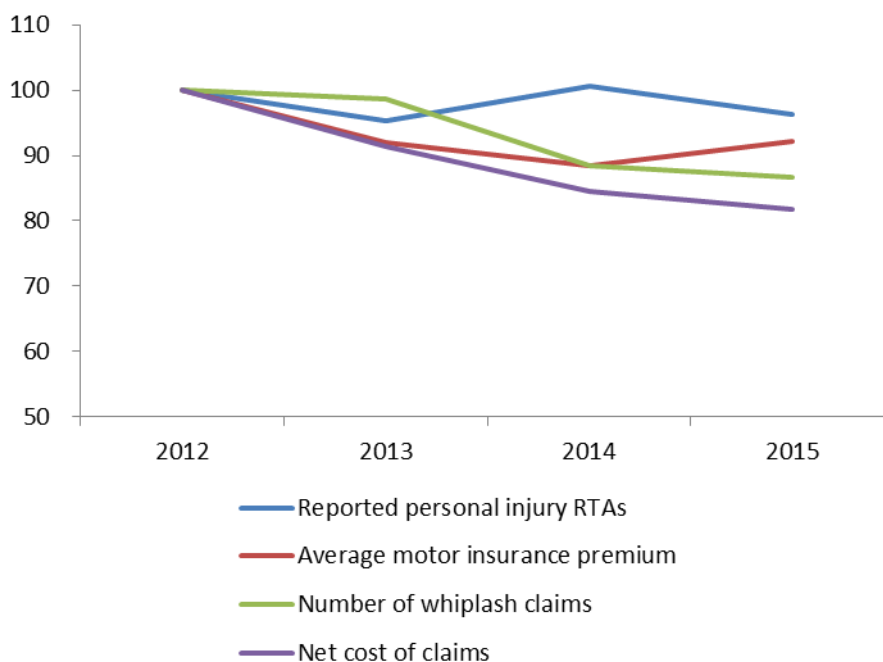
Impact on premiums

Premiums and the cost of Whiplash claims

- 3.1 The MoJ expects its proposals to result in a drop in premiums of around £40 per policy, per year. This implies that there is a direct relationship between the reduction in the value of personal injury claims and the level of insurance premiums.
- 3.2 In the past, the average motor insurance premium has increased despite Whiplash claims and the cost of claims falling. This is because premiums are related to a number of factors other than the cost of claims, such as the rate of return on investment.
- 3.3 Since 2013, the cost of motor related personal injury claims has fallen by 12% - from £4.1 billion in 2013 to £3.6 billion in 2015.⁶ In spite of this, car insurance premiums have increased over the same period.
- 3.4 Figure 3 below shows the number of reported personal injury RTAs, average motor insurance premiums, the net cost of motor claims and the number of Whiplash claims.

⁶ Source: The ABI's Quarterly Motor Statistics, published November 2016, which provides data on the number and average cost of bodily injury claims and the ABI's Insurance Premium Statistics, published October 2016, which provides data on the average motor premium.

Figure 3: 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.

3.5 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.

Pass-through assumption

3.6 The IA assumes a pass-through rate of 85%, which is based on a Competition and Markets Authority assumption that the pass-through rate is 80-90%.⁷

⁷ See 2.4 (iii) of the IA.

- 3.7 However, as we have identified above, there are many factors that impact the level of premium and a quantitative estimate of pass-through is difficult to obtain. There is certainly no evidence of any correlation between insurers' costs and premium levels in the past.
- 3.8 Given the uncertainty of the pass-through rate it would have been prudent for the government to have carried out some sensitivity analysis around the 85% assumption, at the very least to calculate the impacts with an 80% and 90% pass-through. We carry out such a sensitivity analysis in the section below.

Section 4

Sensitivity analysis

Introduction

- 4.1 As explained above, it is important to understand the net benefits that accrue to consumers and taxpayers under alternate assumed pass-through rates. The net benefit is calculated as the total benefits to consumers and taxpayers *less* total costs to consumers and taxpayers. Each of which are calculated as below:
- a. Total benefits (costs) as published in the IA but adjusting for a different pass-through rate and for insurance premium tax ("IPT")⁸; *less*
 - b. Benefits (costs) retained by insurers⁹:
 - i. Sum of the benefits (costs) to "Defendants" and "Wider social and economic benefits (costs)" as published in the IA except benefits (costs) relating to IPT¹⁰; *multiplied by*
 - ii. 1 – Pass-through rate.

⁸ The total benefits and costs published in the IA assume a pass-through rate of 85%. Therefore, the total costs and total benefits have been adjusted to take into account the assumed rate of pass-through in each sensitivity scenario. For example, for the Whiplash proposal (1.1a) and assuming a pass-through rate of 90%, the total benefits are equal to £577 million (published in the IA) *less* £45 million (IPT using 85% pass-through rate) *plus* £48 million (IPT using pass-through rate of 90%) which is equal to £580 million. The same procedure is followed for total costs.

⁹ For example, if the pass-through rate is 90%, the benefit to insurers for the Whiplash proposal (1.1a) is calculated as £80 million (defendants' benefits) + £498 million (wider social benefits) - £45 million (insurance premium tax) = £533 million. This is multiplied by 10% (1 – pass-through rate of 90%) which is equal to £53 million. The benefits to consumers and taxpayers are calculated as the difference between £580 million (total benefit) *less* £53 million (benefit not passed on to consumers) which is equal to £526 million (difference due to rounding). The same procedure is followed for the cost to insurers.

¹⁰ These have been considered under "Total benefits (costs)" using the rate of pass-through assumed under each sensitivity scenario.

Pass-through rate of 90%

- 4.2 Table 2 below shows the net benefit to consumers and tax payers assuming a pass-through rate of 90%.

Table 2: Net benefit to consumers and tax payers assuming an 90% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' and wider social costs (C)	Defendants' and wider social benefits (D)	Costs to consumers and taxpayers (E = A – Cx10%)	Benefits to consumers and taxpayers (F = B – Dx10%)	Net benefit to consumers and tax payers (E / F)
Whiplash proposal (1.1a)	489	580	-	533	489	526	38
Whiplash proposal (1.1b)	889	1,039	-	951	889	944	55
Whiplash proposal (1.2a)	458	550	-	506	458	499	41
Whiplash proposal (1.2b)	839	989	-	906	839	898	59
Whiplash proposal (2a)	633	633	-	581	633	575	(58)
Whiplash proposal (2b)	379	379	-	347	379	344	(35)
Small claims proposal (3)	424	458	247	421	399	416	17
Medical reports (4)	137	95	115	13	126	94	(32)
Combination (5.1a)	1,418	1,512	218	1,369	1,396	1,375	(21)
Combination (5.1b)	1,505	1,656	178	1,506	1,488	1,506	18
Combination (5.2a)	1,386	1,480	218	1,340	1,364	1,346	(18)
Combination (5.2b)	1,451	1,603	178	1,457	1,433	1,457	24

Notes: The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes). The figures in columns A and B have been adjusted to take into account a 90% pass-through for insurance premium tax. Columns C and D include all costs and benefits except insurance premium tax (which is already considered under A and B respectively).

Source: CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.

- 4.3 The table shows that, once insurers' costs and benefits are excluded, even with a 90% rate of pass-through, the net benefits of each proposal is no more than £59 million. The preferred proposals (5.1a and 5.2a) still both result in a net cost to consumers and tax payers rather than a net benefit. The only reason that the MoJ's assessment results in a positive policy impact is because it includes the increased profits of the insurers. However, this table clearly shows that this increase in profit is, for many policy options, at the expense of a net loss to consumers and tax payers.

Pass-through rate of 80%

- 4.4 Table 3 below shows the net benefit to consumers and tax payers assuming a pass-through rate of 80%.

Table 3: Net benefit to consumers and tax payers assuming an 80% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' and wider social costs (C)	Defendants' and wider social benefits (D)	Costs to consumers and taxpayers (E = A – Cx20%)	Benefits to consumers and taxpayers (F = B – Dx20%)	Net benefit to consumers and tax payers (E / F)
Whiplash proposal (1.1a)	483	574	-	533	483	468	(16)
Whiplash proposal (1.1b)	879	1,029	-	951	879	839	(40)
Whiplash proposal (1.2a)	452	544	-	506	452	443	(9)
Whiplash proposal (1.2b)	829	979	-	906	829	798	(31)
Whiplash proposal (2a)	627	627	-	581	627	511	(116)
Whiplash proposal (2b)	375	375	-	347	375	306	(69)
Small claims proposal (3)	420	454	247	421	370	370	(1)
Medical reports (4)	139	97	115	13	116	94	(22)
Combination (5.1a)	1,404	1,498	218	1,369	1,361	1,225	(136)
Combination (5.1b)	1,491	1,642	178	1,506	1,455	1,340	(115)
Combination (5.2a)	1,372	1,466	218	1,340	1,329	1,199	(130)
Combination (5.2b)	1,437	1,589	178	1,457	1,401	1,297	(104)

Notes: The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes). The figures in columns A and B have been adjusted to take into account a 80% pass-through for insurance premium tax. Columns C and D include all costs and benefits except insurance premium tax (which is already considered under A and B respectively).

Source: CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.

- 4.5 The table shows that, once insurers' costs and benefits are excluded and with an 80% rate of pass-through, the net benefits of all proposals are negative. If the actual pass-through rate was closer to 80%, this would imply that for all policy options, the net benefit of the policies as found by the MoJ's IA, was achieved through insurer's additional profits at the expense of consumers and tax payers.

Critical level of pass-through

- 4.6 Given that the pass-through rate is difficult to estimate accurately, another way to assess whether consumers are likely to experience a net benefit from the proposals is by calculating the critical pass-through rate required for the costs and benefits of the policy to break even from the point of view of the consumer. The critical pass-through rate indicates the minimum level of pass-through required for the benefits to outweigh the costs for consumers and tax payers. We calculate two versions of the critical pass-through rate as we explain below.

Simple pass-through

- 4.7 This pass-through rate is based on the net costs and net benefit figures as published in the IA. However, it is biased because the impact of IPT (which depends on the extent to which insurance premium falls) is a function of the pass-through rate itself. The net costs and net benefits used for this calculation are based on a pass-through rate of 85% for the impact of IPT. This simple pass-through rate is calculated as follows:

- a. Net cost to consumers, NHS and HMRC; *divided by*,
- b. Net benefit to insurers: calculated as the sum of the net benefit to "Defendants" and "Wider social and economic benefits".

Adjusted pass-through

- 4.8 In order to solve for the above bias, we also calculate an adjusted pass-through rate by solving for the pass-through rate taking into account the fact that IPT is a function of the pass-through rate.¹¹ This pass-through rate is not materially different from the simple pass-through rate calculated above, because IPT accounts for a very small proportion of net costs and net benefits for each proposal.

¹¹ The pass-through rate is calculated by solving the following equation: $P = \frac{(C+N+H)+P \times IPT}{I + P \times IPT}$. C, N and H refer to net benefits to consumers, the NHS and HMRC which do not depend on pass-through. IPT refers to the insurance premium tax assuming a 100% pass-through. P refers to the pass-through rate. I refers to net benefits to insurers that are independent of the pass-through rate used.

Results

- 4.9 Table 4 below shows the impact of each option considered in the IA and the critical pass-through rate required for the net benefits to exceed the net costs from the point of view of consumers and taxpayers.

Table 4: Critical pass-through rate for each proposal

Proposal	Net benefits to (£ million)							Critical pass-through (%)	
	Claimants (A)	NHS (B)	HMRC(C)	Defendants (D)	Wider social benefits (E)	Claimants, NHS and HMRC (F = A + B + C)	Insurers (G = D + E)	Simple (F / G)	Adjusted
Whiplash proposal (1.1a)	(413)	(9)	(64)	80	497	(486)	577	84%	84%
Whiplash proposal (1.1b)	(760)	(13)	(111)	143	891	(884)	1,034	85%	85%
Whiplash proposal (1.2a)	(385)	(9)	-61	76	471	(455)	547	83%	83%
Whiplash proposal (1.2b)	(714)	(13)	(107)	136	848	(834)	984	85%	85%
Whiplash proposal (2a)	(581)	0	(49)	87	543	(630)	630	100%	100%
Whiplash proposal (2b)	(347)	0	(30)	52	325	(377)	377	100%	100%
Small claims proposal (3)	(130)	(2)	(42)	63	146	(174)	209	83%	83%
Medical reports (4)	52	0	19	0	(113)	71	(113)	63%	62%
Combination (5.1a)	(1,029)	(9)	(133)	201	1,064	(1,171)	1,265	93%	93%
Combination (5.1b)	(1,129)	(13)	(156)	222	1,228	(1,298)	1,450	90%	90%
Combination (5.2a)	(999)	(9)	(130)	196	1,036	(1,138)	1,232	92%	92%
Combination (5.2b)	(1,080)	(13)	(152)	214	1,182	(1,245)	1,396	89%	89%

Notes: The net benefit is calculated based on the sum of all impacts. This differs from the figures published in the IA due to rounding.

Source: IA; 1.1(a and b): 24 – 26; 1.2 (a and b): 30 – 32; 2 (a and b): 37; 3: 46-48; 4: 55-56; 5.1 (a and b): 63 – 67; and 5.2 (a and b): 71 -75.

- 4.10 The table above shows that the critical level of pass-through required is greater than 85% for most proposals. For the government's preferred options (5.1a and 5.2a), the critical pass-through rate is greater than 90%.
- 4.11 This implies that if the actual pass-through rate is 90% or below, the government's preferred policy options lead to a net loss to consumers and taxpayers.