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Transport Committee

Cost of motor insurance: whiplash

Fourth Report of Session 2013–14

Volume II

Additional written evidence

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The Transport Committee

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List of additional written evidence

Written evidence

Written evidence from Owain Llwyd-Williams (WL 01)

Might I suggest that the number of (false) claims would be reduced by ending the practice of lump sum payouts.

A tribunal containing a medical specialist would assess the claimant, and a monthly sum be awarded, reviewable annually.

I would suggest that the lack of large lump sum payouts, and having to attend annual reviews, would deter many claimants.

March 2013

Written evidence from Dominic Graham (WL 02)

This is my personal response to the above inquiry.

I am a solicitor and I specialise in personal injury claims. I handle claims exclusively for claimants. I do not act for insurance companies.

SUMMARY

1. *Whiplash Capital of the World?*

No. Statistics can not be relied upon for various reasons.

2. *Whiplash adds £90 to premiums, how much is fraudulent?*

By the ABI's own figures, less than 0.4% of the average premium relates to fraudulent claims.

3. *Will government proposals reduce motor insurance premiums?*

I have no confidence that premiums will drop as a result of these proposals (or any other proposals, for that matter).

4. *Affect on Access to Justice?*

Devastating. More than 85% of claimants will be prevented from obtaining legal advice.

5. *Any other steps?*

Carefully scrutinise insurance premium calculations, including a review into extortionate automatic renewals and advertising budgets. Consider capping premiums.

— *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"*

No. The origin of the statistics used must be carefully scrutinised, as must the statistics from other countries.

(1) The evidence used is 10 years old.

(2) It is suggested the insurance industry submitted the statistics used within the report, therefore these figures are entirely one-sided and should be treated with great care.

Ms Grant also states that claims increased 60% while reported accidents rose by 20%. Any comparison of these two figures is fundamentally flawed as the statistics are measuring significantly different facts. It ignores, for example, whether more than one person was in the car or whether the police were called.

— *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims*

According to the AA, the average insurance premium is £1,554 per year. If the ABI's figure of £90 is accurate, then it equates to less than 5.8% of the average premium. I submit that 5.8% is a reasonable amount and should not be criticised. Car insurance is specifically designed to pay for injuries caused by car accidents. Such a small amount of the premium going towards injury claims is not an unintended consequence.

The ABI's own estimate is that 7% of claims are "exaggerated, misrepresented or fabricated" claims. It therefore follows that the ABI believe 93% of claims are genuine.

Therefore, "exaggerated, misrepresented or fabricated" claims account for less than 0.4% per year to the average premium.

(7% of £90 = £6.30. £6.30/£1,554 = 0.4%)

Assuming these figures are accurate, I submit that, although improvements can be made, this is a healthy figure.

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

I submit that motor insurance premiums have nothing to do with whiplash claims, whether genuine or fraudulent. All motor insurers state they run their motor book at a loss. Insurers generate profit from the financial markets. This fundamental fact must be understood before attempting more significant change. It has been overlooked thus far.

In relation to proposal, I submit that expert medical evidence is already a requirement and is dealt with in considerable detail in part 35 of the Civil Procedure Rules. The MOJ appear to have ignored the existence of part 35 of the CPR.

Medical experts provide evidence to assist the Court, not for the Claimant. The ABI strongly imply that medical experts are not taking this responsibility seriously. The ABI imply collusion by medical experts in fraudulent claims. It is irresponsible for the ABI to make these vague allegations and thereby tainting every single medical expert. The ABI must provide evidence of this very serious matter.

I submit that problems arise in this area when defendant insurers make offers before a medical report has been completed. By making these "pre-med offers" the defendant insurer removes a significant layer of protection against fraudulent claims.

I submit that "pre-med offers" should be banned. A new rule should be introduced to ensure that all claims for personal injury must be supported by medical evidence.

I also submit that all medical reports should contain a review of the claimant's medical records. This is currently not a requirement. If medical records are reviewed the medical expert can comment on previous similar accidents, previous injuries to the same area of the body etc.

I submit that review of the claimant's medical records by the medical expert should be made a requirement. This would add another layer of fraud prevention as medical experts could check whether a claimant has had a number of similar incidents or whether their injuries have been caused by something other than the index accident.

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

The proposal to move personal injury claims valued at less than £5,000 into the small claims track is potentially devastating. Quite simply, this proposal will prevent around 85% of claimants from receiving legal advice from a solicitor. It is not economical for a solicitor to assist a claimant in the small claims court.

This proposal is the very opposite of "access to justice".

If claimants cannot find representation then there will be a vast inequality of arms. The defendant insurer will certainly instruct a solicitor or barrister, most likely at hugely reduced rates due to economies of scale.

The small claims track is not designed for complex arguments over liability, contributory negligence or quantum. Nor is it designed for multiple medical experts or trials lasting more than one day.

In addition, I remind the committee there is no requirement for evidence or a statement of truth, therefore the small claims court is less likely to deter fraudsters. In fact, the small claims court is likely to attract more fraudulent claims.

— *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance*

- — Careful scrutiny of the way motor premiums are calculated.
- — Clamp down and ban extortionately priced automatic renewals which, in my opinion is immoral and stealing.
- — Cap car insurance. Motor insurers are reportedly making £350–£500 million profit per year. This needs to be looked at very carefully, and it must be borne in mind that car insurance is compulsory. (The cost of car insurance can be calculated very simply by looking at the amount of drivers (DVLA have ready-made database) and compared with the amount required to settle claims per year (ABI have figures).)
- — A thorough review into insurers' marketing budgets, with a view to banning advertising for car insurers. How much of the average premium is spent on these adverts?

March 2013

Written evidence from Roger T Philpott (WL 03)

Anyone in a queue of traffic nowdays can hardly fail to notice that often for the majority the use of the handbrake has become an optional extra. I haue personally witnessed drivers in stationary traffic with only their footbrake applied for up to 20 minutes.

It seems many drivers lack either the intelligence or imagination to work out the inevitable result if such a queue is then rammed from behind!

Many drivers claiming for whiplash injuries are the authors of their own misfortune, my sympathy lies with those who correctly apply the handbrake only to be cannoned into by the incompetent.

March 2013

Written evidence from Chris Addison (WL 04)

I read with interest that there is going to be a probe into fraudulent whiplash claims. As you are no doubt aware there has recently been a decision to cut costs for solicitors that represent the victims of car accidents.

There is no doubt in my mind that this will lead to a rise in the amount of fraudulent claims that will be paid out by insurers. I work for a reputable law firm in the personal injury department, the effect of the lower costs regime means that members of the public will not be able to find independent legal representation as the solicitor could not afford to do the amount of work required for £500 (including business overheads).

In my experience insurers will try and get out of a claim for as little money as possible. For example if the injured patty is elderly they will deliberately undervalue the claim in the knowledge that many elderly people need the money quickly, I have recently represented an 84 year old lady who was injured. The insurers offers to her were £2,500, £3,500, £4,500, £6,600 and £7,200, each amount has been rejected on my advice as the injury is valued at £8,000–£9,000.

Without representation she would have taken the first offer.

Insurers will not fight fraud cases if they only stand to lose £1,000 for the whiplash and £500 Solicitors costs. If they run the case to trial and lose they could be looking at costs of £20,000.

As it stands legitimately injured people will not have legal representation and in many cases will be immediately accused of fraud as a matter of policy, if you have a car accident in Liverpool, Bradford, Blackburn, Burnley etc there will be an immediate allegation of fraud.

If a member of the public is accused of fraud and the insurers letter states that they could go to prison they will drop the case whether it is legitimate or not (unless you are an experienced fraudster and know that the insurer will pay out if you continue with the claim).

The system is now severely flawed, in my opinion the opportunity to properly deal with fraudulent claims has now gone.

The correct way to approach a fraudulent claim is for the penalties to be harsh such as six to 12 months in prison but this is now unworkable as the Claimant will not have legal representation.

The biggest scandal is the rise of alternative business structures in the legal market. The claimant could be taking legal action against direct line/admiral and be represented by a law firm that is owned by direct line/admiral. It is quite unbelievable that this government has allowed people's rights to be eroded in this way.

I apologise for the rant but I cannot believe that no one is on the side of the wronged party, the injured person. In the rush to get rid of fraud and lower insurance premiums the rights of normal people have been taken away and now we learn that insurance premiums will not be lowered.

If you wish to discuss any of my points, please feel free to contact me.

March 2013

Written evidence from David Garside (WL 05)

I am an engineer and have worked in the automotive industry on car design.

My estimate is that certainly *over 95% of the claims are fraudulent*, and quite possibly over 98%.

Car seat headrests were introduced about 35 years ago. Since then it is quite difficult to be subjected to "whiplash" in a car accident.

Why don't you compare, say, the UK car *accident/whiplash claims* ratio with the figures from other more law-abiding countries, such as perhaps Denmark, Japan, Switzerland etc.

You will soon then see how we are all being duped and robbed! A solution?

Put in place a Law/procedure (with high publicity) such that severe financial penalties will be incurred by all of:

— the claimants;

— the Claims Management Cos; and

— the Insurance Cos.

if bogus Claims are made and paid.

Who is to police it? Maybe this is the difficulty.

Probably the Insurance Cos. They ought to have a big incentive to avoid paying out on fraudulent Claims.

As it is, they almost seem to encourage the "industry"!

The financial penalties on the Claims Management Cos should be so severe that this totally parasitic new industry is driven out of business. The unsolicited phone calls that we all receive from them should be made illegal.

March 2013

Written evidence from Stephen Klek (WL 06)

I was interested to read today about the Transport Committee looking into the reasons for the high levels of whiplash injury claims and consequent increases in car insurance premiums. I would like to tell you about my experience on this issue.

About two years ago I had a minor car accident, which was not my fault, resulting in an insurance claim for repairs to my car. Following this I was shocked by the number of telephone calls from various agencies telling me money had been set aside for personal injures, £3,000 seemed to be a common amount quoted, and urging me to make a claim. These calls were a regular occurrence for a year after the accident and I still get the odd one even now. Without exaggerating the number of calls must be reaching 50 or more.

I was tempted at first to go along with a claim with one of these companies and was offered an appointment for a medical assessment. Disturbingly, suggestions were made about what I should say about my injury, how long I had suffered, I was told it needs to be more than four weeks after the accident. Although I suffered some psychological anguish after the accident, I was not physically injured, and I decided not to go along with the claim. I'm sure others less financially well off than me would have continued. I know others who have had the same experience.

I have read numerous articles about the hikes in insurance premiums, referrals by insurance companies, and the whiplash claims but I don't think it is adequately understood how all this is obviously being driven by claims companies.

I have tried to find out how these companies obtained my details and all the information about my accident, but to no avail. I think it my insurance company is to blame as they are the only ones possessing such information about me, but they deny it. Surely there's also an issue with a contravention of the Data Protection Act if insurance companies are forwarding such personal details, isn't this what the Act is meant to protect against.

There is the suggestion that independent medical assessment would deter fabricated or exaggerated injury claims. The Association of Personal Injury Lawyers (APIL), have said this would put off people with a genuine claim. In view of my experience with the persistent personal injury claims companies and ease with which a whiplash injury can be faked, neither is likely to happen in practice. I would suggest preventing accident details being so readily available to agencies who encourage these false claims would be far more effective.

March 2013

Written evidence from Ian James (WL 07)

The committee might be interested in my recent experience:

— Last September we had a road accident. A motor-cyclist fell off his bike behind us, and his bike crashed into the back of our car.

— In January this year we received a "phone call" telling us that we could claim some compensation as a result of this accident. A figure of £7.5k was mentioned. We were told that there were some minimal formalities and if we didn't claim the money then it would go to the other party in the accident. At this point we weren't told what the basis of our compensation claim would be. We decided to pursue the matter just to find out what this was all about.

— The next step was that we were "referred" to a solicitor who explained that all we had to do was say that we had experienced certain types of discomfort for a certain amount of time. There would be forms to fill out, etc. Coming out of the blue like this, we thought that maybe the mild discomfort we had experienced had lasted long enough to justify a claim. But when we looked at the dates of the accident and subsequent events we realised that we would be exaggerating things if we pursued the matter further. So at that point we withdrew from the process.

I should emphasise that at no point did anyone actually say that we should commit fraud. But we felt that we were being offered that opportunity because we were told what it was we needed to say in order to make a successful claim. When we withdrew, we were asked why; I explained that we didn't feel it was right to exaggerate our discomfort in order to claim money, whereupon the solicitor emphasised that to do so would be fraudulent. There is a very fine line between facilitating fraud and encouraging it.

March 2013

Written evidence from National Association of Bodyshops (WL 08)

Introduction

The National Association of Bodyshops is the leading not-for-profit trade association representing the UK body repair sector and is a sub association of the Retail Motor Industry Federation (RMI). NAB welcomes the Transport Select Committee inquiry into whiplash claims and is committed to helping ensure that motor insurance policy holders receive the best value for money from a fair and transparent insurance system.

NAB has previously submitted evidence to the Competition Commission's "Private Motor Insurance Market Investigation" and the Ministry of Justice consultation "The Number and Cost of Whiplash Claims"—both of which are available in the public domain. The below evidence has been written specifically to address the terms of reference laid out by the Transport Select Committee.

A representative of the NAB is available to appear in front of the Committee to give oral evidence if required.

Question 1: *Is the Government correct in describing Great Britain as the "whiplash capital of the world"?*

1.1 According to reports[i] the cost of whiplash claims has increased by a quarter in the last four years and while road traffic accident numbers are falling, the number of personal injury claims continues to rise.[ii]

1.2 Furthermore, European research indicates that Britain is the only country in Europe which has paid out as much in costs as it has in compensation for neck injuries in car accidents. European comparison figures can be sourced from a 2004 Comité Européen Des Assurances study of minor cervical trauma in 10 European countries.[iii] It shows 70% of Road Traffic Accident Personal Injury claims in the UK were related to whiplash, while the figure was 47% in Germany, 32% in Spain and 3% in France.

1.3 Although NAB does not collate statistics on whiplash claims submitted following the repair of a vehicle, we are aware that the trend of personal injury claims is on the increase, despite a decline in the overall number of road traffic accidents. NAB is of the view that this is a result of the prevalence of intermediary Accident Management Companies (AMCs) and Claims Management Companies (CMCs) in generating such claims. NAB is of the view that banning of referral fees will assist in driving down fraudulent claims. CMCs who contact an individual who has suffered an accident due to their details being sold on by an AMC can propagate fraudulent claims by "chancers" who capitalise on a presented opportunity from "free" legal representation (ie companies who operate a Conditional Fee Arrangement). NAB is aware of the need to preserve access to justice in the case of a genuine claim but welcomes more action to reduce fraudulent or exaggerated claims and therefore bring down the overall number of claims in the UK.

Question 2: *Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?*

2.1 This is a much publicised figure, and while NAB has no evidence to substantiate this figure, we would not seek to repute it. Insurers are best placed to provide evidence on the impact of whiplash claims driving up insurance premiums, based on their historic claims data. NAB are of the opinion that some insurers have sought to gain income by outsourcing some of their third party claims management and taking commission from those CMCs. NAB calls for transparency in relation to the outsourcing of this type of third party claim, to ensure that any commission earned in this manner is used to mitigate premiums costs.

Question 3: *Whether the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims, are likely to reduce motor insurance premiums and, if so, to what extent?*

3.1 NAB is committed to a transparent and consistent insurance process and believes that the creation of an independent medical panel and standardisation of medical reports will help filter genuine claims from fraudulent and exaggerated claims;

3.2 NAB seeks action from Government to ensure that the insurance industry is legally obliged to pass on any savings from a reduction in whiplash claims to consumers;

3.3 NAB has concerns that the implementation and operation of an independent medical panel could become financially demanding and eclipse any benefits obtained;

3.4 On a cautionary note, NAB has concerns that the set up and operation of an independent medical panel should not become financially burdensome, such as the benefits obtained are negated by a costly, multi-layered bureaucratic process and structure.

Question 4: *The likely impact of the proposals on access to justice for claimants who are genuinely injured?*

4.1 NAB recognises the concerns raised over access to justice as a result of civil litigation reforms which came into place on 1 April 2013, concerns which are not confined solely to personal injury claims—reforms which have arisen as a result of a commitment to reducing civil legal aid in an increasingly litigious society;

4.2 NAB is of the view that the creation of an independent medical panel to assess claims combined with an availability of Conditional Fee Agreements (CFAs) for larger claims and easier access to a small claims court system protects litigants' ability to access justice for genuine whiplash claims. Genuine claimants should be encouraged to take claims to the appropriate court to gain redress whereas fraudulent claimants will avoid "poaching" from CMCs due to the referral fees ban and be deterred from submitting a claim by the process of an independent medical assessment.

Question 5: *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance?*

5.1 NAB calls for a process whereby revenue that insurers obtain—via supply chain rebates in relation to motor vehicle claims—is used to offset overall claims costs and thus mitigate insurance premiums. NAB is of the view that many insurers receive rebates and discounts from paint and parts suppliers by mandating that repairers use a particular paint brand or supplier;

5.2 NAB considers that many insurers separate motor vehicle repair cost management and claims costs management, often seeking to suppress vehicle repair costs, but failing to pass on any reduction in relation to the overall cost of claims;

5.3 NAB believes that an independent body should be established to oversee all aspects of the motor insurance claims supply chain to ensure transparent governance relating to cost mitigation, subrogation and diminution in vehicle value and repair safety.

April 2013

References

[i] http://fleetworld.co.uk/news/2013/Mar/MPs-launch-investigation-into-soaring-whiplash-claims/0434008667)

[ii] http://www.hilldickinson.com/publications/insurance/2012/december/whiplash_claims_consultation_%E2%80%93.aspx.

[iii] 2004 Comité Européen Des Assurances study of minor cervical trauma in 10 European countries

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Written evidence from Peter Hayman (WL 09)

I write this email to provide short indication of my own personal views.

I was the sole occupant stationary in car in a queue of traffic when my car was hit from behind. I immediately felt an injury to my back and was very careful how I got out of my car and made my way to speak to the other driver. The driver's attitude was such that the Police were called and the matter dealt with. I am still suffering from the injury but I am told that my symptoms are normally expected to clear within the three year period. I hope so.

My concerns are as follows:

1. Those having genuine injuries are not disadvantaged as there can be quite difficult times after such an injury for a number of reasons.
2. Providing proof of a genuine accident not made more difficult, as now a days witness's are reluctant to get involved.

3. It would appear that legal firms handling such claims are, on occasions, using inexperienced staff. My solicitors have had five people handling my case in two years.
4. Although I paid my insurers a premium for Legal Cover, my insurers were paid £800 by the solicitors for the referral. This has to be paid for!!!!!

April 2013

Written evidence from Moving Minds PM&R Ltd (WL 11)

I am writing a response to your questions on whiplash.

My submission is in two parts, firstly a brief overview on the main issues on this subject and secondly answers to your specific question.

BACKGROUND TO SPECIFIC QUESTIONS

1. Whiplash injury is the name commonly given to neck and shoulder pain which occurs in a car driver or car passenger following a road accident.

2. The presumed mechanism of injury gives its name to the condition. It is assumed, on limited evidence, that there is damage to the soft tissues of the neck, which causes pain.

3. The diagnosis of the condition is almost entirely dependent on a patient's history. A plain X ray of the neck will usually eliminate serious traumatic injuries of the bones and joints. All other investigations, such as MRIs, are usually non-contributory.

4. The natural history of the condition is uncertain. However, it seems that in the majority of cases the symptoms resolve over a period of a few weeks. A minority of cases persist for months or longer. In some of these there is objective evidence of associated psychological factors, which may amplify the physical symptoms and may be overlooked.

5. In any medical condition the effective management comprises two distinct components.

(1) Diagnosis; and

(2) Treatment.

6. As we have said above the diagnosis of a whiplash injury is often described as "clinical". The treatment of whiplash injury is subject to debate. NICE has NOT issued guidelines on whiplash and the other body which examines evidence of medical efficacy, the Cochrane Collaboration, is unable to recommend a specific treatment for whiplash (see their website).

7. However, there is a wealth of practical experience over many years and in different countries that physical therapies are beneficial in many cases of whiplash. Whether this is because they are actually beneficial or are due to a non-specific placebo effect is unclear. However a number of motor insurers, Aviva and NFU, have presented data at insurance industry conferences, showing that many whiplash claimants benefit from a short (about six) course of physiotherapy sessions. To confirm these clinical impressions would require a Randomized Controlled Trial (RCT), which bodies dealing with large number of whiplash claims, such as the Association of British Insurers, (ABI) might consider funding. Such an RCT would provide the high quality data that NICE could subsequently use to produce authoritative guidelines.

8. The value of offering treatment is that many claimants, whether fraudulent or not, would find some diminution of symptoms and thus would settle for a smaller quantum of damages. Failure to take up an offer of physical treatment by claimants would be akin to the claimant not mitigating his/her claim.

9. In many areas of medicine, where the diagnosis is uncertain or difficult to confirm or refute it is quite common to offer a trial of treatment. This approach is often successful. I would suggest that a trial of physical treatment, such as six sessions of physiotherapy, be offered to those who may have a whiplash injury following a road accident. To be effective this offer should be made within six weeks of the index accident. Such as approach would tend to eliminate, in part, some of those who had a fraudulent claim.

10. Recent whiplash consultations have focused narrowly on the legal aspects of whiplash injury. It would be preferable if whiplash were treated like any ordinary injury, such as a sprained ankle. In this there is a reasonable physical examination, leading to a presumptive diagnosis followed by currently "best practice" treatment. Only after the completion of early and appropriate treatment should consideration be given to discussions on the quantum of damages.

THE ANSWER TO THE SPECIFIC QUESTIONS POSED BY THE TRANSPORT SELECT COMMITTEE

Q1. *Whether the government is correct in describing the UK as the whiplash capital of the world?*

A1. It is probably correct to identify the UK as the jurisdiction having the largest proportion of whiplash injury claims. However, there is no clear association between the number of whiplash claims and whiplash injuries.

Q2a. *Whether it is correct to say whiplash claims costs add £90 to the average premium?*

A2a. Only the motor insurers can say this by analysing their claims data, and presumably this would require independent auditing to confirm their figures. Irrespective of their answer, whiplash claims could probably be greatly reduced if early treatment was routinely provided.

And, if so…

Q2b. *What proportion of that cost is due to "exaggerated, misrepresented or fabricated claims"?*

A2b. This proportion is not known with certainty. Again, an independent audit by an academic health economics body might provide the answer.

Q3. *Whether government proposals in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims are likely to reduce motor insurance premiums, and; and, to what extent?*

A3. Increased resources directed to establishing a diagnosis are likely to be wasteful, as the diagnosis is essentially a clinical diagnosis, based on the patient's history and physical examination. The absence of any mention of treatment (in the recent government consultation) is perversely likely to actually increase costs.

Q4. *The likely impact of the proposals on access to justice for genuine claimants*

A4. I have limited knowledge of the legal infrastructure dealing with whiplash claims to feel competent to answer this. However, the implied limited access to treatment is a series omission in recent government's statements.

Q5. *Whether there are other steps the government should be taking to reduce the cost of motor insurance?*

A5. Enable community policing officers and traffic wardens access to data bases to enable them to identify static unlicensed and uninsured vehicles, prior to their removal from the road system.

April 2013

Written evidence from ARAG plc (WL 12)

1 Introduction to ARAG

1.1 ARAG plc is part of the ARAG Group, one of the world leaders in legal and assistance insurance. ARAG actively assists customers in Europe and the USA. ARAG Group, based in Dusseldorf, Germany, has been operating for over 75 years is the second largest legal protection insurer in the world and employs over 3,500 staff in 14 countries.

1.2 ARAG plc set up in the UK in 2006 and has rapidly grown to become a major player in both the Before (BTE) and After (ATE) the Event markets. It now insures over 1,800,000 motorists, 800,000 households, 150,000 businesses and 43,000 ATE policies per annum.

1.3 ARAG plc has been recognised by the industry by winning number of trade awards which support that we are placed to contribute evidence for this enquiry. We do not propose to comment on those parts of the consultation that seek evidence from motor liability insurers.

1.4 Any change to the small claims court limit will affect BTE and ATE products which will need to be remodelled and re priced. We cannot retrospectively apply rating changes and policies are issued for a one year term with pricing geared to a small claims court limit of £1,000 currently. We and others in the market will require at least 15 months' notice of changes to the small claims court limit in order to ensure that the premium that has been paid by policyholders has been appropriately formulated. Our preliminary assessment is that the wholesale price for relevant BTE products will need to increase by tenfold should the small claims court limit be increased as proposed.

2 Submission of evidence

2.1 *Is the Government correct is describing Great Britain as the Whiplash capital of the world?*

2.1.1 We are unable to provide substantive evidence to support or oppose this statement. There is a view that whiplash claims are the product of aggressive marketing by CMCS and staged accident claims. Such claims are more likely to be reported as ATE than BTE injury claims. We do not collect data that would enable us to identify the frequency of whiplash claims but we can say that 80% of ATE claims involve damages of less than £2,500 and within these small value claims an unknown proportion will involve whiplash.

2.1.2 As part of global organisation, we are familiar with other jurisdictions, particularly those in Europe. We do not believe the UK is out of step with other territories with regard to either the level of frequency of whiplash claims or the level of cost associated with such claims.

2.1.3 Where whiplash injuries are genuine the victim should not be precluded from seeking reasonable compensation for pain and suffering. BTE and ATE policies exclude fraudulent claims and legal expenses insurers act as a filter which is effective in helping to flush dishonest claims out of the system.

2.2 *Is it correct to say that the cost of whiplash claims adds £90 to the average premium, and if so what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?*

2.2.1 From time to time we have strong suspicions that RTA claims are fraudulent and even more occasionally we are able to gather proof of the fact. In 2012 we accepted just over 22,000 new RTA claims. We estimate that less than 1% of claims gave us cause for suspicion and we have sufficient proof to withdraw cover in only a handful of cases (single figures each year).

2.2.2 Our policy conditions provide that "if any claim under the policy is fraudulent or false the policy shall become void and all benefit under it will be forfeited including the premium". We have a couple of cases currently where proof of fraud was available however the Financial Ombudsman Service considers it unfair of us to enforce the fraud exclusion. Enforcement of the exclusion by us would result in the defendant motor insurer seeking to recover their costs from the fraudulent claimant.

2.2.3 An unintended consequence of encouraging litigants in person may be to increase volumes of fraudulent and exaggerated cases. Approaching a solicitor to assist with a claim infers legitimacy. Where individuals are encouraged to pursue legal actions in person the opportunity to filter out unmeritorious cases is lost. The opportunity to create DIY claim forms must surely raise security concerns.

2.2.4 Despite claims to the contrary, there is little evidence to suggest that fraudulent claims have increased significantly.

The authoritative Experian Fraud Index (July 2011) found that only 0.12% of claims are fraudulent.

Given that liability insurers are supplying many of the personal injury claims to solicitors it seems inconceivable that they would be selling referrals and data and settling such cases.

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

2.3.2 There should be no assumption that motor insurers will reduce premiums and in view of the raft of other reforms working through the system it would be impossible to isolate the effect of a single particular reform. We consider it naïve to anticipate that insurers' cost savings will be passed on to consumers.

2.3.3 Doubtless motor insurers will point to the 10% increase in personal injury damages post LASPO, the impact of qualified one way cost shifting and loss of referral fee income formerly generated by their third party capture activity as factors that increase claims costs.

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

2.4.1 Our data confirms that 96% of successful RTA claims disposed of by us fall below £5,000 in value (based on value of claim before the 10% increase from 1st April). While our BTE policyholders will continue to enjoy access to a lawyer, those who do not have access to BTE—the less well-off members of society—will face the prospect of representing themselves.

2.4.2 It is unclear whether the intention is that uncontested claims between £1,000 and £5,000 will continue to be dealt with through the personal injury claims portal, or whether the lower threshold for the portal will be aligned to a new small claims court limit of £5,000? The former seems more likely and is that scenario that we shall consider.

2.4.3 The portal was developed by the insurance industry with advice from legal professionals being expert claimant or defendant lawyers. Personal injury practitioners process claims forms in bulk and have office facilities at their disposal. Although the portal provides an efficient way of working for such professionals it was not designed with consumers in mind. Roughly 50% of cases of less than £10,000 in value settle in the portal.

2.4.4. We consider the expectation that individuals (without BTE cover) would have the capacity, confidence or appetite to instigate claims through the portal following the trauma of an accident as unrealistic. We envisage genuine claimants viewing the portal as a significant barrier to bringing a claim.

2.4.5 Disabled individuals, those with learning difficulty, those for whom English is a second language and anyone falling the wrong side of the "digital divide" will be most adversely affected and therefore an equal opportunities impact assessment would need to be undertaken.

2.4.6 Use of the portal requires some understanding of the procedure rules and contemplates that users will be aware of what they can claim for and have been sensibly informed of the level of compensation that is reasonable for their injury. Comparisons may be drawn with the employment tribunal claims service where

self- represented applicants routinely expect large pay-outs of compensation which are far in excess of sums typically awarded.

2.4.7 Where individuals struggle with the procedure or have unrealistic expectations, claims are more likely to fall out of the portal, leading to proceedings being issued in more rather than fewer cases.

2.4.8 As far as we are aware no research has been conducted with consumers which would help to establish their attitudes to representing themselves and to what degree they would be willing to do this. Focus groups or consumer questionnaires may help to inform likely outcomes.

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

2.5.1 We agree that cheaper motor premiums are desirable and motor insurers are looking to the technology of telematics to help with accurate risk pricing.

2.5.2 Fraudulent acts of any description result in detriment to the public and severe penalties for those who are caught have a deterrent part to play. Legal costs are one component of claims costs and motor insurers will need to consider other aspects that contribute to their outlay such as the supply of replacement vehicles.

2.5.3 The net effect of LASPOA and the raft of associated reforms required to implement Lord Justice Jackson's recommendations should be fully assessed in advance of further measures being introduced that will have a severe and detrimental impact on individuals' ability to pursue a claim.

2.5.4 The Office of Fair Trading is investigating market practices of the motor insurance industry. We expect that the OFT will be gravely concerned to find excessive subrogation costs being submitted by motor insurers against other motor insurers. Many insurers increase their costs (eg damage to vehicle costs and replacement hire costs) deliberately to maximise recoverability from at fault insurers. Paint and repairer referral fees further increase these unnecessary costs. This practice is understood to be common within the industry and is probably the single most important factor in the cost of motor insurance.

2.5.5 It is our view that liability insurer activity is a major cause of recent increases in both the number of personal injury claims and the cost of motor insurance. We are particularly concerned that the use of "Third Party Capture" has led to a significant increase in the numbers of RTA claims. We believe this insurer activity has led to an increase in the number RTA personal injury claims. *There is a clear correlation between the rise in RTA personal injury claims and the growth of third party capture.*

2.5.6 Marginal reductions to the cost of insurance would result from the abolition of IPT on personal compulsory insurances.

2.5.7 According to ABI published statistics, the premiums since 2003 have undergone a form of rollercoaster with premiums rising in four years and falling in three years—The overall increase in premiums for private vehicles is just 4.8% since 2003, whilst there has been an overall *decrease* of 28.7% in commercial vehicles.

Premiums for all vehicles have in fact decreased by 3.3% between 2003 and 2010. Inflation (both CPI and RPI) has been 18% during this period *so the cost of motor insurance has REDUCED in real terms by 18%.*

According to the ABI, some 10% of motor insurance premiums pay for the legal costs associated with Personal Injury claims. Whilst this is a significant proportion it doesn't explain why insurance premiums have supposedly risen so much. *The reality is that premiums have not been rising at the rates often quoted in the media.*

Other figures, using sources based on sampling of a small portion of insurance providers (as opposed the comprehensive figures produced by the ABI), showing that motor premiums are rising are frequently quoted—

Road Trafffic Accident Personal Injury claims have risen by 52% between 2006–07 to 2010–11. It is estimated that approximately 250,000 additional claims have been generated by referral fees and data selling by insurance companies which has generated approximately £200m of referral income to these organisations. The availability of Alternative Business Structures will allow these organisations to continue to profit from these practices.

3. This submission has been prepared specifically in response to the Transport Committee's call for evidence. We are happy to enter into further correspondence if we can be of further assistance.

April 2013

Written evidence from Michael Arthur Brown (WL 13)

Could I suggest that you might (if you have not already done so) look at a book "Whiplash and Other Useful Illnesses" By Andrew Malleson, McGill-Queen's University Press Canada 2002, ISBN 0–7735–2333–2.

It might be of assistance to see how other jurisdictions, particularly Australia, have dealt with this problem.

As a solicitor formerly in private practice, dealing with accident and insurance claims I have an interest in this matter. I take the opportunity to enclose a copy letter of mine dealing with more general topics. (I no longer have the enclosures.)

April 2013

Written evidence from E Rex Makin & Co (WL 14)

1. I have recently prepared a reply to the Government's consultation paper on reducing the number and costs of whiplash claims. A copy of the response that I have prepared is attached.

2. As a Solicitor-Advocate practising in personal injury work I have a keen interest in the reforms that have been introduced in recent times. I have expressed my own views in the local press and in letters that have been published in the *Law Society Gazette* and *the Times*. Some of the views that I have expressed that I consider are pertinent to the debate regarding whiplash reform are also attached.

3. You will gather from the enclosed documents that I am very concerned that the Government's proposals will have a major impact on access to justice for genuinely injured Claimants.

4. I strongly believe that the Jackson reforms address the very essence of the problems that have been highlighted such as fraud and excessive costs.

5. Insurance clerks receive considerable training on how to deal with road traffic accident claims. This includes training about how to determine who is liable and when it is appropriate to raise arguments of contributory negligence. Where arguments of contributory negligence are raised they will also know what the appropriate range of apportionments might be.

6. In addition they are given training on the civil procedure rules and how a claim is to be valued, including what losses are recoverable and those losses which are not. Often these are issues that require careful investigation.

7. Questions as to whether or not somebody is liable for an accident, if there should be a deduction for contributory negligence or if an item of loss is recoverable in law are all fact specific issues that depend upon all of the evidence. If accident victims are to be left to address these issues without the benefit of legal advice (which would be the effect of raising the small claims limit as is being proposed) the inevitable outcome will be that results will be weighted in favour of the insurance industry, as they will have the training and expertise required to achieve the best possible outcomes for them that circumstances will allow.

8. I do not believe therefore that the Government proposals are reasonable or necessary as the Jackson Reforms are most likely to have tackled the ills of which the insurance industry complain. To the extent that there remain concerns about fraud I believe that the most sensible course, and one which would not impede access to justice or otherwise foster the injustices that I describe above, would be for the industry to devote more funds and resources to the insurance fraud enforcement department at the City of London Police Economic Crime Directorate. I also believe that a ban on offering inducements for claims including cash incentives would be helpful.

April 2013

Reducing the Number and Costs of Whiplash Claims—Response to Ministry of Justice

General Observations

It is acknowledged that there is a problem of fraudulent and/or exaggerated whiplash claims that needs to be tackled. We believe, however, that the complete package of reforms outlined in LASPO and the recently announced changes to the portal and to fix costs in fast track personal injury claims will ameliorate the problems highlighted in the paper. We are concerned that some of the proposals in the paper do not have sufficient regard for the interests of genuine accident victims and do not approach the matter in a balanced way.

It is agreed that it is sensible for the Government to work to provide better guidance on the nature of whiplash injury and its diagnosis. It is agreed that the promotion of assured standards of training and audit is sensible, as is developing the work of the City of London's Police Insurance Fraud Enforcement Department.

Correcting misunderstandings

The paper makes a number of points that give the impression the issues have not been properly understood.

Firstly, it is not only the abolition of the recoverability of success fees payable under conditional fee agreements and the banning of payment and receipt of referral fees that will make a significant difference in this area, but also the extension of the portal and the introduction of fixed costs for all fast track personal injury cases. Those changes will have an equally great if not greater impact in terms of reducing costs. Defendants now know what costs risks they face and the costs can be controlled. For example under the new fixed cost regime the maximum a defendant would have to pay out in solicitor's costs in a fast track whiplash case that gives rise to compensation of £2,500 (to use the average figure cited in the paper) would be £3,155. This is a major leap forward and addresses the very essence of the concerns expressed in the paper.

Secondly, the paper fails to recognise that medical reports are prepared by independent GPs in all personal injury claims. We in fact have a system that goes further than that described as existing in France (paragraph 25 of the consultation document).

Paragraph 26 of the report states "whilst insurers do currently challenge claims, and there have been notable successes in this area, it is estimated that it could cost many times more to challenge a claim for a whiplash injury than to settle." This has been addressed by the introduction of fixed costs in fast track cases.

Likewise paragraph 27 refers to the cost risks on the fast track. Those risks are no longer present.

A trial on the fast track does not usually take about a day and we have never heard of a fast track trial lasting three weeks. Most fast track trials take less than a day and usually last around three—four hours.

Paragraph 28 of the consultation paper fails to fully explain how LASPO will help to re-balance the system. Given costs are now to be fixed on the fast track the risks of escalating costs are massively reduced, if not eliminated. When this is taken into account, as well as the fact that insurers will not have to pay a success fee or ATE insurance; and also the fact that in a case that is found to be fraudulent the insurer will be entitled to recover his costs from the claimant; then insurers will be well placed to challenge claims they suspect as being fraudulent. The failure of the paper to recognise this is a concern and represents a substantial oversight.

Better medical evidence

Firstly this section of the paper fails to recognise that insurers do not ask claimants to provide reports from their own GP if they wish to challenge a claim. They will usually seek permission to obtain their own evidence.

The introduction of an accreditation scheme is unlikely to produce the benefits the Government seeks. It is likely to be populated by the same experts that are presently working in this area.

Standardised reports are already used.

An element of peer review will introduce unnecessary expense and delay. The steps the Government are already taking described at paragraph 24 of the paper are sufficient.

Better incentives to challenge fraudulent or exaggerated claims

The proposal that these claims be dealt with as part of the small claims procedure is misconceived. The paper assumes that if an insurer wishes to challenge a whiplash claim then the issues are relatively simple and straightforward. They are not.

Challenges brought to these claims will involve claimants being accused of dishonesty. Insurers will resort to the use of counsel experienced in this area of work instructed by panel solicitors also experienced in this area. They can produce sophisticated engineering evidence going to both the damage to the vehicles and also reports from accident reconstruction specialists who will express opinions on the likelihood of injury in light of the velocity of impact. Insurers can produce this evidence at relatively little cost and expense. Claimants will not be able to even understand such evidence, which applies the laws of physics. Still less will they be in a position to challenge it.

Even in cases where it is accepted that an injury has been suffered, and the only issue is the value of the claim, the claimant will not be in a position to make representations about the appropriate award for their injuries. They will not understand the principles influencing the assessment of non-pecuniary losses.

We agree with Sir Rupert Jackson that this is not the right time to review the small claims limit in relation to personal injury claims. We also agree that Lord Justice Jackson's reforms will have a significant beneficial impact on whiplash claims by addressing the associated issues.

The introduction of fixed costs for fast track injury trial will allow insurers to challenge claims they consider to be fraudulent and/or dubious at reasonable costs.

Further action

Development of the Insurance Fraud Enforcement Department at the City of London Police Economic Crime Directorate is encouraging. The unit is too small and suggests that the insurance industry is not efficiently targeting its resources in this area. Funding for the unit should be increased.

We believe that a ban on offering inducements for claims including cash incentives, or a ban on the advertising of cash or other incentives would also be helpful.

Present judicial authority is to the effect that in claims of this nature where fraud is alleged the claim can typically be dealt with in the fast track. To ameliorate any concerns of the insurance industry about the risk of such claims being allocated to the multi-track (and thereby avoiding the fixed cost limits) consideration might be given to introducing rules to ensure this type of claim continues to be dealt with in the fast track, unless the insured defendant deploys specialist evidence of a complex nature.

We have completed the questionnaire as attached.

Yours

Richard Edwards, Solicitor-Advocate, APIL Fellow

8 March 2013

Written evidence from Irwin Mitchell (WL 15)

EXECUTIVE SUMMARY

1. Irwin Mitchell is the largest full service law firm in England and Wales. We welcome the opportunity to respond to the Committee's timely inquiry into whiplash, based on our experience as a leading Personal Injury law firm.

2. We agree with the Government that constructive efforts should be made to control the cost of motor insurance premiums and that action should be taken to stop fraudulent whiplash claims. However, we are concerned that the measures proposed by the Government will have a seriously detrimental effect on genuine accident victims, impacting on their ability to seek redress for their injuries.

3. Our own research reinforces the Government's concerns in its impact assessment on raising the small claims threshold, in which it expressed the fear that consumers will be short-changed by the proposals:

> "[Victims may] significantly undervalue their claims and be disadvantaged in negotiations with defendants who may continue to utilise professional legal representation resulting in an "inequality of arms" between claimants and defendants. As mentioned above, this may result in claimants receiving less compensation than is fair given their injuries."[1]

4. Analysis of 500 cases Irwin Mitchell settled shows that, between the first offer received from defendant insurers before medical evidence is available and the final settlement, an increase of 218% was achieved for the victim with the help of our independent legal advice. The FSA's independent figures when considering "third party capture" (cases settled directly by insurers) suggested an average increase of 275% between early offers and the amounts awarded by the courts.[2]

5. The Government's proposals to raise the small claims threshold from £1,000 to £5,000 for road traffic accident (RTA) would remove access to legal advice. This has serious implications for access to justice for those genuinely injured.

6. In our view, many victims will be deterred from claiming and those that do pursue their claims will have to take on the might of an insurance company without legal assistance.

7. There is a clear risk that this would lead to inexperienced victims forced to represent themselves either withdrawing from their legitimate case when faced with experienced litigators on the other side or accepting significantly lower settlements than they are entitled to.

8. We are also concerned that increasing the small claims threshold will not deliver a significant and lasting reduction in motor insurance premiums for consumers.

9. There has already been extensive reform of the civil justice system in recent years (much of which is still ongoing), but early trends suggest that these changes have not yet resulted in significantly lower premiums. We fear that the only result of further reform will be effective denial of access to justice for those who are injured.

10. Finally, we have grave concerns that raising the small claims limit will do nothing to tackle the serious issue of fraud. Indeed, as the system may need to be simplified to enable lay claimants to bring their case to

[1] Para 2.150, Reducing the number and costs of personal injury claims, MoJ Impact Assessment
[2] FSA internal report into Third Party Capture, dated 11th September 2009, obtained via FOI request.

court, we believe it could actually play into the fraudster's hands, removing some of the understandable checks the insurance industry has introduced to tackle fraud.

11. Rather than increasing the small claims limit, we feel there should be tougher action on the estimated maximum 7% of claims which are fraudulent (note—not all of these fraudulent claims are necessarily related to PI fraud).[3] This would in turn ensure the 93+% of genuine claimants continue to have access to independent legal advice about their claim.

12. Action on fraud should include obtaining independent medical reports in all cases before compensation can be paid and an obligation on insurers to share data to enable the industry as a whole to root out fraudulent behaviour.

13. We believe that there is good and bad practice across the whole value chain of the industry—including some lawyers and some insurers and claims management companies. The current focus on preventing the genuinely injured from accessing legal advice does nothing to tackle this bad practice. We set out below alternative changes which we believe will have a positive impact on the validity of claims and the cost to insurers and therefore consumers if such savings were passed on.

Is the Government correct in describing Great Britain as the "whiplash capital of the world"?

14. Whiplash is a genuine injury that causes thousands of people every year to suffer substantial pain and inconvenience, and some to suffer long term disability.

15. In the UK, whiplash is an emotive term, often misunderstood and subject to exaggeration. Considered analysis of the available statistics shows that claiming for a whiplash injury is not the epidemic it is often perceived to be.

16. To put the claims into context, World Bank figures show that the UK has 79% more vehicles per kilometer of road (77/km) compared with the EU average (43/km).[4] It is therefore logical that, given our stringent road and car safety laws, the incidence of minor injuries such as whiplash is in line with our higher road congestion.

17. In addition, the ABI admit that "vehicle bodies have become stiffer since the late 1980s… This helps reduce the incidence of serious injuries, but may increase the incidence of whiplash, due to a higher relative transfer of energy in a crash at the same speed." (James Dalton, the ABI's Assistant Director of Motor and Liability).[5]

18. A survey of 4000 people carried out by APIL in 2012 showed that only around 1% of drivers had suffered a whiplash injury in the last 12 months. Claiming after an accident is not widespread. A YouGov survey in May 2012 found that only 20% of those suffering personal injury or an accident have made a claim. The overwhelming majority have not, with the main reason given for not pursuing a claim being that the injury was not bad enough. Over a third (37%) of respondents surveyed mentioned this while over a quarter (28%) said that they did not believe in claiming compensation.[6]

19. Receiving compensation for an injury is not a "lottery win"—it is a calculated amount for not only the impact of pain and suffering on the individual's, life but also:

- Cost of treatment/rehabilitation.
- Loss of earnings.
- Childcare costs.
- Unexpected travel costs.
- Repair costs.
- Replacement vehicle costs.

20. The vast majority of whiplash victims already undergo medical examination by an independent medical practitioner who prepares a report for the court on the victim's injuries.

21. Any fraud is of course undesirable but the incidence of fraud in whiplash claims is low. The ABI estimate that a maximum of 7% of claims are fraudulent. 93% of claims are therefore legitimate. Any reforms to tackle fraud should also seek to protect the rights of this majority to obtain redress for their injuries.

[3] ABI press release, 17 September 2012
[4] APIL Whiplash Report 2012
[5] http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986, page 9
[6] YouGov—What the World Thinks. Personal Injury Report, May 2012 page 8.

22. Furthermore, whiplash is just one type of injury which can result from a RTA. Increasing the small claims track threshold for general damages to £5,000 as the Government propose will also mean that many victims of injuries other than whiplash will be impacted. Examples include:[7]

Minor brain or head injury	£1,575 to £9,100
Less severe PTSD	£2,800 to £5,875
Minor eye injuries	£2,800 to £6,250
Slight hearing loss or tinnitus	Up to £5,000
Collapsed lung with full recovery	£1,575 to £3,825
Significant hip/pelvis injury (2 yr)	Up to £5,500
Loss of part of finger	£2,800 to £5,600
Fractured nose with surgery	£2,800 to £3,650
Loss of two front teeth	£3,100 to £5,430

23. Finally, there has not yet been sufficient time to assess whether previous reforms have had the Government's intended effect of reducing the number of whiplash claims. For example, the most recent statistics from the Government's Compensation Recovery Unit on the number of whiplash-related claims show that claims fell by almost 24,000 between 2010–11 and 2011–12.

Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

24. While steps can and should be taken to address fraudulent and exaggerated whiplash claims, we are concerned that this may be a distraction from other possible causes of the increase in insurance premiums that has been seen in recent years. The Government seems to have accepted that the full rise in insurance premiums is as a result of whiplash and fraudulent behaviour.

25. However, this appears to be a relatively small part of the story:

- Between 2006 and 2012 the AA shoparound survey has shown a rise in premiums of £326 per premium.
- £86 of this rise over that six year period can be attributed to inflation.
- £34 is attributable to whiplash on the basis of the increased number of RTA PI claims between 2006 and 2012.
- That leaves a sizeable increase of *£206 per policy (over 60%)* which has not been explained despite the Government and ABI having made it clear that claims incidence is down.

26. The real prize for consumers is to tackle the major cause of the increase in premiums.

27. The OFT's decision in September 2012 to refer the private motor insurance industry to the Competition Commission highlights the structural problems that exist in that market. The OFT found that "competition appears not to be working effectively in the private motor insurance market" and that "the insurers of at-fault drivers appear to have little control over the bills they must pay, and this may be leading to higher costs for them and ultimately higher premiums for motorists".[8]

28. The Competition Commission may shine further light on the cause of the majority of the increased cost of insurance, which is currently unexplained.

29. The ABI claims whiplash costs £90 cost per premium but it has never explained how they arrived at this figure. As part of a package of measures to improve the transparency of the insurance industry we believe the ABI should be required to produce an accurate assessment and breakdown of how they calculate the cost of whiplash and update this yearly. Any year-on-year reduction in the cost of whiplash should subsequently be reflected in the price of motor insurance.

30. There have already been a number of reforms, many of which came into force at the start of April 2013. The existing RTA Portal is starting to show a positive impact on insurance premiums which will always lag reform.

31. Changes about to come into force include: the RTA Portal being extended to include cases up to £25,000; recovery of success fees from insurers will no longer be possible; recovery of After the Event insurance premiums from insurers will no longer be possible; a reduction in recoverable costs for fast track claims by an average of around £850 per case.

32. Our analysis suggests that, taken together these reforms are likely to save *insurers over £1.36billion (£61.20 per premium).* This is to be set against the overall bill alleged to be £2billion for whiplash claims—according to the ABI. These reforms should, as per comments made by Lord Justice Jackson, be allowed to "bed in satisfactorily" before a rise in the small claims threshold is considered.

33. What is not clear is what proportion (if any) of this saving will actually be passed on to consumers. Before eroding the consumer's ability to receive compensation for a genuine injury and associated losses the

[7] *11th Edition Judicial College Guidelines*

[8] OFT: "Private Motor Insurance—decision to make a market investigation reference". September 2012

Government should ensure that the savings already put in train are being passed on to make the meaningful change to the cost of living that is intended. This is particularly important at a time when the big insurers continue to report substantial profits in the UK motor insurance sector:

— Direct Line reported in February 2013 that it saw a £7m increase in operating profit in its Motor business in 2012, to £261.8 million. They are making a 16% profit, an increase on 14% in the previous year.[9]

— Admiral's 2012 results, announced on 6th March 2013, indicate an increase in profits in their core UK Car Insurance operation of 19% on 2011—this accounts for £373 million of Group profit before tax.[10]

34. We believe that the existing reforms have already gone too far and there has so far been no evidence and no quantification that any savings resulting from these reforms has been, or will be, passed on to consumers which justifies further damaging access to justice for genuine victims.

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

35. We believe that this is a key question for the Government and the insurance industry to answer, and that it is timely for the Transport Committee to ask this question.

36. On medical evidence, the insurance industry currently attempt to settle claims direct with motorists by offering compensation without the need for a medical report. Many of these claims are reported to the Compensation Recovery Unit as being whiplash with that diagnosis being made by the insurance claims handler. There is a distinct danger that this has developed a culture of opportunism amongst some not at fault drivers and such behaviour will skew the CRU figures used to suggest that whiplash is increasing.

37. Examination by an independent doctor would dissuade those who are simply being opportunistic and would help end an impression held by some that whiplash can be claimed even where no injury is sustained. A requirement of an independent medical report should be imposed on the claimant and compensator before any compensation can be paid.

38. We therefore support the Government's proposals regarding medical evidence. This evidence should be obtained from a wholly independent medical practitioner who has no interest in the treatment or the outcome of the litigation.

39. In most instances of lower value injury we would instruct an expert via an independent medical agency. The agency will have pre-vetted the expert and we will be unaware of the identity of the doctor until the appointment is arranged.

40. These agencies should be wholly independent from any other business in the claims process (eg CMC or solicitor or insurer) and should only use accredited, independent medico-legal experts. We propose that at least 5% of reports produced each year should be subject to peer review. Regulation could be overseen by the Association of Medical Reporting Organisations.

41. Where we disagree with the Government is on their proposals to increase the small claims limit for RTA personal injury cases. Increasing the threshold from £1,000 to £5,000 for RTA cases will fail to deliver a significant and lasting reduction in motor insurance premiums for consumers. Instead, it will increase the burden on the public purse and cost consumers more (please see section on access to justice below).

42. These problems stem from the fact that the Small Claims Track is simply not suitable for personal injury cases. The small claims court is designed for straightforward transactional cases and is no place for potentially complex personal injury claims, where the lay person will be no match for the seasoned litigator who will understandably be used by insurers, whose primary obligation is to their shareholders.

43. The proposed changes will also result in an increased burden on the courts service from more Litigants in Person. The Association of Districts Judges has already warned that the reduction in the legal aid budget will result in an increased burden on the courts seeking to cope with litigants in person trying to navigate the justice system.[11] This will only be exacerbated with an influx of more complex compensation claims for RTA injuries being progressed through the small claims track.

44. Furthermore, the current RTA Portal would not be able to cope. If the Portal is to be re-built to make it more suitable for consumer interaction the question of who pays for and owns the system arises. To avoid a conflict of interests, the Portal would have to be owned and operated by the MoJ at public expense. There may also be issues for litigants who cannot access an online Portal due to lack of internet access or adequate e-literacy skills.

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[9] http://www.directlinegroup.com/~/media/Files/D/Direct-Line-Group/reports-and-presentations/2013/28–02–2013-presentation.pdf

[10] http://www.admiralgroup.co.uk/investor/presentations/docs/FY_2012.pdf

[11] Local Government Lawyer: "Top district judge warns on burdens caused by rise in litigants in person" 27 March 2013 http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=13686:top-district-judge-warns-on-burdens-caused-by-rise-in-litigants-in-person&catid=1:latest-stories

45. We also believe that raising the small claims threshold would impact on tackling fraud and it may make things easier for fraudsters. Increasing the threshold will remove many of the important checks carried out by reputable law firms such as Irwin Mitchell. There are significant risks that anti-fraud tools the ABI have worked hard to develop within the Portal system will be undermined.

What is the likely impact of the proposals on access to justice for claimants who are genuinely injured?

46. We are concerned that creating more Litigants in Person by increasing the small claims limit from £1,000 to £5,000 will result in serious damage to access to justice while delivering little or no benefit for the consumer.

47. The Ministry of Justice's own research on Litigants in Person published in 2011 pointed to problems for litigants in person with, "Understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case"[12] and notes "the extra burden that unrepresented litigants create for court staff and judges".

48. The Association of District Judges has also warned of the consequences to increased litigants in person as did the Civil Justice Council (CJC) working party considering litigants in person in November 2011.

49. To highlight how complex the process will be for the lay person, the recently updated CJC guide to "bringing and defending a small claim" is 28 pages long and far from straightforward for the lay person.[13] The "jargon buster" provided in this guide stretches to two pages. This guide does not even cover personal injury cases in any detail, and the document instead sends a litigant in person off to read the 20 page Pre-Action Protocol for Personal Injury on the Ministry of Justice website.[14]

50. We strongly encourage the Committee to consult both documents to judge whether it is realistic to ask injured claimants who have been the victim of an accident to bring their own claims forward without any legal advice.

51. Consumers do not believe the small claims system is a solution either. A YouGov survey in May 2012 found that consumers believed "…they would need professional help to fight their case. They do not know how to assess the level of compensation they would be entitled to and they do not have the confidence in insurers to offer the correct amount of compensation".

52. Consumers will not get the compensation they are entitled to if more cases are forced through the small claims track and consumers are left on their own to determine whether the money they are being offered is appropriate for their injury.

53. We looked at 500 Irwin Mitchell cases where the insurer attempted to settle the claim before medical evidence was obtained. The difference between the insurer's offer and the final settlement figure was an increase of 218%.

54. An internal FSA investigation into the insurance industry practice of "third party capture" (ie where settlement with the non-fault motorist is attempted directly without independent legal advice) found that on average claimants who reject an initial out of court offer are awarded 274.95% more.

55. Consumers might be put off from seeking redress if they have to pay their own legal costs or bring their case themselves without any experience, while facing well-resourced lawyers for insurers whose fees are not capped—again as recognised in the Government's own Impact Assessment.

56. The Government's proposals would push thousands of genuinely injured people who wish to pursue a claim for compensation into the small claims track, with no recoverability of legal costs.

57. This would pit these injured people, without the benefit of legal representation, against the might of well resourced, insurance industry lawyers. In such a scenario, many genuinely injured people would be put off making a legitimate claim in the first place or feel forced to accept as much as only 1/3 of the value of the claim.

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

58. We agree with the Government that constructive efforts should be made to control the cost of motor insurance premiums and that action should be taken to stop fraudulent whiplash claims.

59. However, to support consumers and bring down the cost of motor insurance, Government must not only focus on reforming how people recover compensation. There is good and bad practice across the whole value chain of the industry, from law firms to claims management companies, insurance companies to victims.

60. By focusing on one sector rather than taking a balanced approach, the Government risks delivering an unbalanced solution that will harm consumers.

[12] Ministry of Justice Research Summary 2/11. Published June 2011, Author: Kim Williams, pg 5.
[13] http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fOther+papers%2fSmall+Claims+Guide+for+web+FINAL.pdf
[14] http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic

61. A better deal for motorists is needed. Changes can be made which will have a positive impact on the validity of claims and the cost to insurers could include:

(I) Improved information sharing on fraud, including legal industry access to the ABI's Insurance Fraud Register.

(II) Further steps to ensure that the Information Commissioner has sufficient resources to enforce the ban on unsolicited texts and spam. Fines imposed could adequately cover the cost of this additional resourcing and the reduction in such communication would also reduce the impression that compensation is freely available.

(III) A commitment from the insurance industry to provide consumers with more information on how their premiums are calculated, with advice on how they can lower their risks.

(IV) The insurance industry must also be clear about the income generated from every aspect of the consequences of a road traffic accident. Insurance data would be a perfect candidate for the Government's midata programme, and would help shift the balance of power to consumers.

(V) A full Government assessment of the RTA Portal and the reforms that have already been introduced to fully understand their impact and the impact on insurance premiums.

About Irwin Mitchell

Irwin Mitchell is the largest full service law firm in England and Wales offering legal services to both consumers and business. Yearly, this service offering includes advising in excess of 20,000 Claimants in respect of RTA matters and more than 6500 Claimants in respect of employers' and public liability issues. We obtain these instructions from a whole variety of sources and have a reputation across the industry for providing a quality service.

April 2013

Written evidence from Cartridges (WL 18)

My name is *Christopher John Tagg* and I am a solicitor of the Supreme Court of England and Wales and I practice Civil Litigation. I have broad experience of personal injury work, although whiplash claims are not a high proportion of my work I have dealt with many in 20 years. I've never taken or paid a referral fee or offered a client an incentive to make a claim with me. I am not on any referral panels and never have been.

"Arming" the Parties

1. There must be "equality of arms" between the parties; that is basic fairness. In a road traffic accident the Claimant is most likely an injured private individual- the Defendant is most likely an international insurance company with an experienced legal team. This must not be forgotten. They do not start the process "honours even".

"Cervical Hyperextension Injury- Whiplash"

2. There is a strong suggestion that "whiplash" is in someway a suspicious, disreputable injury. Orthopaedic surgeons would call whiplash a hyperextension injury, that is to say a sprain related to the rapid acceleration and deceleration (so stretching) of the spine. It is no more suspicious or illegitimate than a sprained ankle or tennis elbow. Anyone who has been in a car accident will probably know it. The symptoms of whiplash are often limited to a few months the effect on people enormously influenced by matters such as whether or not they have a manual occupation and whether they have any pre-existing conditions that effect their spine. A whiplash injury on a cleaner with arthritis would be very significant indeed. The Committee should reject entirely the idea that the injury is someway to be mistrusted. The idea that the Claimant's own GP can be automatically regarded as dishonest should also get short shrift. This is a fiction, and a highly unappealing one.

Different Systems Produce Different Data

3. Much is made of the idea that Britain is the "whiplash capital of the world". This entirely ignores the wide-ranging differences between different legal systems, including those systems which do not use our system of negligence but instead compensate injured people via the criminal code. Many places pay out without establishing fault or measuring the scale of the injury. The idea that people do not suffer neck sprains in other countries is completely fallacious -the average pay out for a whiplash injury in Switzerland is €30000, is that not the whiplash capital of the world? The Committee should avoid the influence of unanalysed data from widely different jurisdictions.

Insult to Injury

4. It is often suggested that a proportion of whiplash claimants are fraudsters. The proportion varies depending on which insurance company press office is putting out the statement: between 7% and 50%. If

50% of claimants are fraudulently claiming for whiplash and the insurance companies are doing nothing about it they are involved in perverting the course of justice and should be investigated.

5. A number which is by its nature "unprovable" is not evidence. The Committee should ask the insurance industry why, if they can identify this fraud, they do not address it, rather than asking that Claimants are yet further penalised as a result.

Reducing Cost by Reducing Claims

6. It is suggested that a way of dealing with the "problem of whiplash" is to raise the small claims limit to £5,000. The effect of this raise would be to remove for most Claimants access to their own legal advice. It is to be expected however that insurers, commercial organisations of scale would still provide their own lawyers for small claims hearings. A small claims limit of £5,000 would include not only many whiplash it would include cases such as scarring including facial scarring, minor fractures, injuries with symptoms that last in excess of two years and acceleration injuries of pre-existing conditions, for instance arthritis or rheumatism which are sparked by the accident. These cases are often difficult to investigate as it is.

7. Any case where fraud is alleged will be automatically referred to the multi-track (where costs are recoverable) and the Claimant (quite rightly) is entitled to some representation to clear their name. The *only* cases remaining unrepresented will be the ones where there is *NO* allegation of wrongdoing. Accordingly perceived fraud will not be reduced, but genuine claims will.

8. It should be remembered that insurance companies owe a duty only to their shareholders. This fiduciary duty is non delegable. They owe no duties to injured people, but are *required* to maximise dividends. Just as cost saving measures since 2010 have not resulted in reduced premiums, future attempts to limit claims will only maximise shareholder returns. Car insurance is compulsory, there is no market imperative here.

A Claims Farmers' Charter

9. In addition in claims Claimants will be forced to take advice from unqualified and uninsured advisors who will not be limited as to the cut of damages they will take. This situation will be similar to the present PPI situation, which is dominated by unregulated, uninsured agents and will result in a huge increase in advertising and "spam" from claims handling organisations and insurers. Insurers are already buying volume claims businesses.

Wasted Resources

10. Finally it should be remembered that amongst the significant and already contradictory and counterproductive innovations that have been pressed through in the last few years perhaps the most significant is the adoption of the "portal system" for RTAs less than £10,000 (soon to be £25,000). Whether or not the portal has been effective is moot, Professor Fenn[i] is very clear that the jury is still out, it is clear however, a raise of the small claims limit to £5,000 will at a stroke render the portal redundant and the investment which has been put into it had an legitimacy which it might seek to develop will be immediately gone which is a very significant waste of public funds and very hard to justify on any terms particularly on an unproven object and one which is (let us remember) related exercise of civil justice.

Conclusion

11. The "whiplash injury" has (by design) been promulgated as a dishonest injury, swinging the lead, a malingerer's condition. That this has been done with such apparent success on the back of two pieces of speculation; "It isn't on an X-ray, so it can't be proved" and "there is loads of fraud out there, we know it, but we can't prove it." This has resulted in the victims of road traffic accidents (our most common type of accident) being significantly disadvantaged compared to, say, the time of the last election.

12. Damages under the "Portal scheme" have fallen by 6%1 and will fall significantly more now that the fees for doing that work have been further reduced.

13. Claimants lose 25% of their damages as an intended result of the Jackson reports. Damages in this country for any injury are at a globally low level without these reductions. If it is the intention that minor injuries should not be recovered for, then that should be stated, but otherwise it seems that justice policy is being dictated by bodies which represent one side of the process only. This cannot but appear unfair and ill advised.

14. Large quantities of hard data were obtained as a result of the Portal Experiment, but this data is not available to the public, it should be available to the committee.[ii]

April 2013

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[i] http://www.justice.gov.uk/publications/research-and-analysis/moj/2012/evaluating-the-low-value-road-traffic-accident-process

[ii] http://www.lawgazette.co.uk/news/government-hiding-rta-portal-evidence-society-claims

Written evidence from Hugh Cannell (WL 19)

In response to the request to provide written Evidence to the Select Committee, so as to allow Claims for compensation if adequately supported by Evidence but potentially to disallow unsupported Claims, may I submit for your attention evidence about jaw joint injuries as follows:

1. The Author.

1.1. The author is a Consultant Oral and Maxillofacial Surgeon with qualifications in medicine, surgery and in dental surgery. He has extensive experience and recognised qualifications in expert witness matters for the Civil Courts.

2. Background.

2.1 Jaw joint (known as the temporomandibular joint) dysfunction (TMD) has been found to occur at times in up to 30% of the adult population. Both physical and psychological disturbances may contribute to its causation.

2.2 TMD can be treated by simple methods by general dental practitioners, sometimes also with support from general medical practitioners. Complicated cases of TMD may have to be treated by hospital-based oral and maxillofacial departments.

3. Claims after Accidents.

Whiplash injuries to the jaw joints are unusual if not rare but are claimed to occur more often in developed countries. Typically such injuries, said to have arisen during the sequence of a Road Traffic Accident (RTA), may be part of a Claim put forward by accident victims. Up to recent times objective evidence in support of accidental injury to the jaw joint has been difficult to demonstrate.

3.1 Occasionally, in my experience, a Claim unsupported by events associated with an index accident may be put forward. More often, a Claim has to be substantially modified when pre-existing disease at the jaw joints is discovered.

3.2 The criteria suggested here allow discrimination between a). accident associated events likely to cause compensatory Claims and b). pre-existing disease:

(i) Unequivocal evidence of recent damage indirectly affecting the jaw joint and demonstrated by medical imaging. Direct damage is infrequent.

(ii) Complete medical, dental and health related records made available.

(iii) An account of any previous TMD recorded in full.

(iv) Consideration of an exacerbation of pre-existing signs or symptoms of TMD but commencing only within a period of up to three weeks post-accident.

3.3 To consider the possibility of a Claim for a late onset of symptoms of TMD, often coincident with a confirmed diagnosis of anxiety or post traumatic stress disorder (each commonly found after accidents), then the exclusion of pre-existing TMD again becomes important.

4. Further Comment.

(a) The suggestion to require objective evidence of TMD allegedly due to whiplash after accidents is welcomed.

(b) There will be cost implications for the NHS in that many cases of TMD would have been successfully treated without for example, detailed scans of the jaw joints. If scans are thought necessary only for the purposes of a successful Claim, then it is possible that insurers might be charged by health providers for that extra investigation.

(c) In my considered opinion, a number of cases of TMD associated with whiplash injuries do occur in susceptible individuals. However the Select Committee is asked to note that the subject of TMD and its causation from whiplash remains controversial and to date any association has been accepted on the balance of probability.

(d) This submission is offered in the hope it might be to be useful as a basis for models at other body sites e.g for back pain.

(e) An appendix is submitted which lists some of the more important papers on the subject of whiplash and the jaw joints. I offer apologies for the technical nature of it. The appendix also serves to demonstrate areas for discussion and the reliability or otherwise of some of the scientific evidence.

APPENDIX

TEMPOROMANDIBULAR JOINT DYSFUNCTION (TMD) AND SIGNS AND SYMPTOMS AFTER INERTIAL ACCELERATION (WHIPLASH) INJURIES. {ABSTRACTED BY THE AUTHOR}.

Laboratory Tests: Models of Injury and Human Volunteer Studies

It has proved difficult to replicate RTA conditions likely to cause inertial acceleration injuries.

Huang1 added a movable jaw to a well tried model system and studied impacts in the range 4.2–9.6m/sec. but no firm conclusions as to neck and TM joint injuries could be drawn.

Miller9 reviewed the dynamics of inertial acceleration type RTAs and pointed out that protective bracing of the neck muscles cannot take place in time to prevent damage to the neck in unaware victims.

Ferrari and Leonard4 reviewed trials using volunteers and reported that no significant opening of the jaw (and therefore potential damage from exaggerated opening), took place during an accident sequence within the ranges previously tested. They also felt that TMD after rear end impacts to cars was inconsistent with traumatic damage. McKay and Christensen10 agreed with this view and stated the laws of physics would have to be broken for TM joint damage to occur in low velocity accidents. The fact that a small but significant number of patients had severe clinical symptoms after this type of accident remained unexplained except by psychological factors21.

Brady et al., 22 felt that within an accident sequence, tensile, compressive and shear forces occurred which could challenge the integrity of the soft tissues and felt further research was necessary before possible damage to the joint could be discounted. Others had found that cervical muscles were injured after 8.okm/hr inertial acceleration conditions and that there was a linear relationship between velocity and the forces generated12.

Mechanisms of Injury

An overview from the reports of many authors is that pre-existing tendencies to TMD or actual TMD at the time of accident, stress and other psychological factors, as well as an element of physical indirect forces, each contributed to to the signs and symptoms (of TMD) after low velocity inertial acceleration accidents3,4,5,8,12,14,18,20,21,22.

The probability of TMD after impacts of this type was not possible to calculate unless velocity, momentum, type of car, posture of occupants, car environment characteristics, deformation ability of car shell and the degree of awareness of impending impact were each known9,10,14,17,20.

Causation

Direct trauma to the TM joint is rarely encountered and most injuries found are caused by indirect trauma. Inertial acceleration injuries occurred only in a small minority of victims (6.1%) of this type of accident.9

On the balance of probabilities (>50%) there are a number of cases 15,17,18,20 , without reported evidence of pre-existing TMD who then express florid signs and symptoms of TMD within a short time (<4 weeks) after an inertial type injury accident sequence (Probert et al., 1994).

Cultural and anatomical differences may account for differences in rates of reporting of TMD3,4.

An overview submitted is that since 25%-35% of the normal adult population has various degrees of TMD, with or without reported symptoms, then an inertial acceleration incident may exacerbate pre-existing disease. Such a view would allow that so few victims of inertial acceleration injuries19 go on to develop overt post-accident TMD4,7,8,9,10,20,22.

Overview

Frequency of TMD after whiplash remains controversial to date but almost certainly rare. Friedman et al.,30 counseled examination with no preconceived notions that TMD was unlikely. Kasch H et al., 29 felt that whiplash was not a major risk factor for TMD but further studies were necessary but later in 2003 stated post whiplash pain was of low intensity and included nonspecific post-traumatic reactions and disability, .(Kasch et al., Neurology. 60: pp 743–9. 2003.)

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* The attention of the Committee is drawn to the differences between carefully controlled scientific studies and clinical reviews of past apparently similar cases as quoted above. Only the former studies can be awarded a high probability of being correct.

The contents of three clinical reviews mentioned above as abstracts would be likely to satisfy the majority of practicing consultant oral and maxillofacial surgeons as probably being correct. The papers would have been subject to rigorous scrutiny at peer review before being published in reputable journals. In my clinical experience, the views expressed by the authors quoted were probably correct.

April 2013

Written evidence from esure Group Plc (WL 22)

Introduction

1.1 esure Group Plc is one of the UK's top 10 private motor insurers as well as a major insurer of homes and their contents. The Group transacts business only in the UK.

1.2 Since the commencement of business in 2000 esure has witnessed first-hand significant increase in costs associated with compensation claims following road traffic accidents and we are strongly of the view that further reform is needed in order to reduce the frequency and cost of whiplash claims. The initial steps taken by the Government to review the legal costs payable for claims both inside and outside of the Portal is a positive step but in our view this does not go far enough.

1.3 At the root of the whiplash epidemic is the fact that far too many individuals are able to pursue a claim for damages without any real medical analysis or challenge. We accept entirely that whiplash is a complex condition with no demonstrable symptoms and as such, the testimony and credibility of the claimant is key. However, the current legal process enables a claimant to describe the accident circumstances and severity of the impact to a medic who has not seen any medical records or even a repair invoice to verify what they are being told. Evidence is accepted at face value and a prognosis period in months offered, which then drives the compensation figure due. A culture has developed whereby it is acceptable for medics to see more than ten claimants in a day affording them some ten minutes for interview and examination, which then leads to a compensation payment of thousands of pounds. The entire process is dysfunctional and it is easy to see why the number and cost of claims has risen so markedly and as a corollary of this, why motor insurance premiums have continued to rise. There must be greater levels of education and understanding amongst medico-legal experts reporting on whiplash claims and a real desire to weed out those pursuing fraudulent claims. Currently, we believe that fraud is not even on the agenda for almost all medical experts.

1.4 The dysfunctional system has suffered further due to the lack of independence of many medical experts with financial relationships between Lawyers and medico-legal firms commonplace. It is therefore reasonably clear to see why so many fraudulent whiplash claims are going unchallenged when there is a clear disincentive for a medic to provide a report stating that the claim is questionable. The whole system is geared towards stacking them high and processing claims as quickly as possible and this drive for operational efficiency has played into the hands of those pursuing fraudulent claims.

1.5 The second key issue in the whiplash arena is the current review of the Small Claims Track Limit (SCT), which is currently set at £1,000. This has not been reviewed since 1991 and currently, very few claims indeed will proceed through the SCT. Our firm view is that improvements are needed in respect of the quality of medical evidence and the supervision of experts providing those reports. In the event that these improvements are delivered, our submission is that there is no good reason why the assistance of a Lawyer should be needed to process a genuine low value personal injury claim and the platform is already in place to enable the general public to pursue such a claim through the MOJ portal. Consistent medical evidence could be produced and processed through the portal delivering quicker access to justice at a reduced cost which would enable the insurance industry to deliver the requisite reduction in premiums. As matters stand, there is no guarantee as to how the reforms implemented thus far will play out.

1.6 In accordance with the guidance notes accompanying the call for evidence, we confirm that the submission made has been prepared specifically for the purposes of the committee and we will seek to keep our answers to the points raised as concise as possible.

1.7 We hope that the responses to the five questions are helpful and should any further information be required please do not hesitate to contact the writer on 0161 862 2037.

Is the Government correct in describing the UK as the "whiplash capital of the world"?

2.1 There can be no dispute that the frequency of whiplash claims in the UK has risen sharply over the last decade and whilst it is difficult to be precise, the Compensation Recovery Unit (CRU) reports that 828,489 RTA personal injury claims were registered in the year 2011–12, which was an increase of some 60% since the same period in 2006–07. The vast majority of the claims registered relate to lower value whiplash claims. To add further context to these widely quoted figures, Government statistics suggest that the number of reported Road Traffic Accidents fell by 20% in the period 2006–10. Vehicle safety is also improving year on year but there is clearly a disproportionate rise in the number of whiplash claims and we are certain that the increase in volume is as a result of claims farming activities of Claims Management Companies and the availability of referral fees for each personal injury claim. The UK clearly has a whiplash problem.

2.2 The next strand of the question is then to consider how the UK fairs in comparison to the rest of the world. This is a very difficult question to answer and we are reliant upon Third Party information when considering this.

2.3 In March 2013 the Association of British Insurers (of which we are active members) estimated that "70% of road accident personal injury claims are for whiplash in the UK, compared to 47% in Germany, 32% in Spain and only 3% in France". The UK had the highest proportion of whiplash claims and certainly carried the title of Whiplash Capital of Europe and in our view this certainly warrants immediate action to address the issues.

Is it correct to say whiplash claims costs add £90 to the average premium; and if so, what proportion of that cost is due to "exaggerated, misrepresented or fabricated" claims?

3.1 The figure of £90 per premium is an industry average released recently by the ABI to reflect the £2 billion cost of whiplash claims in the UK. As members of the ABI we stand behind their research.

3.2 As to what proportion of that £2 billion spend is due to "exaggerated, misrepresented or fabricated" claims then we would submit that this is an impossible question to answer as despite the best efforts of the insurance industry as a whole, a proportion of fraud and exaggeration goes undetected.

3.3 What we are able to say is our that our own Claims Fraud team recorded savings of in excess of £20 million during 2012 and in 2013 the volume of cases requiring investigation has increased during the first half of 2013. esure adopts an extremely hard line in relation to claims fraud and whilst our response sets out our views on how the cost of fraud can be reduced, our own figures seem to tie in with those of the industry as a whole indicating that the cost of whiplash and fraud is a significant issue which must be addressed if premiums are to be reduced.

Whether Government proposals in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims are likely to reduce motor insurance premiums; and if so, to what extent?

4.1 We believe that the proposed Government reforms in relation to the provision of medical evidence in whiplash claims are vital if the frequency and cost of whiplash claims are to be properly addressed and controlled. As highlighted at para. 1.3, a dysfunctional system has emerged whereby there is no real focus or objectivity around the injury sustained and its effect upon the claimant's life. It is commonplace to hear of a claimant who has spent around ten minutes with a medical expert who accepts what the claimant is telling them at face value. The assessing medic rarely sees any medical records to verify whether there are any previous instances of neck or back pain nor do they see any evidence to verify the damage to the vehicles (in order to assess the severity of the impact). It is all too common to read of severe impacts at 30mph or more but upon cross-checking against the vehicle damage, the repair invoice may only be a couple of hundred pounds. Very simply, the whole issue of instruction of medical experts must be revisited so that the medical expert are given the information to properly assess the veracity of what they are being told. It is widely accepted within the industry that a proportion of whiplash claims are fraudulent or exaggerated and medical experts are often the only person a claimant actually comes face to face with when pursuing a personal injury claim. As such, medics must realise that they are the front line defence in PI claims.

4.2 The issue of financial independence between the medico-legal experts and the instructing solicitor is also of paramount importance if claims costs are to be controlled and premiums reduced. The relationship between the medico-legal firms and those instructing them has become too close and many legal firms either own the medico-legal firms they instruct or receive referral fees from them. Against this background, it is clear to see that there is no incentive for medico-legal experts to challenge fraudulent or exaggerated claims. A medic producing a report will be conscious of the fact their work source is likely to look elsewhere if they produce reports stating a claimant is not genuine. It is no coincidence that the most aggressive litigators in the market instruct the medical experts providing the longest prognosis and there needs to be greater monitoring and control of medico-legal experts. We therefore fully support the Association of British Insurers proposal of a Board consisting of key stakeholders overseeing a national call-off contract with a system of accreditation being put in place to improve training and knowledge in respect of whiplash injuries. It should be stressed that our view is that "one-off- training is simply not enough and all medico-legal experts working in the field of personal injury should undergo continuing professional development to ensure standards are maintained and training is up to date.

4.3 Whilst the quality and monitoring of medical evidence is important, the cost of medical evidence has also contributed to increasing claims spend over the last five years. The market agreement (MROA Agreement) is being overlooked more and more with claimant Lawyers seeking to recover upwards of £350 for a medical report covering a whiplash injury. This is often driven by the ownership of the medical agency and there will be an obvious financial incentive to maximise revenue. We strongly urge the Government to look at the fee actually paid to the medical expert, which can be lower than 50% of the overall fee. There is too much fat in this area of the system.

4.4 We are less supportive of the Government's approach to the issue of exaggerated and fraudulent claims. The sentiment is right but the mechanism for fighting fraud is not. The proposition currently on the table is that by increasing the Small Claims Track limit to £5,000 this will remove some of the prohibitive costs risks currently in place when an insurer decides whether to pay or fight a suspected fraudulent claim.

4.5 We do not believe that it is a realistic proposition to suggest that the correct place for fraudulent or exaggerated claims is within the Small Claims Track, which has always been designed to resolve simple lower value disputes. The Court will currently allocate a claim to a track having regard for both the value and complexity of the dispute and we take the view that claims involving fraud should be given sufficient Court time and proper consideration.

4.6 We specifically caution against opting for a half-way house of increasing the SCT limit to £2,500 as this is likely to drive claims inflation. The reason for this is that most whiplash claimants will be courted by claimant law firms who will be able to take up to 25% of the claimant's damages under a Damages Based Agreement. In our view, a system where legal costs are driven by damages will simply drive claims inflation and lead to premium increases rather than decreases.

4.7 Notwithstanding the great strides the Government has made under both LASPO and the Jackson Reforms, the issue of fraud has not, in our view, moved any further forward. Whilst attempts have been made to curtail costs both inside and out of the portal, the main question any fraudster will ask is "what do I have to lose" by pursuing a fraudulent claim? Unfortunately, due to the new rules around Qualified One-way Costs-Shifting, the reality is that most fraudsters have absolutely nothing to lose by running a claim to the doors of the Court and even losing at trial.

4.8 The aim of QOCS is to negate the need for a needless After the Event insurance market. Whilst there is a clear rationale in the approach taken, the reality is that compensators are often left with a large bill after successfully defending a fraudulent injury claim. Either the claimant is a "man of straw" and does not have the means to repay the costs order against him, the claimant disappears leaving the "successful" compensator to spend good money after bad or the ATE provider will cite a fraud exclusion and refuse to pay out. Our claims files are littered with pyrrhic victories.

4.9 Whilst we believe that better focus on fraud by our medical experts would be a good start, there must be sufficient cost penalties and deterrents in place, both on claimants and law firms alike, to ensure that compensators are not forced to simply take a commercial view and pay claims because it is the cheaper option. A logical step would be a requirement for a claimant to satisfy the Court in cases where fraud is pleaded that the claimant has sufficient funds to meet any adverse costs order against them.

4.10 In summary therefore, changes to the way in which medical evidence is obtained in whiplash cases should, in theory, lead to more claims being challenged, greater identification of fraud, and lower claims costs. The motor insurance market in the UK is highly competitive and if the proposals do lead to a measurable reduction in claim frequency and/or average cost this will be reflected in lower premiums generally, all other things being equal. The actual extent of any reduction in premiums is of course very difficult to estimate at this point.

4.11 The issue of fraud is one that requires far greater attention and we do not believe the current Government plans to increase the SCT limit will lead to more fraudulent claims being defeated. Our response to the final question touches on what more the Government could be doing.

The likely impact of the proposals on access to justice for genuine claimants

5.1 The likely impact of the proposals around improved and standardised provision of medical evidence is likely to be entirely positive for claimants as knowledge and education amongst medico-legal experts will increase and claimants will gain more from their examination and the subsequent report commenting on the injuries sustained and recommended treatment etc. Greater time spent assessing the injury and the severity of the impact will naturally lead to the claimant receiving the right amount of compensation.

5.2 In respect of the proposal to increase the SCT limit to £5,000, which esure supports, we believe that claimants will be given the freedom of choice to pursue a straightforward low value injury claim directly via the MOJ portal and for those individuals who wish to claim via a Lawyer then there is the option of doing so.

5.3 In raising the SCT limit to £5,000 it will be argued by the claimant lobby that access to justice will be reduced and that insurers will seek to underpay claimants who are not represented. This is simply not true and the offers we make for soft-tissue injuries are assessed based upon the evidence rather than whether a claimant is represented or not.

5.4 We believe that the MOJ portal provides the perfect platform for claimants to submit their injury claims and for those who do not have access to the internet or choose not to use it, a paper process can be put in place whereby the insurer would administer the portal and send documents out to claimants. The likely impact will be a slicker, quicker and more efficient process removing the unnecessary cost involved in processing whiplash claims. The overall likely impact therefore will be reduced costs, at no detriment to the claimant, enabling insurers to drive down premiums.

Whether there are other steps the government should be taking to reduce the cost of motor insurance

6.1 The primary ways in which the cost of motor insurance could be reduced are by increasing the SCT limit to £5,000 and implementing the Government recommendations in relation to the provision of medical evidence.

6.2 However far more could be done to assist compensators in challenging and defending personal injury claims. We have already touched upon one possible solution of a claimant against whom fraud is pleaded having to satisfy the Court that they have sufficient means to pay an adverse costs order as a result of discontinuance or a finding of "fundamental dishonesty" at trial.

6.3 Further practical steps would be recourse to the claimant solicitor to meet adverse costs orders as a result of discontinuance or fraud. All too often a claimant Lawyer, who has been put on notice that fraud or dishonesty is alleged will come off the Court record shortly before trial leaving the insurer only with recourse to the claimant who either goes to ground or does not have the means to pay. The recent case of Rasoul V Linkevicius demonstrates that Lawyers have a part to play in detecting and preventing fraud.

6.4 We believe that the decision of Summers v Fairclough Holmes in 2012 illustrates that further attention is needed as to how the whole issue of insurance fraud is approached by the Courts. Our view is that it is fundamentally wrong that a claimant who tries to defraud an insurance company but fails can still recover compensation reflecting the true level of disability sustained. The fraudster receives exactly the same amount of damages as the honest claimant who has told the truth.

6.5 The position should be considered against the context of First Party fraud in that any attempt to commit fraud against a household or motor policy, for example, results in all cover under the contract being withdrawn. We submit that the remedies in Third Party fraud should be aligned to those in First Party fraud.

6.6 Continuing along the theme of deterrents, we also believe a review of custodial sentences for insurance fraud and Contempt of Court should be undertaken. The potential rewards for insurance fraud are high, both in organised rings and in the large loss arena, and a six-month sentence suspended for half that term might be seen by some as a risk worth taking.

April 2013

Written evidence from Keoghs LLP (WL 23)

Keoghs is the only "top 100" law firm to focus exclusively on the handling and defence of both mainstream and specialist insurance claims. We offer an "end to end" claims service to insurers, public sector bodies and self-insured corporates which include pre-litigation, litigation and costs negotiation activities. We represent insurers who, between them, provide around 70% of the motor insurance purchased in the UK. With almost 1,200 dedicated staff Keoghs is a recognised leader in the field. In the last 12 months we have been instructed to handle in excess of 35,000 separate matters in total across all classes of personal injury claim.

Keoghs has been closely engaged in the broader Government reforms to the civil litigation system as enacted in Part 2 of the LASPO Act 2012 and other ancillary CPR changes as recommended by Lord Justice Jackson. Whilst these reforms are welcomed, we agree that specific attention needs to be paid to the overall frequency and cost of whiplash claims. This should also embrace a review of how medical evidence is obtained.

Keoghs also has a particular interest in the safety of young drivers and we spoke at the Conservative, Liberal and Labour party conferences in 2012 on this issue alongside the ABI. We welcome the forthcoming DfT Green Paper on this issue and will be responding to that in due course.

Keoghs submitted evidence to the Ministry of Justice consultation on reducing the number and cost of whiplash claims, however this evidence has been written specifically for the Transport Select Committee inquiry.

Summary

Keoghs welcomes this inquiry on issues which characterise our dysfunctional compensation process and serve to drive up motor premiums for the public and UK PLC. The facts speak for themselves. Between 2006 and 2012, road traffic accidents decreased by 20% whilst the number of RTA personal injury claims increased by 60%. This is also against the backdrop of improved vehicle safety as manufacturers work to make cars safer and protect occupants in the event of a collision. Claims farming, referral fees and increasing legal costs have spiralled out of control. An entire industry exists to perpetuate a whiplash claims culture and all at the expense of those who pay insurance premiums.

We must recognise however, that a balance needs to be sought. We do not wish to see any measures that will prejudice access to redress for the genuinely injured claimant. We do, however, seek a reduction in legal fees, a genuine referral fee ban with some teeth and steps to eradicate exaggeration and fraud which is too often supported, explicitly or implicitly, by doctors and lawyers. The process needs to change and this change needs to be Government led. That change also needs to be quite radical if the Government is to achieve its ambition of intervention to reduce premiums.

We agree that whiplash is complex. It is a subjective injury in terms of tangible medical evidence and opinion. Too often, doctors are simply historians who commit to paper a version of events provided by a claimant and then conclude with a prognosis based upon a dearth of medical fact and evidence.

We support the Government's ambition to improve diagnosis and improve the quality and independence of medical evidence. We have some additional suggestions in this submission which we believe will preserve access to justice and deflect a number of unintended consequences:

- Those engaged in the process should be truly independent and not subject to any perverse financial incentives to report either one way or another.
- Medical experts should be accredited and encouraged to keep up to date with emerging views and technology.
- Standardised instructions and reports should become the norm and the expert should have a full and clear insight into the accident mechanics in every case.
- The whole process should be controlled by an independent board made up of a diverse group of stakeholders and with on-going accountability to the MoJ.

Although it is not part of the remit of the Committee's inquiry, we would like to point out some reservations we have in connection with an increase in the RTA SCT to £5,000. If this proposed change is implemented and a *genuine* solution is not found to improve medical evidence then we fear that this could become a prime example of *"unintended consequences"* which will become evident in years to come.

An increase in the SCT is likely to spawn a new industry of Damages-Based Agreement (DBA) law firms. These firms will be incentivised to maximise damages to drive up their own fee income. This outcome in isolation, and without meaningful reform around the medical aspects, could lead to drive up both frequency and cost of whiplash claims and so fail to deliver Parliament's ambition to see car premiums reduced.

We wish to be clear that we do support an increase in the SCT to £5,000, but that, in parallel, a real solution to the medical issue must also be delivered.

Finally, in terms of other steps the Government should be taking to reduce the cost of motor insurance, we suggest the Government looks at the issue of third party fraud.

Third party fraud is systemic in the claims process—this is particularly prevalent around low level/whiplash RTA claims. It should be a fundamental principle that fraudulently exaggerated claims should be struck out in their entirety. This would finally provide sufficient disincentive to would-be fraudsters.

The Government's Proposals on Medical Evidence and Reducing Premiums

1. We support the focus on improving medical evidence for RTA claims. The Government has, within its consultation paper, recognised many of the failings of the current process. All too often, a whiplash report provides a subjective history provided by the claimant with no objective analysis as to whether an injury has actually been sustained and the subsequent impact of pain, suffering and loss of amenity. That narrative is then concluded with a prognosis which has little or no basis in medical fact. The prognosis is the element which drives the valuation and amplifies the true level of damages beyond what is merited in the case. This process has to change if we are to drive different outcomes.

Recommendation

2. The current process does not allow the defendant the opportunity to convey to the examining expert their version of the accident circumstances/mechanics. This requires a simple CPR change to facilitate this. We have seen cases where the medical expert simply reports that the claimant has been in an RTA collision. This, unbeknown to the expert, has included a minor clash of wing mirrors or even in one case, a child opening a car door into contact with an adjacent stationary vehicle in a supermarket car park. The examining doctor must be provided with full details of the accident mechanics so that he can then properly assess the alleged injuries against that set of circumstances. We have spoken to MRO's and other medical experts and they all agree that this simple change would make a significant difference to the quality of medical reporting. The defendant should also then have the right to discuss/challenge the medical experts report against the backdrop of the accident mechanics.

3. The Government has also flagged concerns that, in certain circumstances, there appears to be a lack of independence. You will be aware that many claimant law firms have strong financial links to certain Medical Reporting Organisations (MROs) that they retain on their panels. Such relationships are constructed to deliver

profit and we are increasingly concerned about the growing lack of transparency and independence of some medical experts.

4. This can then manifest itself in the actual reports produced. The lawyer and the doctor both have a vested interest in producing a report that portrays harm and a lengthy prognosis in order to drive up damages and costs. This lack of independence cannot be supported, nor is it sustainable if Government wishes to drive real change.

RECOMMENDATION

5. Such relationships should be investigated further and dismantled by process/rule change. We are striving for real independence in the process so such relationships vested in financial interests cannot be allowed to continue. Medical reports should be provided by truly independent and accredited medical experts and should not be in any form of financial relationship with the claimant's solicitor.

6. We further note the MoJ's call for standardised medical reporting. We would welcome this and consider that stakeholders should work together to create a standardised whiplash template. This could be part populated prior to instruction of the expert with agreed accident circumstances, witness commentary and/or detail from the Claims Notification Form (CNF). This would focus the mind of those reporting and would create a universal report where the claimant is asked a set of specific and pre-defined questions.

7. There is, however, something of *"putting the cart before the horse"* in this proposal. We believe that the first step is to actually standardise the examination itself. There is currently no best practice or governance that we are aware of that dictates how an examination should take place and what enquiries made. We would suggest that, with support from the Department of Health, a best practice examination process should be agreed which must be adhered to. This would then naturally flow into a template report.

RECOMMENDATION

8. The MoJ work with a diverse group of stakeholders to draw up and agree a universal medical reporting form which can include brief details of the accident circumstances/mechanics and brief witness commentary where appropriate. The medical expert would then complete this template by way of pre-agreed questions. We would like a more detailed debate to take place as to whether this template should also include any view on prognosis. We hold a view that a doctor should report only on observed symptoms and history. We do not believe that doctors can justify the prognosis they give and these only serve to artificially inflate damages. If a claimant has recovered by the time of the medical then the claim is one to settle on that basis. In tandem with this activity, and as detailed above, is the need to formulate and agree a defined best practice examination process which must be adhered to in all cases.

9. The Government has also set out possible changes in infrastructure of the medical reporting process. The consultation offers options of a national call off contract or a process of accreditation. We see these proposals as working side by side and that both could be considered in parallel.

10. There is no question that MROs have helped to bring some order and discipline to the medical reporting process. They have helped control quality, speed and price. However, some of that discipline is beginning to break down, with MROs connected to claimant law firms now seeking to drive up fees beyond the MRO guidelines. This is precisely the behaviour we have mentioned above and is further evidence of why these vested interest relationships should be prevented. Many MROs, however, are legitimate businesses working with stakeholders to improve the process. We certainly see a role for such bodies going forwards and being part of the overall solution.

RECOMMENDATION

11. The cost of medical reports should be fixed and set within CPR. If a standard examination and reporting format is adopted then there is no reason why there should be any discrepancy in the cost of a report. We are also seeing an increasing number of ancillary reports being obtained in low value whiplash cases—these are generally reports from psychologists. With certain claimant law firms, this is rapidly becoming a standard step in their process. The report adds little—sometimes nothing—to the overall evaluation of the claimants condition; however, fees for such reports range from anywhere between £800 and £1,400. There seems little point in addressing the issue of GP or orthopaedic evidence unless the MoJ also intervenes with firmer guidelines around ancillary reports—both in terms of when they can be obtained and how much they should cost.

12. We can also see that accreditation would be a valuable addition to the process. We consider that some form of quality accreditation process should be embodied in the medical reporting process and that MROs should not engage any expert who is without such credentials. Some training and on-going education process that keeps experts up to date with changes in knowledge, diagnosis, etc, must be a worthwhile process addition and should be implemented. The cost of that could be recovered by the MROs by way of a simple levy on the individual doctors who would benefit from the accreditation process and updates in knowledge.

13. We are in favour of some form of board to oversee and regulate the overall whiplash reporting process. We consider that this could be not dissimilar to the approach adopted with the portal board where stakeholders come together and work in partnership to deliver the Government's ambitions. This board should ultimately be responsible to the MoJ in terms of its delivery and ability to demonstrate real change.

Recommendation

14. The MoJ should press forwards with a piece of work to develop a national panel of truly independent MROs who work only with accredited experts. That accreditation process is to be agreed and implemented and the cost to be borne as a levy across all engaged experts who in turn will benefit from membership via education, etc. A board should be created to oversee this operation comprising diverse stakeholders and chaired by an independent, MoJ-appointed person with responsibility back to the MoJ at minister level.

Conclusion

15. We seek a holistic approach to the issue of whiplash medical reporting. Those engaged in the process should be truly independent and not subject to any perverse financial incentives to report either one way or another. Experts should be accredited and should be helped and encouraged to keep up to date with emerging views and technology. Standardised instructions and reports should become the norm and the expert should have a full and clear insight into the accident mechanics in every case. The whole process should be controlled by an independent board made up of a diverse group of stakeholders and with on-going accountability to the MoJ.

Other Steps which the Government should be taking to Reduce the Cost of Motor Insurance

16. We welcome the Government's invitation to set out any other proposals that may improve the overall RTA claims process. This was contained in the recent consultation paper issued by the MoJ examining how to reduce the number and cost of whiplash claims. We focus our suggestions on three areas—improving young drivers' safety, third party fraud and changing the limitation period for low value RTA claims (the Limitation Act 1980).

Young Driver Safety

17. Firstly, we welcome the Government's announcement that they are to publish a Green Paper by June on this very important issue.

18. The single biggest cause of accidental death of young people aged 15–24 is being killed in a road traffic accident. In 2011, 5419 people were killed or seriously injured as a result of accidents involving at least one young car driver aged 16—25. No less than 40% of 17 year old males have an accident in their first six months of driving.

19. Keoghs partnered with the ABI at the Conservative, Liberal and Labour party conferences in 2012 to talk about this crucial problem. We are no longer equipping our young people with the skills to drive on all roads and in all weather conditions. The driving test is no longer "fit for purpose" and too many young people are dying on our roads.

20. Reform is required in terms of both the driving test itself and then what a newly qualified driver is allowed to do. We support the concept of graduated driving licences and believe that the evidence from other countries where this step has served to reduce fatalities and serious injuries is compelling.

21. All too many catastrophic injuries that we see, involve young males under the age of these claims are of very high value—now breaching the £10 million mark and so must have an effect of the mind of a prudent underwriter when assessing premium for young drivers. Reform that leads to a reduction in claims frequency and severity must in turn lead to a reduction in premium for young people.

22. This outcome creates a "win, win" with the TSC helping to save young lives and bring about reduced premiums for young people. This in turn will support both social and employment mobility which again, benefits all.

Third Party Fraud

23. Keoghs has long advocated that third party fraud should be treated by the courts in the same way that they view first party fraud.

24. Third party fraud is systemic in the claims process—this is particularly prevalent around low level/ whiplash RTA claims. It should be a fundamental principle that fraudulently exaggerated claims should be struck out in their entirety. This would finally provide sufficient disincentive to would-be fraudsters.

25. We would refer the MoJ to the case of *Summers v Fairclough Homes Ltd [2012] UKSC 26* where the claimant amplified the true worth of his claim ten-fold. The matter was finally considered by the Supreme Court who considered that the level of exaggeration was not sufficiently exceptional to strike the case out in its entirety.

26. There is of course some irony in this position and perhaps the Supreme Court was unfortunately correct that claimants exaggerating their claim ten-fold is no longer deemed to be exceptional.

27. We would urge the MoJ to re-open this debate and to move swiftly to a position where such cases can be struck out in full to deter fraudsters.

28. Further, the introduction of Qualified One Way Costs Shifting (QOCS) provides fraudsters with a real risk-free incentive to "have a go". Whilst, the proposed rules provide that fraudsters will lose QOCS where a party can prove that the claim was fundamentally dishonest on the balance of probabilities, this hurdle is simply too narrow and of no deterrent effect whatsoever to exaggerated claims.

29. Lord Justice Jackson intended that the rules should be drafted, *"to deter frivolous or fraudulent claims,"* (Chapter 19, para 2.11 of his final report). The rules may capture a fraudster if the claim is fundamentally dishonest, but do not cover the errant conduct that we see where an element of a claim is dishonest.

30. If the Government is serious about reducing the cost of exaggerated claims then it should endorse the initial draft of the exception proposed by the Civil Procedure Rules Committee (CPRC) at the meeting of the Civil Justice Council on 19 October 2012.

31. The CPRC proposed that, *"A claimant should lose QOCS protection if the claimant's conduct is dishonest on the balance of probabilities."* This test is the same but it can be applied to individual heads of claim and instances of exaggeration.

Limitation

32. Finally, we would like to raise the issue of the Limitation Act 1980 in respect of low value RTA claims.

33. The Act was formulated in 1980 when a very different culture prevailed in terms of claiming for personal injury damages. An individual's awareness about his rights to claim and ability to access compensation was limited and the Act was an important safeguard to protect claimants from becoming time barred in terms of pursuing redress.

34. Times have moved on and we would suggest, particularly in RTA compensation, that the level of public awareness is now extremely high. This is supported by a constant stream of television, radio and newspaper advertising and a general public awareness that if you are involved in an accident that was not your fault then you can seek compensation.

35. We suggest that MoJ give consideration to reducing the limitation period as set out S11(4) of the Act. We believe that in respect of RTA claims <£10,000, this could now safely be reduced to 12 months. We would recommend however, that you retain the wording within S33 and preserve a Judge's discretion to waive S11(4) where (s)he believes that there would be genuine prejudice to the claimant. We would couch this in terms that this would be used very much in exceptional circumstances, and the bar be set high, to deter countless applications from claimant lawyers.

36. This would serve to reduce overall lifecycles of RTA claims, bring swifter resolution for claimants and assist insurers in understanding their future liabilities—so supporting them in pricing.

37. We would also suggest that this move will be highly beneficial should the MoJ decide to increase the SCT to £5,000. We believe that this decision will bring forward a new industry of DBA lawyers. The MoJ will be aware that the DBA fee will be set as a percentage of past losses. This may cause certain claimant law firms to delay both notification and settlement of the claim to build up past losses so as to inflate their own costs. A new limitation threshold set at 12 months would help militate against this adverse behaviour and promote early notification, evaluation and settlement—which must be in the interest of the injured victim.

38. Given the above, we would urge MoJ to give consideration to reviewing legislation that is now 33 years old and that no longer reflects culture and practice in 2013. There will be real benefits to claimants and consumers in modifying the limitation period and will hopefully help meet the Government's overall ambition of reducing premiums.

Conclusion

39. We submit our views for consideration by the TSC. We do not believe that anything being considered by Government will hinder access to justice. The proposed reforms are concerned with genuinely independent and fair medical evidence, allied to a revised small claims track. Claimants will still be represented as LASPO provides for Damages Based Agreements and this is how we envisage claims being funded in a new regime.

40. These proposals will reduce cost which could then be passed on to the consumer by way of reduced premiums.

April 2013

Written evidence from Camps Solicitors (WL 24)

Introduction

1. Camps Solicitors welcome this opportunity to submit written evidence to the Inquiry into Whiplash by the Transport Select Committee.

2. This response begins by providing a background on our practice and highlights some recent work we have undertaken as a no win no fee solicitors, before going on to address the specific issues on which the Committee is seeking evidence.

3. We are an independent law practice. We have no ties or affiliations to motor or household insurers and work for and on behalf of the litigants we take on board. Our on-boarding process includes a validation of the claim every time. We are known to the insurance industry as a litigious law firm, for which we make no apology as we pride ourselves on our focus to fight and win for our clients.

4. We have represented over 70,000 claimants in the last five years in a variety of Personal Injury (PI) cases. Almost 90% of these cases were in relation to Road Traffic Accidents (RTA) (cars, cycles and motor bikes, along with pedestrians). We also practice in the Clinical and Medical negligence areas of injury. We have a considerable track record, with over 95% success in claims for injured and wronged people. The overwhelming majority of our work is undertaken on the basis of No win, no fee.

About Camps Solicitors

5. Based on Merseyside, Camps Solicitors provides legal advice and assistance to people across the North West and North Wales and other parts of England and Wales. We have over 25 years' experience of working with the victims of non-fault accidents, handling thousands of cases every year. Camps Solicitors is one of the leading firms offering legal services and advice to the victims of personal injuries. We employ over 300 people locally in the North West.

6. We have impressive success rates across a wide variety of PI and work accident claims. We are proud of the service we provide to accident victims, particularly people who are most vulnerable. No win no fee compensation claims fees are covered through the insurance of the person or organisation at fault. This system of payment allows us to represent clients with limited financial means, who might otherwise be put off pursuing a case by the prospect of incurring significant legal fees. This approach also ensures the fundamental principle of "equality of arms", whereby an injured party is provided with proper access to legal services to recover an appropriate amount of compensation from an insurance company with access to significant legal resources, who has limited contractual interest in providing that compensation. It also allows our practice to take on more risky cases on behalf of some of the most deprived in society.

7. We put customer service at the heart of what we do and expect all our staff to meet exacting standards in relation to customer care. One reason for this is that we believe that when someone needs to seek a personal injury compensation claim, the quality of service they receive from their solicitor is as important as the money they receive at the end of their claim.

General Comments on Proposed Reforms to RTA Compensation Structure

8. Camps Solicitors have significant experience in handling PI claims resulting from RTAs. As whiplash is the most common injury caused by a RTA at around 60–70%, Camps Solicitors handle around 12–14,000 whiplash cases each year. We welcome the consideration of the role of independent medical assessments as we have strong anecdotal evidence that key issues the government are looking to address can be addressed through their more rigorous use.

9. We also believe that the review of the current structure provides government with an opportunity to review the practice by insurance companies of making blind offers to claimants before any independent assessment of the claim has been made.

10. As the PI industry looks to address the concerning trend of increasing car insurance premiums it is understandable that the government should seek amendments to the threshold for damages in personal injury claims in the Small Claims track. We would be concerned if this led to minor injuries which may still cause considerable personal distress being excluded. We are also concerned that, even by the ABI's own estimates, only 4–7% of claims are regarded as fraudulent and/or exaggerated. Yet the government propose applying a 100% change in law and process to address this relatively small percentage. As a legal practice we would regard any claim in that 4–7% as a criminal issue, which can and should be tackled in other ways.

11. The perception that there is a growing culture of compensation in England and Wales is certainly unhelpful to those individuals who suffer from injuries and have legitimate claims to make. Steps taken to throw light on the role of compensation in aiding individuals' rehabilitation from personal injury are to be welcomed, in particular among influential media and political stakeholders.

12. In the debate that has resulted from the rise in car insurance premiums we are concerned that the Government appears to have sought much greater representation from the insurance industry than from other stakeholders, and that this has resulted in rather one-sided proposals for reform being brought forward. By any

objective assessment it would be bizarre to create a situation where the defending party's insurer is routinely the looking after the person who has been wronged and the principle of independent legal advice has been discarded.

13. In particular, we are extremely concerned that the principle appears to have been accepted that in PI claims an individual is better protected if his or her access to independent legal representation is severely restricted. This is what recent proposals from some companies explicitly advocates, and what the Government is tacitly accepting. This sets an extremely dangerous precedent, and one that we do not believe exists in any other walk of life. We would ask the Committee to note that insurers themselves actively "sell" no fault accident details to Claims Management Companies (CMCs) and other PI lawyers.

14. There are a number of occasions when the insurance industry has not acted in the consumer interests. For example using the courts to challenge a policyholder's right to a hire car whilst repairs are undertaken to their vehicle and to be reimbursed for their employment of loss adjusters to deal with claims. If the government were to accept the insurance industry's proposals on dealing with no-fault claims without question it would be akin to asking a house buyer to accept the seller's valuation of the home without seeking professional or independent advice. We believe that raising the threshold for small claims will also greatly increase the number of individuals self-representing in the courts. The new threshold restrictions remove any economic incentive for independent legal involvement. It is clear that this would reduce the volume of claims being dealt with by lawyers but in doing so, it would also deny a majority of valid claimants access to justice.

15. In targeting whiplash claims in the way that is currently proposed, wider ranging implications will be felt for claimants across the board. There are likely to be unintended consequences resulting from such an approach, which could bring UK law into disrepute and certainly a fall from its current standing in the world.

16. We hope that this submission goes some way towards broadening the debate as these reforms are considered, ensuring that UK drivers get a good deal when paying their insurance premiums while protecting those who have a legitimate right to compensation.

Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"

17. We believe this to be easy headlining by the government. Whiplash is a serious injury that is the most common injury as a result of a car accident. Given the prevalence of this injury in car accidents there will be no whiplash capital of the world, or if there is it will be the same as the car accident capital of the world (something attributed to both Ethiopia and Uganda).

18. The Ministry of Justice's statement in their consultation paper said that 70% of UK road accident personal injury claims are for whiplash, compared to 47% in Germany, 32% in Spain and 3% in France. The statement does not consider the system each nation uses to treat and assist those who suffer from whiplash, whether it is through medical insurance, motor insurance or a national compensation scheme. To that extent we would go so far as to say that the British government are being disingenuous and misleading the debate by crowning the UK with the title "whiplash capital of the world".

19. The British legal system is something to be proud of. In an increasingly connected and homogeneous world the UK continues to stand out for it robust and independent legal approach. Our legal approach is often considered the best in the world and has set a benchmark to which people from other nations aspire.

20. In another light whiplash cases could be seen as examples of the rigour of our legal system and the application of the principle of access to justice. In this light the high number of whiplash cases would actually be viewed positively and considered vindication of the UK's effective legal approach.

21. If 95% of traffic accidents lead to injury any international league table of whiplash claims becomes irrelevant, or at least a reflection of each nation's legal standards and the effectiveness of their compensation processes.

Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims

22. This is the highest figure put forward by the insurance industry. Other members of the insurance industry have also suggested £60, £40 and even 3%. All of these claims fail to recognise a common practice among insurance companies that is driving up average premiums.

23. The insurance industry's eagerness to reduce their costs by settling claims before full evidence has been gathered, including a medical assessment, actually encourages fraudulent claims. It seems logical that the cumulative effect of this approach, as they attempt to save money on several individual claims, would be a greater sum may be paid out. In their desire to make pre-medical settlements the insurance company will not be able to identify fraudulent claims.

24. We believe that, somewhat unfairly, PI solicitors have become a focus of angst in consideration of the "compensation culture". It is important that this is balanced by a full consideration of the behaviour of members of the insurance industry. As a solicitors firm we work through the law and when necessary through the courts. We believe this methodology is vital to weeding out fraudulent insurance claims.

25. It is interesting that despite a strong investigative and evidenced Channel 4 dispatches program (broadcast *date* 07.01.13) highlighting the behaviours of the insurance industry when dealing with vehicle repairs through a range of "approved" repairers—nothing more has been done or considered with regards this. This practice, outlined as a way to manage repair costs and therefore premiums, has not had any such effect to the end user. See; http://www.channel4.com/programmes/dispatches/episode-guide/series-111/episode-6

26. The history of rising insurance premiums also does not suggest that the big insurers will move to reduce premiums following reform of the market. Many market interventions have been argued for over the years, always with the "carrot" of reduced premiums at the heart of the industry lobby. Such reductions have never materialised in the past, and it would be naïve to believe that they will on this occasion.

27. We would also point out that the industry is advocating that those who fear being denied access to justice should take out "Before the Event" (BTE) cover. As well as representing a lucrative new line of business for the insurers, it undermines their core positioning that cover for whiplash is unnecessary and at an estimated €50 per annum, largely negates the impact of any reduction in the main premium, however unlikely that is to materialise.

28. As a no win no fees solicitors our costs are met by the defendant's insurance company when they are found to be at fault. This is separate to the compensation that may be awarded to the injured party and typically represents 40% of the compensation. It should be noted that in proceeding with a claim the solicitor has to accept the impact of negative cash flow.–The average claim takes 9–10 months so clearly there are risks and outlays that a solicitor must accept in dealing with such claims, without an a surety of success.

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

29. It is important that the means for reducing fraudulent and exaggerated claims are treated separately.

30. All Lawyers and Insurers should be compelled to use an independent and appropriately qualified medical expert. Increasing the importance of medical evidence is fundamental to the removal of fraud and exaggerated claims.

31. Verified medical evidence should ensure that the claim is suitably adjusted to reflect the level of injury and there by remove the possibility of exaggerated claims.

32. We also strongly recommend that the law is changed to prevent pre-medical settlement offers from the insurance industry.

33. Where fraud is suspected, it should be pursued through the courts. The insurance industry estimate that between 4–7% of settled claims are fraudulent. This means that at least 93% of claimants have a genuine case. It would be wrong that the 93% of legitimate claimants should lose because of attempts to defraud the system by minority involved in criminal activity.

34. All parties should ensure that they continue to follow up on abuses that are found within the system. The penalties that are applicable to those who abuse the system should also be communicated more widely. Those involved already face prosecution and in some recent cases where criminal gangs have been operating to defraud the system, stiff prison sentences have been issued.

35. As an immediate short term step, the government may wish to encourage insurance companies to reconsider the practice of offering pre-medical settlements when they are acting on behalf of the defendant. Further we would suggest that this is outlawed and conditional upon receiving compensation, a medical must have been carried out.

36. Further, better and more robust regulation of Claims Management Companies should also be undertaken to reduce the intrusive cold calling.

37. We therefore support the general proposals put forward by the Government with regard to the use of medical evidence in challenging fraudulent claims and cutting out exaggerated claims.

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

38. The proposed changes to Small Claims significantly limit the access to justice for claimants who are genuinely injured.

39. We do not believe this principle should be allowed to stand. Settlements are designed to reflect the rehabilitation needed from the injury suffered, including costs incurred such as physiotherapy and other remedial treatments. Around 85% of RTA related whiplash claims are below £5,000. Raising the threshold to £5,000 would automatically mean lesser injuries were no longer compensated.

40. The unintended consequences of raising the threshold must be considered. If 98–95% of the current claims are made to disappear it does not mean that fewer people are suffering from Personal Injuries. So the question that must be considered is where these people will go if the threshold has risen? It is reasonable that a great number will turn to the court system in their distress.

41. Individuals without the means to hire legal representation would be forced to represent themselves in the small claims courts. These claimants would be challenged by lawyers hired by the insurance company they are looking to claim against. In this situation (some might draw comparisons to David and Goliath) it is reasonable to expect that it will become common for the court to decide that the individual is not properly prepared to represent themselves in court. If this is the case the court is obliged to appoint a legal representative, at no cost to the individual. An increase in cases going through the courts would not only be hugely disruptive to the courts but it is also highly likely to drive an increase in costs to the taxpayer.

42. We could see the behaviour and outcome of this akin to the approach insurers have taken to vehicle repairs through approved repair centres, except of course we are dealing with people and families and the direct impact accidents have on them. Low offers and ill-informed offers to save claimants having to appear in person at court could become the norm.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance.

43. UK insurance companies are required to have available any money with liability on it for a longer time than their European counterparts. Therefore capital requirements become higher. A consequence of this is to automatically make premiums in the UK higher than those in Europe.

44. We would strongly encourage the Committee to break with the insurance industry's habit of considering PI lawyers in the same breath as Claims Management Companies. The two are not the same, examination of their roles should be done independently. So there are three groups to consider as you seek means to reduce the cost of motor insurance; PI solicitors, insurance companies and Claims Management Companies.

45. In other European countries there is a minimum speed below which a claim cannot be made, for example in Germany this is 10mph. While we recognise that there will be certain attractions to this sort of idea, we believe an individual who suffers from injury should be entitled to the necessary compensation to help them recover from their injuries. While a minimum speed would remove some claims it is also possible that a consequence would be to disenfranchise a number of people who have been genuinely injured.

46. We are aware that the issue of the high insurance premiums faced by young drivers is at times talked about at the same time as wider issues that affect motor insurance premiums, such as whiplash. It is important to disassociate the arguments around the level of motor insurance premiums paid by young people in the UK with the wider issues around whiplash being looked at in this inquiry. The higher premiums paid by young drivers reflects the risks faced by this group. While there may be sensible steps to reduce these premiums they are not the same as steps that need to be taken to reduce the cost of motor insurance overall.

47. Finally, the insurance industry should be set a range of actual targets and a time line that can be measured to show the positive impact of premium reductions. This should be transparent and accessible to the great British public.

SUMMARY

48. Following the government's own consultation we firmly believe that should the small claims limit raise to £5,000 the mainstream litigant in "no fault" claims it would face a broad denial of "access to justice". With a claims limit at £5,000 we estimate that over 85% of currently legitimate claims will be excluded. A considerable number of these will fall to the courts to deal with as a "LIP" (Litigant in Person). This is highly likely to result in the courts becoming clogged with inexperienced members of the public looking to progress their claim in a "David v Goliath" hearing, as the LIP takes on an insurance company's legal team.

49. The additional cost burden of handling such LIP cases in the small claims courts and providing up to £250 of legal representation will fall to the tax payer and the already under pressure MoJ budgets. A fairer approach would be to apply a relevant inflationary adjustment to the £1,000 limit from its last agreed set up date.

50. We believe to balance the litigant and defendant position it should become compulsory to have medical evidence for accident claims and that pre-medical offers by insurers should be outlawed.

51. Finally, CAMPS would be delighted to meet the committee to answer any questions it may have on this submission and to discuss the broader context and implications of the proposed reforms around whiplash injuries.

April 2013

Written evidence from Liverpool Law Society (WL 26)

1. Liverpool Law Society (LLS)

LLS represents over 2,500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This paper has been produced by canvassing the views of members. Most of the information provided is based upon the opinions and experiences of solicitors who are predominantly engaged in the work of personal injury litigation. Contributors include lawyers acting for both insurers and Claimants. At all times LLS has sought to express an impartial view without preference. The views are expressed are therefore not necessarily the views of the author of this document.

2. Summary of Position

2.1 It is inappropriate to label Great Britain as the "whiplash capital of the world". Such labelling appears to be emotive and does not appear to be based upon any evidence in support. No two legal systems or cultures are the same and such a comparison is erroneous. It is a fundamental right of any citizen of Great Britain to be able to recover damages for injuries sustained as a result of the acts of omissions of another. It is wrong and wholly arbitrary to restrict access to justice to a particular type of injury. Whilst the majority of what are known as whiplash injuries are relatively minor, a substantial number of them can be life changing, causing long term disability.

2.2 Whether whiplash claims add £90 to the costs of insurance premiums is not a relevant consideration when considering how to address a possible reduction in motor insurance premiums. The cost of, for example, claims for damages arising out of the ingestion of asbestos may add significant amounts to the cost of employer's liability policies. In both cases the answer is not to punish victims by restricting access to legal advice in connection with such claims. Rather to take steps to ensure that those who have a genuine right to receive compensation do in fact receive it and that society as a whole should take steps to ensure that the circumstances giving rise to such claims should be brought under control.

2.3 Some of the proposals put forward by the Government in relation to medical evidence could have the effect of controlling or indeed eradicating fraudulent or exaggerated claims. Indeed there may be other types of injury claims that would benefit from such controls. Over many years since the late 1970s, lawyers instructed by trade unions and insurance companies have been able to agree robust formats for the medical screening of industrial disease claims, for example in relation to noise induced hearing loss and chronic obstructive airways disease. These controls have been devised voluntarily without Government intervention. LLS is in favour of a structured approach in relation to medical reporting for whiplash claims.

2.4 The proposals to increase the threshold for small claims to £5000 either for whiplash claims of for road accident claims as a whole would, if implemented, have a devastating effect on access to justice for thousands of people every year and would discriminate unfairly against them for no logical reason other than the application of a blunt instrument, in an attempt to reduce insurance costs.

2.5 LLS is of the view that Government should recognise that whiplash claims are simply a type of damages claim. Such claims are common due to the number of vehicles on British roads. Government should be encouraging motor insurers and Claimants' representatives (for example Association of Personal Injury Lawyers) to set up "neutral" schemes for screening cases at economic cost. At the very least insurers should be required to consider whether it is appropriate to continue to pay compensation on claims that are considered to be fraudulent or exaggerated rather than to (i) invest in agreeing protocols with Claimants' groups for case screening or (ii) invest in procedures that are designed to "weed out" such cases rather than just paying them and expecting premium payers to meet the cost. Such behaviour, coupled with the historical practice of insurers (as well as claims management companies) encouraging claims by "selling" cases externally to lawyers and other groups has contributed to the present position.

2.6 The recent ban on the payment of referral fees (a significant proportion of which were paid to motor insurers as well as claims management companies) will have the effect of reducing the numbers of claims in the system. Government should not ignore the historical effect that this has had on the claims system.

3. Great Britain as Whiplash Capital of the World?

The suggestion that GB is the whiplash capital of the world appears to be a somewhat emotive statement. LLS are unable to provide any direct evidence on the point but it is certainly the impression that whiplash and any other type of claims were considerably more prevalent in the United States of America from around the 1970s. This was dependent on the laws of each state. In Europe, rules about entitlement to compensation for injury are arguably less liberal than in Great Britain and that has contributed to a higher level of claims in this country.

The right to claim compensation for whiplash injury arises out of a citizen's right to receive damages for injury arising out of the acts or omissions of another based around the law of tort (or Delict in Scotland). The law of tort is highly developed in this jurisdiction with a long history of precedents setting out precisely when and in which circumstances a duty of care arises. The equivalent law in other European jurisdictions is not so well developed.

GB has a high density of population. Car usage and ownership in GB is highly concentrated and has certainly increased markedly in the last 10 years. The current structure of the GB benefits system will be relevant also where there is a prevalent culture that someone else must pay for a citizen's misfortunes. This applies to all types of claim not just whiplash.

The Insurance industry in GB has created a situation where claims of all type proliferate. Whiplash claims arise out of road accidents. All vehicles and therefore their occupants are insured making it easy for insurers to "capture" potential claims and sell them to the highest bidder. Whilst the recent ban on referral fees will curtail such activities the culture of expecting a payment of compensation in all but the most gentle of collisions now prevails as a result of claims being promoted in this way. There has been little or no difference in terms of consequence between the activities of insurers and claims management companies.

In summary it is the view of members of LLS that GB enjoys a relatively well developed law of tort in relation to injury cases. That development in the law has served GB well in terms of protecting employees from unscrupulous employers particularly over the last 40 years. The right to receive damages for injury arising out of a road accident is simply a part of that whole system. It is wrong to attack a perceived fraudulent claims regime in relation to one type of claim by attacking the whole system with misleading statements. Many whiplash claims fall into the lower end of scale in terms of the amount of compensation paid, however it should not be overlooked that here are still a significant number of life changing injuries that arise from a neck injury of the same mechanical origin.

The remains always a fundamental difficulty in defining what a whiplash claim is if special rules were created governing both entitlement to damages and the procedure for obtaining damages. That of itself is likely to result in protracted test litigation actively seeking to define which cases would or would not come within such a scheme.

4. Whiplash Claims Adding £90.00 to the Cost of Motor Premiums

LLS is unaware of any statistical evidence to support this contention. Whether whiplash claims add £90 to the costs of insurance premiums is not a relevant consideration when considering how to address a possible reduction in motor insurance premiums. The cost of, for example, claims for damages arising out of the ingestion of asbestos may add significant amounts to the cost of employer's liability policies. In both cases the answer is not to punish victims by restricting access to legal advice in connection with such claims. Rather to take steps to ensure that those who have a genuine right to receive compensation do in fact receive it and that society as a whole should take steps to ensure that the circumstances giving rise to such claims should be brought under control.

5. Regulating the Production of Medical Evidence

It is recognised that the symptoms of whiplash can genuinely exist without any supporting objective findings on examination. There is of course an issue as to what exactly "whiplash" means as set out above. Nevertheless, it has to be accepted that if on medical grounds the type of soft tissue injury that is under discussion can exist without any objective physical signs, then the system may become open to abuse.

In the past, Claimant lawyers and insurers have been able to agree schemes of compensation of procedures for medical screening dealing with such cases as Noise Induced Hearing Loss, Vibration White Finger and Chronic Airways Obstruction Disease.

Formats have been agreed for the preparation of medical reports and the evidence that had to be before the medical expert before the report could be prepared. Standardised questions (to be asked of the Claimant) would be included in the examination so as to ensure that the symptoms complained of were consistent with the actual injury. Fraudulent of exaggerated whiplash claims would be exposed as part of such a process.

LLS is in favour of the provision of an independent medical panel for these purposes to be financed and managed by the private sector subject to a competitive tendering process based on cost and quality. The scheme management would have representatives of both motor insurers and claimant lawyers groups. The scheme would be subject of a set of rules that became part of the Civil Procedure Rules.

Reports for such claims would be in a standardised format with panel members being accredited and subject to peer review of a set proportion of their reports.

Such a scheme would preserve the integrity of the reporting and make it available for the Court process if required and would avoid the perception of a "state compensation" scheme.

6. The Impact on Genuine Claimants

LLS is of the view that provided the template for medical reporting set out above is followed, those with genuine claims for damages will not suffer. Indeed they would benefit from a voiding the "finger of suspicion" being pointed at them.

However raising the small claims threshold for such claims from £1000 to £5000 would be both arbitrary and discriminatory.

Recent changes (the so called "Jackson Reforms") introduced that include a ban on the payment of referral fees and the extension of the Fixed Costs Regime for lower value claims will have an immediate effect on the number of claims proceeding through the system. LLS have concerns about access to justice in relation to those reforms and whether those concerns are valid or not, it is the case that the drastic reduction in recoverable legal fees in lower value road accident claims will have the immediate effect of reducing the number of whiplash claims that will be made. Citizens will be unable to afford the cost of having a lawyer represent them. Claims will be resolved without "equality of arms" and many ordinary people will suffer as a result.

In the view of LLS further tinkering with the system could be extremely damaging in terms of access to justice. Government may well take the view that they have the balance right and that no further action is required. Alternatively, steps should be taken to monitor the effect of the reforms already implemented.

7. *What Other Steps Should be Taken by Government?*

LLS has already referred to compensation schemes being set up on a voluntary basis in the past without Government intervention. Such schemes should be looked at here, ensuring that Claimant's were adequately represented and not at the mercy of deep pocketed insurers.

LLS would like to see Government questioning why it is that insurers are paying claims that they know or suspect are fraudulent. If they have such a suspicion then more resources should be placed to deal with ensuring that such claims are exposed. It is far too easy to pay the claims on the basis that the economics of challenging such claims do not stand up and then pass the additional cost of payment on to the premium paying public.

Insurers have already developed anti fraud databases and software for monitoring potentially fraudulent claims. It is the view of LLS that these facilities should be available to Claimant's representatives also. Claimants' solicitors have no interest in accepting instructions to run fraudulent claims for damages. Even the most cynical observers would have to accept that it is not in a Claimant lawyer's financial interest to take on such case.

The practice known as "third party capture" should be outlawed. An insurer having access to the contact details of a potential Claimant following a road traffic accident may make an immediate offer of compensation by telephone or letter. Such offers are made without the Claimant having the benefit of legal advice and more usually without any supporting medical evidence. Claimants' lawyers regard this as a cynical attempt to "buy off" claims at low cost but the practice is also contributing to growth in claims and deprives the insurer (and by analysis its policy holder) of any possible screening of the claim to ensure an injury exists before payment. The same principles apply to the practice of insurers making offers prior to receipt of medical evidence even though the claiming party is properly represented.

April 2013

Written evidence from Clyde & Co (WL 28)

BACKGROUND

On 15 March, The Transport Committee called for evidence on reducing the number and costs of whiplash claims, following up its recent enquiries into the cost of motor insurance.

OVERVIEW

It is our submission that the concerns regarding Great Britain being the "whiplash capital of the world" are well founded and, whilst the proposals by the MOJ are well intended, more needs to be done to tackle the medical diagnosis of whiplash injuries which, in turn, will impact on fraudulent/exaggerated claims. Whilst the proposed change to the small claims limit should at least reduce fraudulent claims, it would also discourage genuine claimants, impacting on their access to justice.

Our view is that there are alternative ways to reduce the costs of whiplash claims, which would be more effective than the MOJ's current proposals.

RESPONSE

The Transport Committee seeks a response in respect of the following questions:

1. *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world."*

I. The available data on this point is difficult to ignore. Recent figures from the MOJ's December Consultation Paper said that 70% of UK road accident personal injury claims are for whiplash. This compares to 47% in Germany, 32% in Spain and 3% in France. This suggests there are significantly more claims in Great Britain than our European neighbours listed above.

II. Furthermore, an increase in CRU figures for motor claims supports the allegation of Great Britain being the whiplash capital.

2. *Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated claims"*

III. We can only assume the assertion that whiplash claims add £90 to the average premium comes from within the insurance industry. We note the Government Consultation Paper suggests this information has come from The Association of British Insurers.

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

IV. In relation to the creation of an Independent Medical Experts Panel, it is almost certain that the majority of existing Medical Experts would apply for and receive accreditation. If this is the case, it is difficult to see how the landscape would change between the current Experts who provide reports for use by the Court and the Independent Medical Experts Panel.

V. Without a change to the diagnostic criteria used when reporting on whiplash cases it is difficult to see any difference between the Experts currently instructed and one appointed by the Independent Medical Panel. The Experts will still be relying on the symptoms as described by the Claimant and thus it is extremely difficult for Insurers to defend the claims.

VI. Therefore, whilst proposals of the MOJ are welcomed, there needs to be more independence to assist the court in making the right conclusion.

VII. It is also not considered appropriate to raise the Small Claims Track threshold for RTA whiplash claims to £5,000.00 for the following reasons:-

- As recognised at paragraph 74 of the Consultation Paper, significant difficulties are envisaged regarding the classification of injury. There are likely to be disputes over what is and is not a whiplash claim.
- If the Small Claims Track threshold is raised only for whiplash claims, it does not prevent exaggerated or fraudulent claims for other injuries.
- The current costs provisions for claims arising from road traffic accidents and the proposals set out in Lord Justice Jackson's Reforms are considered to be sufficient.
- The vast majority of whiplash claims are settled without the need for litigation. It is believed this outcome would not prevail if the majority of Claimants represented themselves.
- The proposed increase in the Small Claims Track threshold would not provide any commercial rationale to challenge fraudulent claims in their truest sense.

VIII. It is inevitable that if the majority of personal injury claims valued at £5,000.00 or less fell within the Small Claims limit settlement, negotiations between Insurers and unrepresented Claimants would be difficult.

IX. It is anticipated that the consequence of more unrepresented Claimants bringing claims would be:-

- A higher number of litigated claims.
- A higher number of claims proceeding to Trial.
- Protracted settlement negotiations.
- A requirement for Insurers to increase their claims handling resource to cope with dealing with Litigants in Person.
- Not all claims with a value of less than £5,000.00 are simple.

X. It is therefore difficult to see how the above would lead to a reduction in Motor Insurance Premiums.

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

XI. If the small claims limit was increased, it could potentially impact on the amount of fraudulent claims. The concern would be that it would also deter genuine claimants who would largely be without representation. It would be a hugely unpopular (and probably unfair) reform—though it would certainly reduce fraud.

XII. The difficulty is that if 7% of claims are suspected of being fraudulent, you run the risk of penalising the 93% of claims that aren't by denying them legal representation.

5. *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance*

XIII. Fraud claims to be heard by Specialist Fraud District Judges fully trained in fraud related issues.

XIV. Additional disclosure in fraud claims to include standard disclosure of medical records, mobile phone records, employment records and gym records.

XV. Standardisation of medical reports.

XVI. Use of forensic reports in whiplash claims in addition to research dealing with the diagnosis of whiplash injuries and guidelines to be issued to Medical Practitioners regarding the validation and the diagnosis of whiplash injuries.

XVII. Significant cost sanctions in all claims where the claim has been held to be either exaggerated or fraudulent.

XVIII. Requiring the Claimant's representative to validate a Claimant's identity and address.

XIX. Requiring a Claimant to provide a detailed description of the accident circumstances at notification stage.

XX. Licensing of Claims Management Companies.

XXI. Challenging people's perception of insurance fraud—engrained as part of society.

XXII. Requiring any Medical Expert examining the Claimant to verify the Claimant's identity.

XXIII. Requiring Claimant's initial symptoms to be verified by contemporaneous GP or Hospital records.

April 2013

Written evidence from Thompsons Solicitors (WL 29)

ABOUT THOMPSONS

Thompsons is the UK's most experienced personal injury law firm. It has a network of 29 offices across the UK. At any one time we will be running 70,000 claims on behalf of people who have been injured at or away from work, through no fault of their own.

INTRODUCTION

For many years the insurance industry has been stoking the debate about compensation culture and using its considerable influence with government and sections of the media to stoke concerns about rising insurance premiums in order to undermine access to justice for injured people.

Behind insurance industry claims of compensation culture is a determination to engineer the market so that weak, unrepresented claimants have to negotiate and litigate against strong, well financed and expertly represented insurers.

The motive is pure profit, not concern for the consumer.

We now address the specific points in the Select Committee's terms of reference:

WHETHER THE GOVERNMENT IS CORRECT IN DESCRIBING THE UK AS THE "WHIPLASH CAPITAL OF THE WORLD"

The number of personal injury claims in 2011–12, including employer and public liability and clinical negligence, exceeded one million. Motor claims accounted for nearly 80% of that total.

Between 2007 and 2011, motor claims increased by 43% to 790,999, while employer liability (work injury) claims fell by 66% to 81,470.

The issue is what has caused the increase in motor claims.

In our view it is due to abuses by insurers and others in the industry (including claims firms, many of which are owned by or linked with insurers) through their practices of third party capture and selling cases on for substantial referral fees.

Fuelling the rise

Third party capture, a tactic used by insurers to try to "capture" and settle an injury claim direct with the claimant before independent legal advice or a medical report are obtained, actually fuels claims by encouraging people involved in RTAs to make injury claims that they may not have intended to bring.

Typically the insurer will cold call or write to a policy holder after an RTA resulting in bent metal (vehicle damage only) is reported to them. They also contact passengers who were in the car at the time of the accident.

The insurer suggests that they discuss any claim for injury that they may have direct with them and may suggest a sum of money up front in final settlement of the claim, if the claimant does not involve solicitors.

Insurers are, under the industry's voluntary code, meant to advise the policy holder that they have a right to independent legal advice but often they do not.

Alternatively, or in addition to, an insurer may automatically refer the policy holder to one of its panel solicitors.

We have provided the MoJ with examples which suggest that claimants are first being encouraged by insurers to make a claim and then become victims of insurer attempts to undersettle. These include:

1. A union member was allocated solicitors through their motor insurers following an RTA. The insurer advised the claimant to accept an offer of £2,250. The claimant was unhappy with this offer and the service they had received. Thompsons was instructed to take over the file. The insurer made an increased offer of £3,000 which we advised client to reject. We made a part 36 at £8,537 and advised our client to accept any offer of £5,000 or more prior to issue of proceedings. The offer was rejected and proceedings were issued for an amount over £5,000.
2. We settled a claim for a client who suffered whiplash and back injuries when her car was hit by another vehicle. Before we were instructed, and within hours of the accident, the Royal and Sun Alliance—the other driver's insurer—were on the phone admitting liability. The victim was then repeatedly called over a weekend in what became a campaign of harassment to get her to accept £1,000. A colleague then advised her to seek legal advice through her trade union. Thompsons was instructed, medical reports revealed the extent of her injuries and her claim settled for five times the amount first offered by the insurer.

These are clients who may not have thought about making a claim until they were subjected to hounding by an insurer, a claims firm or an insurer panel law firm (tipped off by the insurance company).

Perhaps the committee should ask the ABI and insurance company representatives that go before it how extensive a practice third party capture is among its members.

WHETHER IT IS CORRECT TO SAY THAT THE COSTS OF WHIPLASH CLAIMS ADD £90 TO THE AVERAGE PREMIUM AND, IF SO, WHAT PROPORTION OF THIS ADDITIONAL COST IS DUE TO "EXAGGERATED, MISREPRESENTED OR FABRICATED" CLAIMS

The insurance industry has consistently refused to provide any real evidence as to how it arrives at the £90 figure, or indeed any previous figures it has used. Aviva says it is £118, which appears to be based on an estimate of average legal fees without, again, explaining how that estimate was reached. We are not told what proportion are claimant solicitors' costs, disbursements, defendants' solicitors' costs or what are insurers' in-house costs.

We asked Nick Starling of the ABI to clarify this point after the publication in 2006 of the Frontier Economics report (commissioned by the ABI) *Outcomes for legally represented and unrepresented claimants in personal injury compensation,* which was similarly opaque on legal costs. He told us that government research showed that claimant lawyers receive 43p for every £1 insurers pay in PI compensation, but that the ABI's own research showed it was more than 90p for claims settled between £1,000 and £5,000.

He didn't explain how the ABI had calculated that.

Industry adding costs

Credit hire agreements are also said to fuel premiums, adding around £44 to each motor insurance policy. They must be costing the industry a considerable sum.[15] This is the practice whereby insurers, claims management companies and some lawyers try to be the first to get to the claimant after an accident and provide them with a replacement car (whether or not its needed) while theirs is being repaired. This is similar to third party capture.

Claimant insurers also have sweetheart deals with bodyshops in return for referral fees. This dramatically inflates the repair bill. A judge has described the practices by Royal and Sun Alliance in apparently inflating the price of car repairs as falling somewhere between "sharp practice and "outright fraud".[16]

It is entirely in the insurance industry's power to put a stop to third party capture, credit hire and bodyshop deals and to reduce premiums as a result of the subsequent savings. Instead it is using the premium stick to beat and disenfranchise legitimate injured claimants.

The precedent for a reduction in premiums is not good. There have been a number of opportunities for insurers to pass savings on to consumers, but none have been taken. These include:

1. The development of the RTA portal for claims worth under £10,000 and which is being extended to all personal injury claims below £25,000. There has been no passing on to consumers of the savings it is said to be producing.
2. The Jackson civil justice reforms which came into effect on 1 April.
3. Fixed recoverable claimant costs, which have been cut dramatically by the government.

The fact is that It instinctively goes against the grain for insurers to reduce premiums, rather than to pass savings on to shareholders.

[15] "Greedy firms to profit from your car insurance" This is Money 2 March 2011 http://www.thisismoney.co.uk/money/cars/article-1713879/Greedy-firms-to-profit-from-your-car-insurance.html#ixzz1Y7cOlSh7

[16] Office of Fair Trading http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/motor-insurance/

The committee might consider asking the ABI and insurance representatives what percentage reduction in premiums insurers can guarantee if costs come down.

WHETHER THE PROPOSALS PUT FORWARD BY THE GOVERNMENT, IN RELATION TO MEDICAL EVIDENCE OF WHIPLASH AND INCENTIVES TO CHALLENGE FRAUDULENT OR EXAGGERATED CLAIMS, ARE LIKELY TO REDUCE MOTOR INSURANCE PREMIUMS AND, IF SO, TO WHAT EXTENT.

Fraud is a red herring in this debate. Insurers *can* tackle fraud and some are taking a more robust approach than in the past. The courts will and do support insurers when they deal with fraud correctly. If insurers are able to identify fraudulent claims with such confidence as to assert that they are the cause of high premiums, then they should be able to take criminal proceedings against those known fraudsters, along with the claims firms and doctors who encourage dishonest claims.

Insurers could close down those businesses overnight by working with the police to routinely challenge known offenders.

The reality is that these allegations of fraud are intended to achieve government policy outcomes that will stop genuine claims.

The government's proposals in respect of medical evidence and fraud will do nothing to reduce either the number of fraudulent claims or premiums. The two are not, in our view, linked. Our evidence to the 2011 Transport Select Committee enquiry into what was fuelling the rise in premiums pointed out that in Northern Ireland motor insurance premiums had risen substantially above inflation, significantly more than in England and Wales,[17] while RTA claims were until 2009 falling.[18]

The insurance industry had not criticised or called for a reform of the claims process in Northern Ireland, which in our view demonstrated that there was actually no direct link between claim volume and premium levels.

A claimant intent on pursuing a fraudulent claim will not be put off by having to use the small claims track. They will in fact have a further incentive to pursue the claim because, in contrast to cases outside the small claims track—where from 1 April, in an exception to QOCS, they will have to pay costs—they won't run the risk of paying costs.

The small claims court was never designed to deal with fraud.

The primary action against fraudsters should be criminal proceedings. Insurers have not provided evidence that they are working with the police to ensure that known offenders, including claims firms, are routinely challenged.

The MoJ's whiplash consultation paper suggested that insurers do not fight fraud because it is cheaper to settle the case. That is a nonsense. If the case is fraudulent, the insurers stand under the current regime to save having to pay the damages and claimant's costs and will get an order for their costs to be paid. For it not to be cheaper to settle the case, the insurer's costs would have to exceed the damages and claimant's costs currently payable. So if the potential damages were £4,000 and the potential claimant's costs £3,000, the insurer's costs to fight the case would have to exceed £7,000.

Under the government's proposals, which force all whiplash claims into the small claims court where there is no costs recovery, the economic balance would be titled towards settlement rather than contest because, using the previous figures, the £3,000 claimant costs are removed and the sum to fight the fraudulent case would have to be £4,000 or less to make it economically viable.

It must be fundamental to insurers that they do not give into fraud.

Medical evidence

The proposals on medical evidence are not logical and again, the insurance industry has not guaranteed a reduction in premiums even if they result in reduced claims or costs.

Currently, either side can propose a doctor and the parties agree between them who the doctor should be or they get their own doctor where they can't agree. That is both fair and independent and allows insurers to object and to get their own report if they don't agree with the claimant's. It is then for the court to decide which report it prefers. If insurers are not using this opportunity then that is not a reason to fundamentally change the system.

Insurers, in pushing for independent medical panels, appear to be saying that the courts are incapable of weighing up the medical evidence of the two sides. The insurers say there are experts who can determine genuine whiplash claims. If there was a genuine problem with current medical evidence, then insurers would have been rejecting claimant doctors' reports, which they consider to be biased, and insisting that both reports go before the courts.

[17] Office of Fair Trading http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/motor-insurance/
[18] Compensation Recovery Unit (NI) RTA statistics 1 April 2000—31 March 2009 and 2009—11.

THE LIKELY IMPACT OF THE PROPOSALS ON ACCESS TO JUSTICE FOR CLAIMANTS WHO ARE GENUINELY INJURED

The unrepresented injury victim would not only have to deal with experienced insurers but will also be confronted with experienced solicitors and counsel.

Increasing the small claims limit has the potential to lead to the growth of a huge and unregulated industry. Insurers will see the opportunity to set up limited companies to do small claims linked to BTE or at a low fixed fee which will allow them to effectively control the market including which medical expert the claimant can go to.

The outcome, putting it bluntly, will be a market that is stitched up to the advantage of insurers. Claimants will have the Hobsons choice of fighting the insurers on their own, having to pay out of their compensation, or opting for a representative owned and run by insurers, who will be compromised by their lack of independence from those insurers.

The government's proposals will reduce the numbers of whiplash and RTA claims, not because people aren't genuinely injured but because they will choose not to represent themselves, or decide they will lose such a significant proportion of their damages as to make pursuing a claim not worth while. And if they chose to deal direct with insurers, they will receive significantly less compensation.

Whatever the claims of the insurance industry, based on the Frontier Economics report referred to above, that unrepresented claimants receive as much or more than represented ones, the reality is that they don't.

The FSA's 2009 work on third party capture found that on average, 3rd parties were awarded 274.95% more through court proceedings that the initial rejected out-of-court offer from an insurer (Source: Financial Services Authority: 3rd Party Capture Risk report 2009).

WHETHER THERE ARE OTHER STEPS WHICH THE GOVERNMENT SHOULD BE TAKING TO REDUCE THE COST OF MOTOR INSURANCE

Motor premiums could be reduced by ending insurance industry rip-offs. Instead of playing into the hands of insurers, the government should:

- Outlaw third party capture.
- Ban credit hire agreements.
- Shut down claims firms.
- Outlaw "CLAIM" texts and "robocalls" made by claims management companies.
- Outlaw cold calling by insurance companies.
- Make bodyshops manufacturer approved and industry accredited, not just insurer approved.

April 2013

Written evidence from the Chartered Institute of Legal Executives (CILEx) (WL 31)

INTRODUCTION

1. This response is submitted by the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007.

2. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and in the public interest. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform discourse relating to justice issues.

3. As it contributes to policy and law reform, CILEx endeavours to ensure adequate regard is given to human rights and equality considerations and to the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this within Government and advocate for such reform.

4. Of importance to this written submission in response to the Transport's Committee call to evidence on reducing the number of whiplash claims, CILEx Council members specialising in personal injuries, who represent both Claimants and Defendants, have provided evidence which draws heavily on their day-to-day professional experience.

GENERAL OBSERVATIONS

5. The Government consultation on whiplash was extremely one-sided, and heavily influenced by the insurance industry, which ultimately has an interest in keeping their expenditure and pay-outs as low as possible. Importantly, the insurance industry works in the interests of its shareholders, and not the injured parties. The Government consultation focused on fraudulent and unmeritorious claims, which are disproportionally small in relation to meritorious claims. The Association of British Insurers (ABI) recognised

in its Publication "TACKLING WHIPLASH Prevention, Care, Compensation"[19] the Insurance Fraud Bureau estimates that those detected fraudulent claims, which are based on "staged accidents" represent 5% of whiplash claims.

6. CILEx and its members agree with the Government and Insurance Industry that it is vital to eradicate unmeritorious, exaggerated and fraudulent claims. However, CILEx is adamant that in doing so, access to justice should not be lost to genuine Claimants.

7. It is important to emphasise that Lawyers are subject to high ethical standards and, as officers of the court, have a duty to the court. It is not in a Claimant Lawyer's best interest to take on fraudulent claims. CILEx acknowledges that unfortunately there are "bad apples" which can contribute to problems, but it is appropriate to note that the majority of lawyers have a genuine wish to help Claimants who have been injured as a result of a third party's negligence. Furthermore, if a Lawyer is representing a Claimant, which it later transpires was acting fraudulently; they ultimately will not be paid for the work which has been completed. Therefore, it is simply not in the interests of a Lawyer to encourage claims of a fraudulent or exaggerated nature.

8. With the Government wishing to address the issue of costs, the conduct of the Defendant in such matters cannot be ignored. Costs incurred are not simply down to illegitimate or fraudulent claims by Claimants. There are occasions when costs are higher than would be expected due to a Defendant, or Defendant insurers, failing to deal with claims appropriately. This situation was raised by Master Campbell, Master Haworth and Master Leonard of the Senior Courts Costs Office (SCCO) in their response to the Government Consultation regarding the Jackson Reforms.[20] In their report[21] when they made it clear that costs judges dealt with many bills where the costs had been "…significantly but avoidably increased by the conduct of the Defendants." They provided an example that in some cases "…defendants delay, thereby causing unnecessary additional costs. In others, still, settlements are left to the last minute…whereas had the defendants opened negotiations earlier, the figure would have been significantly less." They made it clear that culpability "…lies with the defendants who, nonetheless, area always the first to complain on detailed assessment about having to pay…"

Areas of Enquiry

Whether the government is correct in describing Great Britain as a "whiplash capital of the world"

9. The Government's statement that Britain has become a "whiplash capital of the world" is not backed by any real evidence in the impact assessment or from elsewhere. Such statements sound effective, but are meaningless without detail or independent evidence to back them up. Indeed, the Government consultation on the subject was extremely one sided, and heavily influenced by the insurance industry, which has a vested interest in paying out less claims. Moreover, CILEX does not see that it can be acceptable to introduce proposals which the Government's Impact Assessment recognises as benefitting the Defendants (usually an insurer) on the majority of occasions, whilst at the same time being to the detriment of the Claimant in terms of lower settlements, fewer claims being pursued and fewer successful claims. It is wholly unfair for Government to reach a conclusion based only on those representing one perspective in a matter and not take a balanced view.

10. The absence of significant detail and evidence can be found in other areas of the Government consultation. For example, the Government consultation on the issue assumes everyone will have Before the Event (BTE) insurance. This is incorrect and no evidence has been furnished to justify the truth of the statement.

Whether it is correct to say that the cost of whiplash claims add £90 to the average premium and, if so, and what proportion of this cost is due to "exaggerated, misrepresented or fabricated" claims

11. Examining the figures in detail suggests that the premiums have increased by only £3.98 rather than the £90 per motorist alleged by the insurance industry. According to the insurers' own figures, fraud accounts for roughly 7% of claims. Still too high, we accept, but the total of £140,000,000 would save each motorist only £3.83 from their annual premium.[22]

12. The fact is that this will impact on the 93% of motorists who are honest and genuinely injured, who are simply unlucky to be involved in an accident.

13. We would urge the committee to reject the insurance industry's allegation of the £90 increase in premiums per motorist without further statistical analysis and evidence.

[19] www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986
[20] "Proposals for the reform of civil litigation funding and costs in England and Wales."
[21] http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/RespocostsJudges-Feb11.pdf
[22] http://www.lawgazette.co.uk/blogs/blogs/news-blogs/grayling-falls-great-insurance-con-trick

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

14. CILEx reiterates its earlier statement, that it is not acceptable for Government, as noted by its own impact assessment, to introduce proposals that on the whole mainly benefit the insurance industry when to do so is at the expense of the public and impacts on access to justice.

15. In any event, it is has already been announced by some major insurers that premiums will not be reduced as the Government had hoped. For example, LV has already warned consumers not to expect vastly reduced premiums as a result of the new fixed costs.[23]

16. That said, CILEx remains concerned that the idea of panels of experts, in a sense, "dumbs down" the potential effects of a whiplash injury. A whiplash injury is not always a straight forward injury and a diagnosis can be fraught with difficulty. Furthermore, CILEx is concerned by the idea of the use of a "standard report form", and recommends this should be avoided. A standard form has the very real potential to lend itself to becoming simply a "tick box" exercise, and allows for the likelihood of a number of issues to be missed, for example chronic pain syndrome, brachial plexus injuries, psychological issues, and even in some relatively rare cases brain damage.

17. Furthermore, giving medical experts a pre-determined format may deter experts from expanding relevant points using their knowledge, particularly in areas which are specialist or unusual, or suggesting alternative medical evidence is sought as may be necessary. For example, a detailed questioning of a Claimant by a suitably medically qualified practitioner will include, although will not be limited to, issues such as details of the onset of pain, any freedom or restriction of movement, additional pain and details of the accident itself as well as any past history that may be relevant. All of these, together with an examination and thorough review of the records will more likely result in an accurate diagnosis, which will not be achieved or imparted to the lawyers or insurers with a simple "tick sheet" exercise.

18. Practitioner input suggests that the figure of £195 for a medical report (paragraph 32) is not something which is charged in practice. Practitioner input also suggests that it is extremely unlikely that a consultant will be willing to accept £195 per medical report (and it is not clear whether that is the full amount or whether an "agency" fee would be included). This would further lead to the problem raised above at paragraphs 16 and 17.

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

19. CILEx has genuine and grave concern that the proposals within this paper will have a fundamental impact on access to justice, by substantially reducing it. The issue of inequality of arms will also become more prevalent with insurers, for example, sending a team of legal representatives to court to present a case, with the Claimant representing themselves. Even the Government recognises in its Impact Assessments that Defendants will be represented in matters, and it is extremely likely should these proposals come to fruition.

20. Moreover, CILEx is concerned that the consultation assumes everyone will have Before the Event (BTE) insurance in place, and believes this is incorrect. Furthermore, CILEx suspects that if such insurance were to become compulsory, that it would ultimately lead to an increase in costs and insurance premia. It is also problematic that at present, BTE insurance does not cover matters to be heard in the small claims court. If the small claims limit is increased to the level intimated by the MoJ this would result in the majority of Claimants being unrepresented despite having BTE insurance.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

21. CILEx strongly believes that in order to reduce unmeritorious, exaggerated, and fraudulent claims there should be a much better exchange of information between Defendant and Claimant representatives, including access to the same fraud databases. Information should also be readily available from the Insurance Fraud Bureau to assist parties in detecting fraudulent behaviour as early as possible. CILEx considers it of equal importance that, should insurers have information or evidence which indicates fraud, it should be shared with the Claimant's representatives at the earliest available opportunity. Practitioner input included one example where insurers provided a number of DVD's, taken over several years, which it claimed proved the Claimant to be exaggerating their symptoms. However, it had not previously intimated any concern of fraud or exaggeration. If it had done so, the Practitioner could have addressed the issue much earlier, and/or ceased acting for the Claimant, rather than continuing to do so for a number of years, thereby incurring costs.

Conclusion

22. The issues that the Transport Committee are considering on the issue cannot be seen in isolation. They come at a time of a much wider package of reforms within the civil litigation field (including The Lord Justice Jackson reforms; The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO); Reducing Fixed Recoverable Costs; Changes and extensions to the RTA Portal). CILEx is concerned that the government proposals are being made to deal with a perceived problem rather than an actual problem. To date a number

[23] http://www.lawgazette.co.uk/news/mps-announce-new-whiplash-probe

of studies have shown that there is no compensation culture; indeed Lord Young in his 2010 report[24] concluded that *"…the problem of the compensation culture prevalent in society today is, however, one of perception rather than reality"*. Lord Young recognised that there is a need for *"…those injured as a result of negligence to receive adequate damages…"* In attacking the perceived compensation culture, the civil justice system is being drastically altered, fundamentally changing the balance between Claimants and Defendants, and all without the Government taking the opportunity or time to assess the impact of changes due to be implemented.

23. CILEx urges the Justice Committee rebukes the Government for not providing adequate protections to ensure access to justice is maintained and expanded, and for giving to much consideration to insurers with vested interests at the expense of legitimate claimants and injured victims.

April 2013

Written evidence from Royal & Sun Alliance Insurance plc (RSA) (WL 35)

About RSA

With a 300 year heritage, RSA is one of the world's leading multinational quoted insurance groups, with the ability to write business in over 130 countries and with major operations in the UK, Scandinavia, Canada, Ireland, the Middle East and Latin America.

RSA is the UK's second largest commercial insurer and fourth largest personal insurer, specialising in general insurance. Our direct insurance arm, MORE TH>N, is one of the UK's top three personal motor and household insurance companies, and we also cover many thousands of businesses, from small enterprises through to large multinationals.

Our Interest in the Paper

RSA is a major provider of motor insurance, employers' liability insurance and public liability insurance. Under these covers, we make many payments to claimants who have suffered a personal injury as well as additional costs where they have legal representation. In addition we also provide our own "Before the Event" legal expenses insurance. The types of claims we therefore deal with can be broadly categorised as follows:

- Third party liability motor claims made by claimants injured in accidents involving RSA or MORE TH>N policyholders.
- Claims for personal injury or disease made by employees of employers who have an Employers' Liability insurance policy with RSA.
- Claims for personal injury or disease made by members of the public against individuals and organisations who have a Public Liability policy with RSA.
- Pursuit of personal injury claims through provision of legal expenses insurance to individuals and organisations.

Given RSA's interest in this area, we welcome the opportunity to respond to this call for evidence. We have also worked closely on this issue with our UK trade body, the Association of British Insurers (ABI). If convenient, we would of course be happy to discuss any aspect of our response further.

1. RSA Support for Civil Justice Reform

The spiraling costs, associated with personal injury claims, have been a concern for RSA and the insurance industry for some time. The existing process is costly, inefficient and slow, and does not meet the needs of modern consumers. This also contributed to the increases in motor insurance pricing, and we have therefore supported the reforms introduced by the government designed to address this.

2. Our View of the Proposals put forward in the Ministry of Justice (MOJ) Consultation to Reduce the Number and Cost of Whiplash Claims

- We support reform in this area noting in the MOJ consultation that at least 70% of RTA claims in England and Wales relate to whiplash—a rate which is more than double that of most European countries. In RSA, that rate has increased by two thirds in the last four years.
- In RSA, the cost of whiplash claims adds around £85 to the average motor insurance premium.
- Whiplash is a non-demonstrable soft-tissue injury. Absence an objective test, it is impossible to prove whether the claimant is suffering from the condition.
- As civil claims are determined on the balance of probabilities, this has enabled easy profit for Claims management companies and lawyers to pursue whiplash claims.
- We therefore welcome the Government's proposals to increase the Small Claims Track limit which will assist in reducing the cost of whiplash claims.

[24] "Common Sense Common Safety" 2010

— Whilst the proposals in relation to provision of medical evidence are welcome, we believe that further measures are required to address the nature of medical examinations and reporting. RSA for example has improved its detection of fraud saving around £22 million in relation to whiplash in 2012—however fraud and exaggeration continues to be a serious issue for the industry in the context of whiplash claims.

3. Summary of our Response to the MOJ Consultation on Reducing the Number and Costs of Whiplash Claims

We are happy to forward a copy of our full response to the consultation if required. Here is a summary of the key points:

Medical evidence

— There needs to be a clear separation of relationship between organisations providing the medical reports and those who commission them so that remuneration is decoupled from volumes, commercial relationships or outcomes.

— Reform in the provision of medical evidence should be extended beyond whiplash to associated injuries, most notably Post Traumatic Stress Disorder (PTSD) and similar psychiatric disorders.

— It is questionable what value a medical expert can add from a clinical perspective given both the lack of an objective test for a non-demonstrable low grade soft tissue injury and the fact that the examination often takes place after symptoms should have resolved.

— The prognosis—the main element driving valuation of damages—for resolution of symptoms is relatively meaningless: a medical expert should be obliged to provide either a pathological basis for any ongoing symptoms, or if there is none to make a statement to such effect.

— Standardised reporting mechanisms would be desirable. These should include a statement by the claimant providing permission of access to relevant medical records to enable review where necessary.

— Instruction of a medical expert should be on a joint basis: the Civil Procedure Rules (CPR) should be amended where appropriate to give effect to this.

— As part of standardised reporting, the medical expert should be provided with mechanical evidence of the accident circumstances so they can link it with the claimant's medical records and observations of functionality at examination offering their unbiased expert opinion (as if he were an expert witness) as to whether the mechanics of the accident and responses to some general questioning about lifestyle and level of any impairment are consistent with the reported symptoms.

— The cost of all medical reports associated with whiplash claims should be fixed under CPR rules.

Small Claims Track

— The Small Claims track (SCT) threshold should be increased to at least £5,000 for all RTA PI claims—constructing rules which seek to restrict the limit to a definition of "whiplash" (which nearly all low value RTA PI claims are anyway) would be inherently difficult.

— The limit should be periodically and regularly reviewed in order to avoid inflation of damages over time undermining the reasons behind why such an increase in the limit was deemed necessary in the first place.

— There have been specific issues associated with whiplash claims: a significant increase in the volume of bodily injury RTA claims in recent years against a context whereby the number of road traffic accidents has fallen and RSA's experience is no different.

4. Our Response to the Specific Questions Raised by the Transport Select Committee:

Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"?

This country certainly endures a "have a go" compensation culture which for too many people makes whiplash an easy fraud of choice. This has a number of complex causes but the key underlying factor is that within a civil justice system where the validity of claims are determined on the balance of probabilities, there is no objective test to prove or disprove whether an injured party has suffered from the condition.

We cannot categorically confirm that the assertion that Great Britain is the "whiplash capital of the world". However the statistics appear to damning: the number of RTA personal injury claims for whiplash in this country is significantly higher than Germany, Spain and France. As the government noted, "some 2.7 claims for whiplash damages are made for every accident reported and Department of Work and Pensions Compensation Recovery Unit data indicates that around 70% of RTA PI claims are for whiplash injuries. This rate is significantly higher than in other countries: a 2004 comparative study shows that the equivalent rate in Germany to be 47% and Spain 32%, whilst in France the rate was just 3%." Further, this needs to be considered in the context of an increased frequency of whiplash claims in recent years. The number of whiplash claims has increased by 60% in the last four years despite the number of road accidents falling.

Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

- In RSA, the cost of whiplash claims adds around £85 to the average motor insurance premium.
- This is based on all whiplash claims which accounts for around 22% of our burning cost.
- We therefore agree with figure supplied in the question, our calculated figures being reflective of a generally safer book than average.
- We received 50,835 whiplash claims in 2012 with 37,109 of settled at cost.
- 60% of motor injury claimants report only whiplash. However, 95% of motor injury has an element of whiplash included.
- The average time for a claim to manifest itself is 66 days. 13%% are notified within three days.

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

Medical evidence of whiplash

We believe that the proposals put forward in relation to medical evidence of whiplash are a useful start in addressing the "have a go" compensation culture, but we believe further measures are likely to be required in order to impact upon cost of whiplash claims, and thereby feed through into lower insurance premiums.

Incentives to challenge fraudulent or exaggerated claims

Exaggerated and/or fraudulent whiplash claims are a particular concern for defendants, as referenced by the frequency of personal injury claims against number of motor accidents outlined in the Executive summary of the consultation paper. A combination of factors have contributed towards this including disproportionate costs for this type of work and inadequate controls and regulation of the activities of claims management companies (CMCs). Some progress has been made in addressing these issues although further action might be required in relation to CMCs in the context of the transitory nature of some of these organisations, if the existing raft of reforms do not prove adequate.

Further factors however include the lack of an objective test in a system where the threshold as to whether a claim is valid is determined on the balance of probabilities. The outcome of cases, particularly for low velocity impact cases, varies enormously depending on the court where such cases are heard. This is of course a matter which the judiciary should in the first instance be encouraged to resolve with a view to determining a benchmark and ensuring consistency.

As we outlined earlier in our response, the action proposed to improve the outputs from independent medical agencies will deliver positive results. However it may very well be that the only effective resolution of this issue is that low value whiplash claims are considered not to be compensable.

We remain concerned that Third Party fraud or exaggeration continues to be treated differently from policyholder fraud—an effect which is unfair upon honest policyholders. The Courts are asked to consider the extent of dishonesty when considering a third party claim and the impact of the dishonesty on the recovery of damages. In the Court of Appeal decision in *Shah v Ul Haq* Lady Justice Smith stated "I have some sympathy with the view that fraudulent exaggerated claims should be struck out in their entirety….In my view…a change would have to be a matter for Parliament."

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

We agree with the comment in the consultation that many small value whiplash claims are straightforward, and we support the proposition that the Small Claims Court would be a more suitable venue for the small number of cases where the issues remain unresolved (though not where fraud is involved as this would invariable involve transfer to the Multi Track). We do not consider that the concerns around access to justice and "inequality of arms" are valid. Insurers subscribe to the ABI Code of Practice for third party assistance, which sets out how insurers should engage with unrepresented claimants. The ABI have also published a *Third party assistance claimant guide*, which explains to an unrepresented claimant how the third party insurer can assist them, and their rights when dealing with the insurer.

Furthermore, most claimants will usually enjoy the benefit of some form of legal expenses funding, whilst the market will undoubtedly develop, for example through the provision of Damages Based Agreements, to provide injured parties with alternative funding mechanisms to enable them to fund the pursuit of a claim. Claimants and/or their legal expenses insurers will bear their own costs but that is an essential control which is required to address the current issues.

Accordingly, we do not see impacts to access to justice as a result of the increase in the Small Claims Track limit. It follows that we do not foresee there being a significant impact upon the volume of whiplash claims. Such claims could still be cost bearing but the liability for payment of such costs would transfer from the

defendant to the claimant. This would result in overall reduction in cost of whiplash claims although this could to some extent be moderated by "damages creep".

Predictable damages

We refer to the final report by Jackson LJ who, as part of the interlocking package of measures which he proposed, recommended the introduction of a software based assessment tool to value personal injury claims. Such a system of predictable damages, calibrated at levels which reflect existing practice (combination of mainly negotiated settlements but also including a number of judicially awarded settlements) would provide transparency and certainty. It would also offer a facility for unrepresented claimants which would in effect resolve the concerns around "inequality of arms" and access to justice which this paper has identified.

For all the reasons outlined above, we believe that increasing the SCT will help to reduce the cost of whiplash claims but will not have a significant impact upon access of justice.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

Unless objective evidence can be developed, it is ultimately a question for society to determine whether low value whiplash claims should be compensable at all in the current civil litigation system. This needs to be viewed in the context that the volume of whiplash claims has increased at a time when vehicles possess better safety features than ever before. Furthermore, it is an open question whether there is a psychosomatic overlay to the culture of compensation for whiplash which contrasts with the experience of whiplash in other counties where medical-legal structures and incentives do not exist.[25]

Given that chip technology now exists which, dependant on force of impact, regulates operation of air bags in vehicles, consideration could be given to statutory intervention whereby minimum speed/force of impact would be required for compensation of a non-demonstrable injury.

The reality is that in most cases, the form of "whiplash" which is suffered is a soft tissue sprain in the neck which resolves within a relatively short time frame. In our experience, the typical whiplash claim involves a low grade soft tissue sprain which resolves within six to eight weeks (42 to 56 days). We have already noted above that on average it takes 66 days for a claim to reach us following an accident, and therefore often times the symptoms should have resolved before a medical examination has taken place.

We share the views of the TSC that, unfortunate though these short term effects are, unless the injury goes on to result in a significant impairment of function and/or amenity, compensation should not be payable with the resulting costs which fall upon society as a whole.[26]

April 2013

Written evidence from Minster Law Solicitors Ltd (WL 37)

Minster Law is a top 40 UK Law firm specialising in personal injury work particularly on behalf of victims of road traffic accidents and represents approximately 50,000 RTA personal injury claims per annum. As such is one of the largest law firms of its kind.

Minster Law employs over 800 people and typically provides services to clients who are referred under the terms of their motor insurance or legal expenses insurance policy. These arrangements are administered by brokers as part of the overall services that are provided under the terms of these policies.

Minster Law broadly supports the Government's desire to lower the costs of motor insurance though the initiatives it is currently exploring with the implementation of LASPO and extension of the RTA Portal, subject to safeguarding the interests of victims of accidents. We consider that the reduction of costs payable under the Fixed Recoverable costs scheme is too stringent and does not safeguard the interests of claimants. Minster Law also considers that the Government should commit to measures which ensure that any premium reductions are fully realised and passed on to motorists.

The responses to the specific questions raised by the Transport Committee are set out below:

1. *Is the Government correct in describing Great Britain as the "whiplash capital of the world"*

1.1 The source for the European comparison can be traced back to ABI's 2008 report: Tackling Whiplash: Prevention, Care, Compensation in which it cites a 2004 comparative survey conducted by the European Insurance and Reinsurance Federation (CEA).

1.2 This survey shows that with 76% the UK had twice the average percentage of whiplash claims as a proportion of personal injury claims across Europe.

[25] "Natural Evolution of Late Whiplash Syndrome Outside of the Medical-Legal Context"—Schrader *et al*

[26] Page 2 Transport Select Committee, Cost of motor insurance: follow up: Government Response to the Committee's Twelfth Report of Session 2010–12

1.3 However, the fact that these statistics were gathered in 2004 is a cause for concern. The Prime Minister's Office press release indicated that Britain "is now the whiplash capital of Europe" which suggests that this is currently the case. However if the best available data is from 2004, this is far from ideal at proving that it remains the case in 2012.

1.4 The ABI and the European Insurance and Reinsurance Federation have confirmed (when contacted by FullFact.Org[27]), that the statistics were the most recent available that they knew of on the cross-European comparisons.

1.5 The ABI assertion is based upon figures dating back from eight years ago. In isolation these figures may well still suggest some truth in the claim however there are important contexts which ought to be taken into account.

1.6 Road congestion

According to the World Bank, the UK has 79% more vehicles per kilometre of road compared to the European Union average. Logic dictates that, if our roads are busier and our towns congested, low velocity accidents, with relatively minor injuries, are likely to be more prevalent than high-speed crashes.

1.7 Car design and construction

According to the Association of British Insurers, "vehicle bodies have become stiffer since the late 1980s, increasing crashworthiness in high speed rear-end crashes. This helps reduce the incidence of serious injuries, but may increase the incidence of whiplash, due to a higher relative transfer of energy in a crash at the same speed."[28]

1.8 James Dalton, the ABI's Assistant Director of Motor and Liability, reiterated this point when he said that: "in reducing death and serious injury, there has been an increase in more minor injuries such as whiplash."[29]

1.9 The most recent Department for Transport road casualties figures (2010) indicate that "the proportion of car occupants with minor injuries was higher in the newest cars, suggesting less severe injuries for occupants of newer cars. For example the proportion of MAIS 1 injuries [minor injuries] was 34% for occupants of cars aged 1–4 years, and 29% for occupants of cars aged 10 years or older."[30]

1.10 Seat belt legislation

A number of studies have found that the introduction of seat belt legislation in 1983 led to an increase in neck sprains and soft tissue injuries to the lower part of the neck. Galasko *et al*. (1993) stated that their results "confirm that there was an increase in all forms of neck sprain after the introduction of seat belts."[31] Andrew Ritchie QC—in his book "Medical evidence in whiplash cases"—is quick, however, to point out that "these figures are not a criticism of seat belts. It appears that by their introduction we have reduced head injuries, facial injuries and fatalities but paid the price in 'whiplash injuries'."[32]

1.11 Whilst the ABI rhetoric and most of the populist media obsess about the "compensation culture" the reality is that most evidence based studies do not conclude that a compensation culture exists. The most recently commissioned report of Lord Young, himself no ally of claimant or accident victim concluded that the compensation culture was a perception not a reality.

1.12 In a 2012 survey of 4,000 people conducted by the Association of Personal Injury Lawyers (APIL), only around one in a hundred had suffered a whiplash injury in the last 12 months. The Government's Compensation Recovery Unit statistics on the number of whiplash-related claims show that claims fell by almost 24,000 in the past 12 months.

1.13 The Access to Justice Campaign cites the Opinion Health research which indicates that 23% of road accident victims do not bother to make a claim for compensation even though they know they are not at fault.

2. *Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims*

2.1 This assertion is one which is made by the Association of British Insurers however Minster Law are not aware of any empirical evidence that the figure is based upon, and as such cannot comment upon the accuracy of the sum stated. Equally we cannot comment upon how much of any premium can be allocated to the costs of any exaggerated or fraudulent claim. We suggest that that the ABI is put to strict proof of this assertion.

[27] A non-profit company (no. 6975984) limited by guarantee and registered in England and Wales committed to validating facts in public debates

[28] http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986, page 9

[29] http://www.abi.org.uk/Media/Articles_and_Speeches/59263.pdf

[30] http://assets.dft.gov.uk/statistics/releases/road-accidents-and-safety-annual-report-2010/rrcgb2010–00.pdf , page 6

[31] "Neck sprains after road traffic accidents: a modern epidemic" Injury; vol 24; issue 3, March 1993; pp155–157

[32] Medical Evidence in Whiplash Cases' Andrew Ritchie (Sweet & Maxwell, 1999)—paragraph 1–05, page 3

2.2 What is clear however is that the assertions that whiplash is modern and suddenly deteriorating phenomenon which has arisen in recent years as a consequence of referral fees and CMCs is flawed, and is not supported by the financial performance of the motor insurance markets performance over a longer period of time

2.3 A report published by Ernst & Young in 2011 ("bringing profitability back from the brink of extinction—a report on the UK retail motor insurance market") notes on p17 that:

2.4 *"Personal Motor is the largest single class of insurance business, with a Gross Written Premium (GWP) of £9.5 billion in 2009…It is therefore, a critical market for any insurer with aspirations to be a major part of the UK insurance landscape. The desire to participate in this large revenue pool means that competition among insurers is high, leading to very slim profit margins."*

2.5 *"The insurance market has made almost no money at all from the underwriting of motor insurance in the past 25 years, relying on investment income and sales of ancillary products to create a return on invested capital."*

2.6 This suggests to us that the costs of whiplash is a rather convenient basis on which to leverage regulatory reform for the purposes of increasing already slim profit margins.

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

3.1 The answer to this question rather depends upon the appetite and ability of the Government to compel the insurance industry to pass on the substantial windfall it has received in the form of the reductions in costs payable to solicitors for representing claimants, already established by the Ministry of Justice by the reduction in fixed recoverable costs within the portal and in litigation.

3.2 Reduced costs to insurers

There is no doubt that the reduction in costs payable will represent a significant saving to insurers. In very simple terms the average cost per RTA personal injury claim to an insurer is £4,000 including legal costs. The reduction as a result of the reforms already implemented as at 1 April will deliver a saving to insurers of 25% (50% of the legal costs). The Government's latest proposals include raising the arbitration limit to £5,000 which on the basis that the average personal injury claim is valued at £2,500 will result in the legal costs element not being payable, a saving of at least £1,200 per case.

3.3 Insurers are already reporting that the results of the current reforms will not reduce the costs of premiums for some significant time if at all, an early signal that they are not themselves committed to pass on such savings.

3.4 Our observation is that the Government have been very specific in identifying regulatory and legislative reform which will create savings for the insurance industry through initiatives which reduce income paid to solicitors and consequently compensation paid to claimants however they have failed to identify how any savings achieved will be passed onto motorists other than we assume to leave matters to the operation of the market generally.

3.5 Tackling Fraud

Whilst the Government repeats much of the unsubstantiated rhetoric of the insurers in relation to the true extent of fraudulent and exaggerated claims in the body of the consultation, the Government makes no attempt in its proposals to identify ways which could assist the industry as a whole could tackle fraud.

3.6 Furthermore an increase in the PI small claims limit for either all claims or RTA whiplash claims is not likely to directly tackle the phenomenon of fraud in personal injury claims and will service only to prevent genuine claimants (the vast majority) from being fairly compensated.

3.7 Minster Law, as well as APIL and MASS separately, have made repeated calls for the industry to share access to information which will further enable them to assist the industry as a whole with preventing fraud.

3.8 In November 2011 Minster Law met with the Insurance Fraud Bureau at their offices in London. At this meeting the IFB showcased a "Portal" which they were working on and which would if provided to claimants enable claimant solicitors to check their client data against anonymised data held by insurers, police, other fraud agencies, electoral roll etc. and thereby allow solicitors to understand whether any accepted fraud indicators were present.

3.9 This portal would have provided the means for claimant solicitors to check the credibility and honesty of claimants and allow solicitors to cease acting in cases where claimants were being dishonest about their claims history. Despite calls from both MASS APIL and Minster Law and commitments from Minster Law to provide data which would further assist the IFB portal the IFB board (made up of motor insurers) refused to allow the portal to be used by claimant organisations.

3.10 The Government could and should compel the insurers to work with all stakeholders. The implication drawn from the continued refusal to work collectively is that insurers are actively incentivised not to create a level playing field in terms of their intelligence on fraudulent claims because they prefer to maintain competitive advantage over other insurers with less intelligence.

3.11 Insurers rarely allege fraud or make information or evidence available to solicitors during the claims process until the case has progressed significantly (and is usually litigated) at which point a great deal of expense has been incurred by both parties. Earlier disclosure of all available evidence of fraud is absolutely key to tackling the incidence of fraud. The Government could have suggested amendments to the civil procedure rules which would place a burden upon defendants to raise suspicions and disclose evidence sooner.

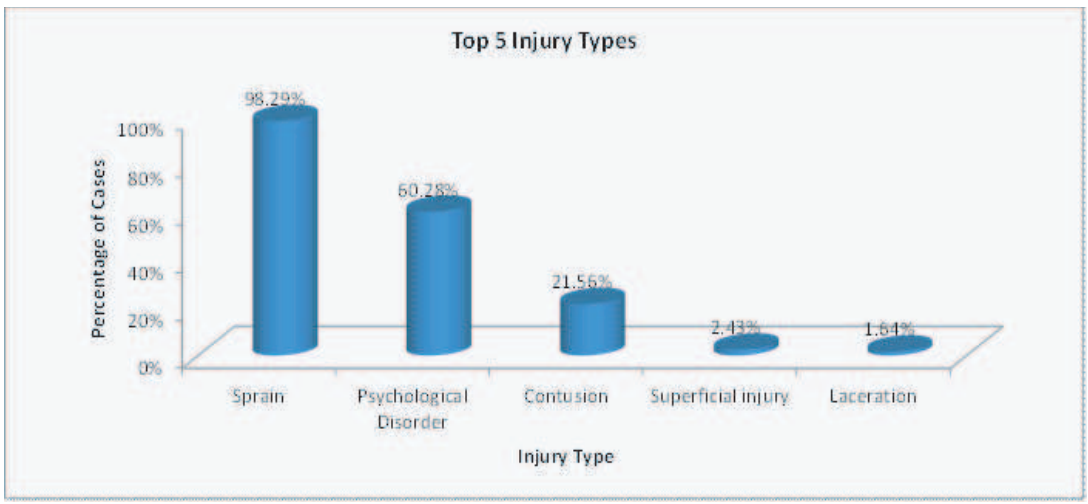
3.12 Minster Law supports the 10 point plan for eliminating whiplash fraud set out by APIL and repeat it here for ease of reference.

4. *What are the likely impact of the proposals on access to justice for claimants who are genuinely injured?*

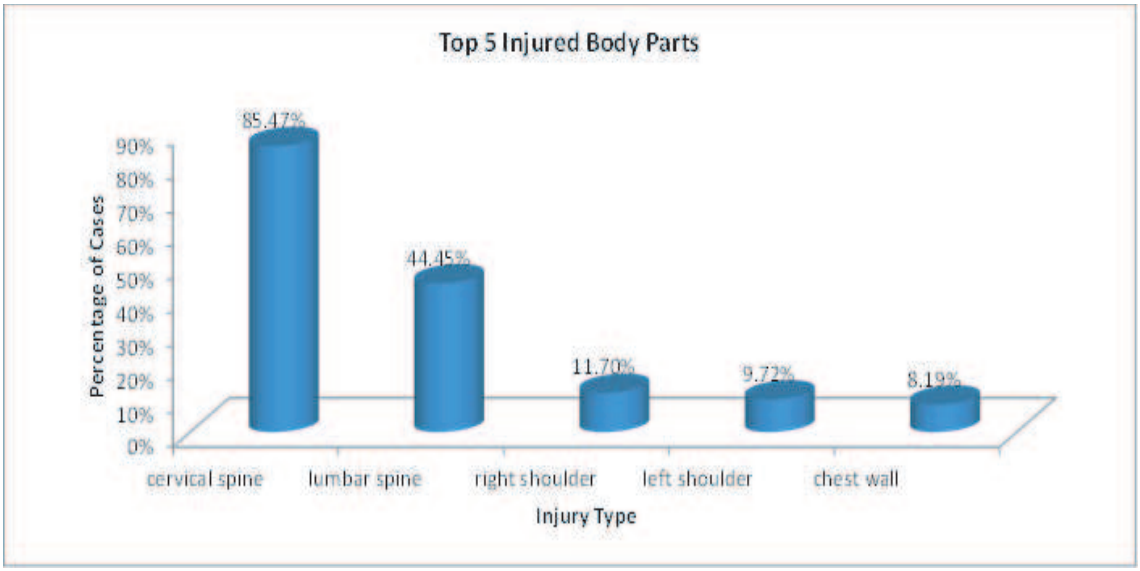
4.1 Raising the small claims limit to £5,000 would have implications that go far beyond whiplash fraud. It will exclude many genuine claimants from receiving the legal support and the compensation they deserve following an accident. The idea that the arbitration limit can be set at a level which specifically targets whiplash claims without an unduly harsh repercussions for other types of injuries is misplaced.

4.2 Injuries which are commonplace and routinely sustained in RTAs are often more complex than the simple categorisation of whiplash and in a great many cases occur as only one of multiple injuries sustained.

4.3 A study of Minster Law RTA injuries (sample size 9,000 cases) with data taken from medical codes extracted from the medical reports shows that some 60% of cases demonstrated a medically proven psychological disturbance.



4.4 In 85% of cases reviewed an injury to cervical spine was demonstrated and in 44% of cases a lumber spine injury was also present. Shoulder injuries occurred in 20% of cases and superficial injuries and lacerations occurred in circa 2% of cases.



4.5 Developing injuries

In Minster Law's experience up to 35% of RTA cases which are allocated to the Multi Track (cases valued at above £25,000) are originally presented as routine whiplash or simple soft tissue injuries and develop over a period of time, and as a result of either a degeneration of symptoms and/or unseen complications, into injuries with far more serious impact on the claimant.

4.6 Some of the types of these recognised complications and injuries which fall into this category are detailed blow:

Type of unseen or developing complication	*Example*
Closed head injury	A closed head injury is a trauma or blow to the head or a severe shaking causing tearing, shearing or stretching of the nerves at the base of the brain, blood clots in or around the brain or oedema (swelling) of the brain. There is no penetration of the skull or brain tissue by an object; the skull may be fractured but this does not result in a direct connection between the brain and the outside.
Complex regional pain syndrome	Pain which can develops after an injury—which in most cases is a minor injury—but the pain experienced is out of all proportion to what you would normally expect. For example, a person with CRPS may only strain their ankle but it can feel like a serious burn
Fibromyalgia	Fibromyalgia syndrome is a widespread musculoskeletal pain and fatigue disorder for which the cause is still unknown. Fibromyalgia means pain in the fibrous tissues in the body
Subscapularis, supraspinatus, infraspinatus and teres minor damage, rotator cuff (Shoulder injuries)	Rotator cuff injury is a general term to describe inflammation (soreness and swelling) or damage to one or more of the muscles, tendons or bursa that make up your rotator cuff
Nerve root irritation	Cervical nerve root irritation refers to the "pinching" or inflammation of a nerve within the cervical spine as it exits out of the spinal cord and from between the cervical vertebrae. This condition can often present as not only an unremitting dull ache in the neck, but often a sharp and/or burning sensation with or without referral into the arm and/or hand. Referred symptoms can include pain, pins and needles, numbness or weakness, or a combination of these.
Torn Meniscus	A tearing or split of the cartilage in the knee. These injuries can often occur in RTAs as the collisions can lead to blows to the know on dashboards, the symptoms of which can oftentimes be masked by the immediate and more prevailing whiplash symptoms and not be felt for some time after the accident as the tears develop and become inflamed.

Type of unseen or developing complication	*Example*
Exacerbation and acceleration injuries	Conditions which pre date the accident but which are made significant worse by the injuries (often seemingly minor) but which may not be identified in causative terms until complex investigation and advice is provided. Acceleration injuries are injuries in which the onset of degenerative disease or change is accelerated often, by years.
Post traumatic stress disorder	PTSD can develop in any situation where a person feels extreme fear, horror or helplessness immediately after someone experiences a disturbing event or it can occur weeks, months or even years later. Someone with PTSD will often relive the traumatic event through nightmares and flashbacks, and they may experience feelings of isolation, irritability and guilt. They may also have problems sleeping, and find concentrating difficult. These symptoms are often severe and persistent enough to have a significant impact on the person's day-to-day life.

4.7 If an accident victim sought to represent themselves, they would be at a distinct disadvantage as they are unlikely to have a comprehensive knowledge and understanding of the claim value, process and components of the case.

4.8 Burden on the court systems

In the absence of legal representation and the reduced risks associated with bringing claims to court achieved through qualified one way costs shifting, there will be a dramatic increase in litigants in person (LiP). Cases brought by litigants in person often take up more of the courts' time because of inexperience and require a different style of case management from the judge to support the LiP.

4.9 The Master of the Rolls has already expressed concern at the pressure this will put the system, particularly during a period of budget cuts. Accident victims will face an un-level playing field in court where they are likely to be faced by a defendant who is represented by an insurance company who has the relevant funding and expertise to contest the case.

4.10 Speaking last week at a forum in London on costs and children's claims another senior Judge, Master Cook said:

4.11 *"In short there is going to be blood on the floor and that seems to be the intention of those who have drafted the rules." The addition of proportionality to the overriding objective, together with other key changes, would "have a huge potential impact on the case management process"….*

4.12 Commenting on the impact on court resources he said…

4.13 *"Resources are going to be a problem across the country," he predicted. "Nobody, least of all the Ministry of Justice, has undertaken a resource impact study on the effect of the changes." The "clever money" was on the likelihood that "many courts… up and down the land are going to be overwhelmed by the additional workload that is created by these reforms".*

4.14 Exploitation of unrepresented persons

Without any recourse to independent advice claimants will fall prey to insurers making unscrupulously low offers and there is evidence of this happening now.

4.15 In recent weeks Aviva's Director of Claims Dominic Clayden has made calls for laws which compel claimants to speak to insurers first about their claims. Aviva claim that there is no difference in the compensation achieved without a lawyer than that which is achieved with representation.

4.16 In a recent review of cases involving pre medical offers by insurers to claimants at the outset of a claim our experience is as follows:

Average Initial pre-med offer	*Average Settlement actually achieved*	*Average % increase on pre med offer*
£1,086	£1,795	65% on pre med offer

4.17 Furthermore on a sample of 100 random RTA personal injury cases the following results were achieved in general damages terms by Minster Law versus that which was offered to claimants by the third party insurers.

Total General Damages Offered by insurers	*Total general damages settlements secured by Minster Law*	*Difference*	*% difference*
£518,979.00	£821,475.00	£302,496.00	37% lower

4.18 The above tables demonstrate that in relation to pre-med offers, claimants are being offered on average 65% lower damages than they eventually settle for with medical evidence. Similarly offers made to claimants in a random sample of 100 RTA claims, were 37% lower than that which is ultimately achieved by negotiation with representation.

4.19 Insurers utilise damages assessment tools to control offers made to claimants by their staff who have insufficient skills and experience, in order to reduce costs of handling. These assessment tools are calibrated to ensure that a much low offer than is appropriate is generated. In the absence of representation vulnerable and impecunious clients will be unable to ascertain the appropriate level of compensation.

4.20 Insurers are incentivised to reduce the levels of compensation payable to claimants. They are under no professional or regulatory obligation to act in the interests of those claimants and will not provide adequate levels of compensation to either whiplash claimants or the many other types of cases that are presented to them.

4.21 The Public purse

When a compensation claim is made, the insurer, or paying party, is required to register the claim with the Compensation Recovery Unit and pay accordingly. If the injured claimant receives any form of social security benefit as a result of the accident, the insurer has to repay the value of these benefits to the DWP. This totalled £138 million in 2011–12, of which £38 million was for motor claims. Additionally, if the claimant has treatment at an NHS hospital or uses the ambulance service, the NHS recovers the cost of treatment from the insurer. In 2011–12 the total collected by the NHS IRC scheme was over £221 million.

4.22 If fewer injured parties feel able to bring claims then the NHS and DWP will not receive any compensation from the at fault driver and will bear the full costs of treating the injury and/or any social security payments made in relation to the road accident.

4.23 Interplay with the current Portal

The consultation document does not address the practicalities raising the PI small claims limit in personal injury cases and the interdependencies upon the current RTA protocol and particularly the Portal. Whiplash and soft tissue injuries are valued largely by reference to the severity and length of symptoms. It is therefore not possible to ascertain whether an injury is likely to be valued at over £5,000 in all but the most severe cases where other injuries are present, and not in any event until the receipt of medical evidence. This will require use of the RTA Portal for the presentation of all claims regardless of value. The technology utilised is for presentation of portal claims cannot easily be accessible to members of the public, some of whom will have no access to a computer or the internet.

4.24 The RTA Protocol is in our view drafted with sophisticated users in mind. The pre action protocols and procedure rules will be unduly complicated for a lay person to understand and interpret and as suggested above unrepresented claimants will have unduly high expectations or in the alternative are likely to be exploited by the more sophisticated users such as insurers or defendant solicitors.

5 *Additional Comments*

5.1 These proposals cannot be viewed in isolation the wide ranging reforms to the civil litigation system are already presenting a fundamental challenge to the rights of accident victims.

5.2 The civil justice sector is in a period of unprecedented change and by April 2013 there will have been a fundamental shift in the way the industry operates as the result of several packages of changes: the Jackson Reforms and LASPO Act 2012; the referral fee ban; reforms to the RTA Portal, including reducing Fixed Recoverable Costs; and Alternative Business Structures. The whole market is also being reviewed by the Competition Commission.

5.3 The cost of motor insurance is falling. Surveys published by insurers and aggregators are showing that insurance premiums have actually reduced. The reforms that will be implemented this year will help to further reduce costs.

5.4 Reducing the number and cost of whiplash cases is the stated aim of the proposed reforms, however this objective is predicated upon the fundamentally flawed logic that fraud represents a significant proportion of claims presented to insurers when in fact insurers themselves cite only 7% as being potentially fraudulent, a figure which cannot be corroborated by empirical evidence.

5.5 These proposals do not address fraud. They merely serve to reduce an insurer's liability to pay claims. Insurance cannot always be provided on the cheapest basis. The result of these proposals is to diminish the

level of cover provided by restricting what losses can be claimed by policyholders and passing the burden of the costs of bringing a claim onto the injured party.

5.6 Raising the small claims limit is therefore in essence taking a sledgehammer to crack a nut. To place 93% of genuine claimants at risk of having no representation or equality of arms to address such a low proportion of *potentially* fraudulent claims is in our view a disproportionate measure, the unintended consequence of which will be to benefit insurers but not society as a whole.

April 2013

Written evidence from Zurich Insurance plc (WL 38)

INTRODUCTION

1. Zurich Insurance plc (UK Branch) is a major insurance service provider for both private car and motor fleet. Delivering motor insurance solutions in the United Kingdom, distributed through both direct and brokered channels. In addition Zurich is the leading provider of risk management services and motor insurance solutions to the UK's public services market through its Zurich Municipal division.

2. As a major stakeholder with a broad spectrum of coverage, we have a wealth of expertise and technical knowledge in this area Zurich very much welcomes this inquiry on reducing the number and costs of whiplash claims.

Is the Government correct in describing Great Britain as the "whiplash capital of the world"?

3. Zurich is unable to state whether this is the case or not. Zurich does not write motor insurance in every country and the claims are dealt with under very different legal jurisdictions. As an example, until recently, in Germany a third party was unable to claim for an injury where the collision between the motor vehicles was lower than 10 miles per hour.

4. Research carried out by the European Insurance and Reinsurance Federation (now Insurance Europe) in 2004 showed that 76% of road traffic accident personal injury claims in the UK were for whiplash, compared to 47% in Germany, 32% in Spain and only 3% in France.

5. What we do know is that in the UK approximately 550,000 people claim to have suffered whiplash in 2011 which cost the insurance industry over £2 billion and this adds substantially to the average car insurance premium.

6. Between 2006 and 2012, road traffic accidents decreased by 20% whilst the number of RTA personal injury claims increased by 60%. This is also against the backdrop of improved vehicle safety as manufacturers work to make cars safer and protect occupants in the event of a collision.

Is it correct to say that the cost of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated claims"

7. The ABI has stated that whiplash claims add an additional £90 a year to the average motor insurance premium. Based on Zurich's own experience and broad assumptions on how to extrapolate this to a market average this does not seem unreasonable.

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

8. Zurich believes these proposals will reduce the cost of handling genuine claims and the risk of paying non-genuine claims. Due to the competitive nature of the motor insurance market Zurich believes this could lead to a reduction in motor premiums—although Zurich is unable to estimate the likely impact.

9. Zurich support the focus on improving medical evidence for RTA claims as proposed by the Government. The Government has, within its consultation paper, recognised many of the failings of the current process. In many cases, a whiplash report provides a subjective history provided by the claimant with no objective analysis as to whether such an injury has actually been sustained and the subsequent impact of pain, suffering and loss of amenity.

10. The Government has set out possible changes to the infrastructure of the medical reporting process. The consultation offers options of a national call off contract or a process of accreditation.

11. Zurich believes that these options should not be mutually exclusive and that both should be adopted.

12. We are in favour of some form of board to oversee the national call-off contract and regulate the overall whiplash reporting process. We consider that this should be not dissimilar to the approach adopted with Claims Portal Limited where a board of stakeholders come together and work in partnership to deliver the

Government's ambitions. This board should ultimately be responsible to the MoJ in terms of its delivery and ability to demonstrate real change.

13. We can also see that accreditation would be a valuable addition to the process and that all experts must be accredited before being signed on to the national call-off contract.

14. There is no question that MROs have helped to bring some order and discipline to the medical reporting process and they have helped control quality, speed and price. However, some of that discipline is beginning to break down with MROs connected to claimant law firms now seeking to drive up fees beyond the MRO guidelines. This is precisely the behaviour that should be prevented.

15. Zurich considers that an element of peer review by way of audit is required as part of the accreditation process, and indeed would be essential in order to ensure that standards are consistently high and to give an increased confidence factor. Peer review and audit would also play a part in producing consistent results to allow outliers to be investigated further.

16. The current process does not allow the defendant the opportunity to convey to the examining expert their version of the accident circumstances/mechanics. This requires a simple change to facilitate this. We have seen cases where the medical expert simply reports that the claimant has been in an RTA collision. This, unbeknown to the expert, has included a minor clash of wing mirrors or even in one case, a child opening a car door into contact with an adjacent stationary vehicle in a supermarket car park. The examining doctor must be provided with full details of the accident mechanics so that he can then properly assess the alleged injuries against that set of circumstances. We have spoken to MROs and other medical experts and they all agree that this simple change would make a significant difference to the quality of medical reporting. The defendant should also then have the right to discuss/challenge the medical experts report against the backdrop of the accident mechanics.

17. Further, the MoJ has called for standardised medical reporting. We would welcome this and consider that stakeholders should work together to create a standardised whiplash template. This could be part populated prior to instruction of the expert with agreed accident circumstances, witness commentary and/or detail from the Claims Notification Form (CNF). This would focus the mind of those reporting and would create a universal report where the claimant is asked a set of specific and pre-defined questions.

18. Zurich also considers that the cost of medical reports should be fixed and set within Civil Procedural Rules. If a standard examination and reporting format is adopted then there is no reason why there should be any discrepancy in the cost of a report. We are also seeing an increasing number of ancillary reports being obtained in low value whiplash cases—these are generally reports from psychologists. With certain claimant law firms, this is rapidly becoming a standard step in their process. The report adds little—sometimes nothing—to the overall evaluation of the claimant's condition; however, fees for such reports range from anywhere between £800 and £1,400. Firmer guidelines around ancillary reports would be beneficial and we would recommend that the MoJ considers how to support this.—both in terms of when they can be obtained and how much they should cost.

19. If these measures were implemented, this would ensure that every claimant is actually seen (rather than undergoing a telephone interview) by an accredited expert who has the full set of facts in front of them.

20. These proposals if implemented would also need the full support of the judiciary to drive the correct behaviours of all parties.

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

21. The majority of whiplash cases do not involve liability disputes and should therefore, in a system in which the level of damages is predictable and the process well-defined and standardised, be resolved quickly and efficiently without the need for either recourse to the Court or legal advice. Predictable damages are a key enabler to this, but if introduced this would in fact make the claims compensation payment process quicker.

22. The introduction of a national call-off contract with a process of accreditation and standardised medical reports do not, in our opinion, have any adverse impact on access to justice for claimants who are genuinely injured.

23. With regard to the proposal to increase the small claims track limit to £5,000 for motor personal injury claims (or specifically whiplash), Zurich believes that measures can be taken to ensure that access to justice is still available to genuine claimants.

24. Zurich believes the £1,000 limit for personal injury claims is probably set too low. While making a claim for personal injury is undoubtedly different than for a general consumer issue, we believe the small claims track is sufficiently consumer-friendly for this limit to rise without any detrimental impact on consumers.

25. In 1991, the small claims track was extended to cover claims for pain, suffering and loss of amenity (PSLA) with a value under £1,000. In 1991, around 50% of personal injury claims were dealt with in the small claims track. By 2005, that had decreased to only 10–15%. The limit has not been revised in over 20 years. As such, given that in that period that there has been significant damages inflation there has been a substantial reduction in the number of claims that are dealt with in the small claims track.

26. Zurich is aware that there is an argument that a claimant is not in a position to value their own claim for general damages. Whilst not accepting that proposition, any potential concerns over access to justice issues could be addressed if Lord Justice Jackson's recommendations on predictable damages were to be implemented for such claims. If there was a transparent and independently controlled system of predictable damages available then this should address the problem of self-represented claimants having to assess their own claim for general damages.

27. Where liability is disputed then the small claims track provides a quick and efficient means of resolving such issues. All other issues would be capable of resolution outside of the Court if the level of damages were predictable. Mediation is also available in the small claims court and can be accessed via telephone in most instances. Zurich considers that mediation would, in many instances, help to resolve liability issues without matters ever coming before the Court. If a mediation does not succeed, then a small claims court hearing is specifically designed to be used by self-represented claimants and District Judges are well able to assist in levelling the playing field for such claimants should there be a need for a judicial determination.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

28. The Government has announced plans to publish a Green Paper with its proposals on improving the safety and reducing risks to young drivers. Zurich attended the Motor Insurance Summit and welcomes this announcement which we anticipate will assist in reducing premiums further.

29. The costs of tackling fraud are substantial and these are costs which are necessarily passed on to the premium paying customer. The Insurance Fraud Bureau estimates that the insurance industry's exposure to fraudulent organised motor insurance claims is £350 million per year. This adds, on average, £44 to the annual costs of individual policyholders.

30. Third-party fraud is an ever-present risk in any claims process—this is particularly prevalent around low level/whiplash RTA claims. Therefore any measures which act to reduce this risk should benefit the honest policyholder and claimant. Zurich believes the fraudulent exaggerated claims should be struck out in their entirety. This would provide another disincentive to would be fraudsters.

31. We would refer the Committee to the case of Summers v Fairclough Homes where the claimant exaggerated the true worth of his claim tenfold. The matter was finally considered by the Supreme Court who considered that the level of exaggeration was not sufficiently exceptional to strike the case out in its entirety.

32. Zurich believes that the MoJ should re-open this debate and to move swiftly to a position where such cases can be struck out in full to deter fraudsters.

33. Further, the introduction of Qualified One Way Costs Shifting (QOCS) provides fraudsters with a real risk-free incentive to "have a go". Whilst the proposed rules provide that fraudsters will lose QOCS where a party can prove that the claim was fundamentally dishonest on the balance of probabilities, this hurdle is simply too narrow and of no deterrent effect whatsoever to exaggerated claims.

34. Lord Justice Jackson intended that the rules should be drafted "to deter frivolous or fraudulent claims" (Chapter 19, para 2.11 of his final report). The rules may capture a fraudster if the claim is fundamentally dishonest, but do not cover the errant conduct that we see where an element of a claim is dishonest.

35. Zurich believes the best way to implement these changes is through the endorsement of the exception proposed by the Civil Procedure Rules Committee (CPRC) at the meeting of the Civil Justice Council on 19 October 2012. The CPRC proposed that, "A claimant should lose QOCS protection if the claimant's conduct is dishonest on the balance of probabilities." This test is the same but it can be applied to individual heads of claim and instances of exaggeration.

April 2013

Written evidence from Chris Nairns (WL 39)

Is Government correct in describing GB as "whiplash capital" of the world?

1. The data sources used by the Government are selective and do not give a comprehensive view of the full picture.

2. The volume of injuries reported to the DWP/CRU increased through this period due to enforcement of DWP guidelines via the RTA/Personal Injury Portal. Historically, some insurers did not notify every NOTIFIED claim but did notify every PAID claim. The Portal changed this practice.

3. It should be noted that, depending on insurer, some 16%–30% of reported claims end in NO Payment or claim and were only ever notified to account for the possibility of a claim, based on the initial description of the incident by their policyholder.

4. The volume of accidents reported to DfT does not correspond with the volume of accidents reported to insurers as standard motor insurance claims, which in fact did increase through this period.

5. Insurers have driven efforts to reduce and/or avoid accidents being reported to police/others through this period to allow them to "capture" the claim and manage the cost as they see fit.

6. The figures ignore the tangible increase in multi-occupancy in vehicles; the average seating capacity has increased through this period.

Is it correct to say that the costs of whiplash add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

7. The specific breakdown by insurers by cost is problematic and in whiplash is complicated by a number of factors. Not least, most major insurers (I have worked for three of the top five in a senior claims capacity) park most claims costs under the most complex item. So the claim with £5k personal injury cost and £3k other cost suddenly shows as £8k personal injury cost. Insurer MI is notoriously poor at identifying specific costs factors and cannot be relied upon to determine breakdown to any real meaningful degree.

8. The proportion showing as exaggerated, misrepresented or fabricated claims is exceptionally difficult to assess and may differ according to various interpretations of the data available.

9. I would contend that in excess of £90 is added to every insurance premium through insurer incompetence, poor training and lack of any real management.

10. The UK's largest insurer has consistently operated claims departments with backlogs of work in excess of six months when the daily cost accrued on these claims would total millions of pounds PER DAY.

11. Another large UK insurer regularly operated a personal injury claims department with backlogs of work in excess of three months when the daily cost accrued on these claims would total a (then estimated) £0.5 million PER DAY.

12. Insurers have effectively sold personal injury claims to claims referrers and solicitors for significant sums regardless of the impact of this claims farming.

13. Rival claims managers operating in the SAME company that I served would sell claims against my department from their department and be rewarded with significant bonuses for doing so.

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

14. Unlikely in the extreme. All proposals relating to medical evidence are likely to increase cost on each and every claim.

15. The current commercial arrangements in place have reduced real terms costs of medical evidence across the board and have effectively held costs stable for several years now.

16. There is no real added incentive to challenge claims and the insurer lobby has been unwilling to engage with medical report providers to explain what, if anything, can be done that is not being done.

17. Medical experts are engaged and willing to combat suspected fraud but are denied admission of relevant data or information by the insurer, which would rather "ambush" the claimant than engage in productive investigation.

18. Medical panels are in place and accredited already. They have contributed to training and diagnostic and prognostic toolsets that have helped decrease the overall extent and duration of injury reports consistently over the last three years. This reduces all subsequent injury valuations.

19. The ability to harvest biometric data for fraud prevention has been offered to insurers and rejected as a probable cost factor despite the likelihood it would deter almost all professional fraud.

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

20. Access to justice will remain for a large proportion of claimants but will evaporate for a sizable volume on the basis that no legal provider will consider their case viable.

21. Any less straightforward cases will be forced into the hands of less scrupulous and untrained bodies working on the margins of the legal industry and beyond.

22. Genuinely injured claimants where an insurer disputes liability may find they are represented by bodies which are unregulated.

Whether there are other steps the Government should b taking to reduce the cost of motor insurance?

23. Regulating the work undertaken by insurer claims departments so that they consistently measure costs.

24. Regulating the work undertaken by insurer claims departments so that they consistently deal with claims on time and without accruing unnecessary cost.

25. Forcing insurer claims departments to publish costs in a workable league table to understand which insurers are functioning and which are increasing premiums unnecessarily.

26. Forcing insurer claims departments to engage with medical reporting organisations and others to assist the medical experts in receiving full disclosure of all facts and aiding them to investigate suspected or potentially fraudulent or exaggerated claims.

27. Allowing medical reporting organisations to contribute medical evidence directly to the Claims Portal together with meaningful diagnostic and prognostic markers to aid the management and training of medical experts.

April 2013

Written evidence from Roger Carter (WL 41)

1. I welcome this opportunity to place this submission of evidence and proposals before the Transport Committee. I have discussed this proposal with people working in road safety and accident reduction within Highway Authorities, The Highways Agency, Road safety GB and Police. *Individuals have welcomed and generally endorsed this proposal, the named organisations have yet to be formally consulted and the Committee may wish to consult them.*

2. The insurance industry will be able to provide the committee with some data on the number and costs of whiplash injuries. The questions I wish to address is how to reduce the number and costs of these and Road Traffic Accidents [RTA] generally and the "*other steps the Government should be taking to reduce the cost of motor insurance*".

3. Government and DfT Policies for improving Road Safety now require this to be evidence led but the lack of data renders this unachievable. I would like to start with the problem:

4. *Lack of Accident Data*

5. DfT published statistics and surveys (I will reference these later) show how sparse and inadequate current Road Traffic Accident data is:

- — *67.5% of Road Traffic Injury Accidents are Unrecorded and Not Reported to police meaning the cause and site are unknown.*
- — (730,000 Injury accidents in 2010 of which just 237,000 were reported and 493.000–986,000 motorists committed the offence of failing to report an accident.)
- — *92.1% of All Road Traffic Accidents are Unrecorded and Unknown.*
- — (Three million Road Traffic Accidents in 2010 of which just 237,000 were reported and recorded.)

6. The lack of data is because under current legislation Highway Authorities and DfT only receive Injury accident data from the Police. The Police only record accident data where it is reported to them and a Personal Injury (PI) or Fatality has occurred (Section 170, Road Traffic Act). Accident or claims data is not currently provided from Insurance companies

7. *The Lack of Accident Data means that*

(a) Accident reduction is curtailed, as without the accurate data Local Highway Authorities cannot properly address the task of reducing accidents;

(b) Sites with high numbers of damage only accidents cannot be identified, evaluated or improved to reduce the numbers of accidents and claims.

(c) Sites with a mix of injury and damage-only accidents may not meet cost-benefit criteria on injury but would if all injury accidents were known or would through a combination of the number and costs of both types of accident.

(d) Design criteria for road layout, junctions etc cannot be tested and evaluated for accident reduction (or cause) potential against both Injury and Damage only accidents without RTA full data on both. This hinders development of safety by design

8. *Reducing the cost of motor insurance in the UK* can only be addressed by working to reduce numbers of All road traffic accidents and thus the cost of claims and motor insurance premiums.

9. That reduction cannot be achieved cost-effectively while RTA data is as sparse and incomplete as it is at present. That applies to whiplash injuries and claims as much as to any other type of road accident and has a direct bearing on both the cost of motor insurance in the UK and the economic loss to business and to GDP.

10. *Cost and Cost Effectiveness—Motor Insurance Premiums and GDP*

(a) A Roundabout or Junction with 1 low speed damage-only RTA per week costs £242,000 a year in accident costs without including economic loss (DfT figure).

(b) Altering markings, layout, priority or restructuring at a cost of £10,000—£100,000 might reduce this by 50% and saving £121,000 of accident claim costs each year—but only once the full RTA data is available. A remarkable return on investment.

(c) Even if improvements were to cost £500k to achieve a 50% RTA reduction then payback would take just four years. (Anecdotally some busy urban junctions see one or two minor collisions a day generating accident claims of some £1.7 million–£3.4 million a year but RTA data is not available so the problem is unidentified and no remedial work can be considered or undertaken).

(d) Were data to be available then evidence-based decisions could be made leading to action to reduce claims based on a true cost-benefit analysis.

11. *Obtaining 100% of Injury and Damage only Accident Data*

12. This is now possible as a straightforward exercise at no cost to Government, Local Authorities or Police; it only requires a small change in legislation which I would ask the Committee to consider as a change to policy and to recommend to Government.

(a) The Motor Insurance Database [MID] is run by the Motor Insurance Bureau [MIB] and funded by a levy on the motor insurance industry.

(b) The MID provides the records to meet the Continuous Insurance requirement for motor vehicles in the UK and this data is made available to Police, DVLA and others.

(c) The MID receives insurance information electronically 24/7 from Insurance companies' databases on a regular and timely basis with financial penalties for slow or late updates.

(d) The insurance companies record and hold data on all motor accidents and the cost of claims for both injury and damage only RTA.

(e) The current legislation on reporting insurance details should be extended to include a requirement on Insurance Companies to report all motor claims to an expanded version of the MID.

(f) This should include details such as those provided by the police but importantly should set out the total claim value of every claim. (This may need a time lag of say six months to allow for claims settlement).

(g) The data on all accidents (injury and damage only) will then be made available to the relevant authorities on a monthly basis to allow their road safety plans and works to be fully evidence-led.

13. Highway Authorities will then have a complete, evidenced picture of all accidents in their area and can then fully assess cost benefits of reduction. Apart from injury accidents it would clearly be in the interests of the local community for a junction or layout improvement to significantly reduce All accident and claim values.

14. There would be a cost involved to the MIB which it would recover through levy on the industry and although there may be some set up costs for insurers to create the data flow to MIB this would be offset by the savings that could be achieved once the data is available to Highway Authorities and accident levels reduced.

15. *Will this approach help reduce the cost of motor insurance?*

16. I, Highway Officers and other relevant organisation I have discussed this with in detail believe it will provide the opportunity to significantly reduce the level of accidents and motor insurance claims. *As just 7.9% of RTA data* is currently available it is impossible to assess the level of potential reductions, although preliminary calculations suggest a readily achievable reduction of 10% of RTA which would save the UK economy around £5 billion a year.

17. I draw a parallel here with Landfill site construction. In the early 1990s there were increasing problems with contamination of aquifers and groundwater from putrescible waste leakage in Landfill sites. There was no research in the UK to show why and construction techniques relied upon methods and standards developed in the 1950s for road base compaction by the predecessor of the Ministry of Transport. I researched this around the world and found there was recent research on this published by the University of Texas A&M (the USA had been using the same approach). As Chairman of the Environment Committee of Berkshire County Council I was able to introduce new standards of construction for landfill sites in Berkshire based upon this research. These standards were subsequently adopted by central government for all UK landfill and groundwater pollution was reduced. It could not have been achieved and arguably would have been wrong to implement without the research and relevant data.

18. There is currently no research to show how effective the approach I propose would be although commonsense dictates that it should be very effective and Highway officers and others in the industry charged with reducing accidents believe it will be.

19. It should be tested, validated and quantified before changes in legislation are made and my Local Highway Authority, the Royal Borough of Windsor and Maidenhead are keen and prepared to run a pilot study within their Unitary Authority to test and evaluate the benefits which could be achieved.

20. I would be happy to explain to the committee and provide further detail in conjunction with the Council of how a trial would be set up and conducted and I would ask the committee to invite and support that. I suspect that others from the Highways Agency, Road Safety GB might also wish to comment or provide evidence to the committee on the proposal and if requested I can provide contact details of people I have discussed this in depth with.

21. *Will this approach require additional road safety budgets?*

22. In the first instance a better and more accurately targeted spend of existing budgets would be able to achieve a greater reduction in accidents and claim costs than is currently achievable. Evaluation of that against benefits to the UK economy may demonstrate that an increase in central government funding for Road safety works would produce a payback through savings in lost GDP.

23. Potentially it may open the door to other avenues of funding:

(a) Where it can be shown that expenditure can save claims costs which are greater than the cost of works it would be in the interest of insurance companies to consider providing the funds to achieve the savings in claims. (A mechanism would need to be developed to manage this fairly.)

(b) Local businesses may wish to sponsor a road safety initiative where it can be shown to benefit their local community by reducing accidents.

24. *Why are 67.5% of injury accidents not reported?*

25. That question and the partial answers to it raises questions which the Committee may wish to address with further inquiry of others.

26. The police believe that some drivers are unaware that failing to report an accident involving injury to person or specified animals as soon as practicable or within 24 hours is a Road Traffic Offence under Section 170 of the Road Traffic act. They believe this should be addressed through the driving test.

27. The police also think that to report in person at a police station has become harder with closure or part-time opening and lack of public parking at police stations and this may be a deterrent to reporting.

28. I believe there are other potential reasons which need considering further by the Committee:

(a) It is common practice for insurance companies to refer people reporting a no-fault accident to Claims Handlers. One of the first questions asked by Claims Handlers is if anyone was injured and, commonly, did anyone suffer whiplash injury they could receive compensation for. The prospect of receiving a payout may persuade people to proceed with such a claim despite there being no reason of injury to report this to police at the time of the accident. Indeed police often receive requests from defendant's solicitors as to whether or not the accident and any injury was reported at the time.

(b) Manufactured accidents where individuals set out to cause an accident for the sole purpose of making claims for vehicle damage and injury have been widely reported as a growing problem. I suspect that those involved do not report these accidents to the police as it would soon draw attention to their activities.

29. *An Interim Proposal* which could reduce or end these unreported occurrences and may deter spurious or fraudulent claims is:

(a) Government/DfT/MoJ support or requirement for insurance companies to refuse to consider any claim for personal injury until it can be proven that the injury accident was reported to the police.

(b) Any motorist reporting an RTA to the police after the time allowed in statute should be issued with a fixed penalty notice for "failing to report". Insurance company's and claims handlers should be required to point this offence out to their insured at the time of making a claim.

30. The committee may like to consider if this approach as an interim measure in advance of establishing a national accident database would reduce claims and particularly spurious claims.

31. I am aware that there are proposals that all whiplash claims should be supported by medical evidence and I would wholeheartedly endorse that approach.

References and Notes

The following documents and reports have been gone through in preparing the proposals contained in this submission:

Stats19 2010
NTS
Strategic Framework for Road Safety, May 2011

Background Data from DfT and Parliamentary Transport Committee Papers

£15.6 billion cost of Reported Road Accidents in 2011

£34.8 billion cost with inclusion of Unreported personal injury Road Accidents in 2011 the Cost to the UK as assessed by DfT—

But these figures do *Not* include Non-Injury (ie Damage Only) accidents.

(DfT Publication: Reported Road Casualties in Great Britain: 2011 Annual Report. "A valuation of road accidents and casualties in Great Britain in 2011")

Accident costs for Damage Only (No personal injury) are stated with Police cost, Insurance and Admin, Property damage included as the following different averages (*Note the DfT tables show they do not include economic loss in these figures)*:

£3,067.00 (The Accidents Sub-Objective; TAG Unit 3.4.1 August 2012 department for Transport: Transport Analysis Guidance *http://www.dft.gov.uk/webtag/documents/expert/pdf/u3_4_1-accidents-120817.pdf*)

£4,668.00 (Reported Road Accident Casualties in Great Britain 2011 Annual Report page 4 Table RAS60003 *http://assets.dft.gov.uk/statistics/releases/road-accidents-and-safety-annual-report-2011/rrcgb2011–02.pdf*)

£2,027.00 (DfT Published cost of £4.7 billion annually of 2.3 million damage only accidents)

The proposals were discussed with police, Local Highway Authorities, Road Safety GB, Highways Agency, and various other organisations concerned with road safety. All endorse the proposal to create a national accident database as an extension of the MID.

Roger Carter

1989–98 an independent Berkshire County Councillor

- — Chairman of the Environment Committee (and various other committees).
- — Introduced 20mph speed limits outside schools to the UK.
- — Researched and introduced new standards for Landfill site construction—adopted nationally.
- — Developed policies to recycle construction industry waste to reduce requirements for primary aggregate in Berkshire—introduced into national minerals policy.
- — Developed recycling led waste disposal policy—widely copied throughout the UK.

Has had a wide-based business career in international business and run a publicly quoted company in the UK. Has farmed for 30 years.

A number of other public-benefit initiatives included establishing Enterprise Agencies in Poland to help small business develop post-communism (trained by the Berkshire and Buckinghamshire Enterprise Agency; chairman 1993–98); Satellite-based training and monitoring system to ensure safety of East European nuclear reactors post-communism and post-Chernobyl this became a formal project of the European Space Agency and was supported by many UK institutions as well as government.

April 2013

Written evidence from Graham Penwarden (WL 45)

I suffered a whiplash injury in December 1994 as a result of a car driving into the back of me whilst I was stationary ready to turn right at a junction. I suffered severe pain in my neck for several months after and longterm lower levels of pain plus reduced flexibility.

I missed out on many months of playing sport as a result of someone's carelessness.

As it was a company car and I was on business at the time, I had the benefit of legal insurance to persue the claim against the other driver for compensation. His insurance company for a very longtime offered ridiculously low sums , until at the final stage just prior to booked court attendance in the the year 2000, they offered around £5,000, which was accepted to avoid further delays and larger legal costs.

I know that my payment was less than my sides legal bills, which is crazy. The timescale involved also needs to be considerably shortened.

Without my companies legal support or NoWin NoFee arrangements it would not have been sensible to persue.

You have to make sure that:

(a) claims, supported by medical evidence , are fairly treated by insurance companies as quickly as possible;

(b) there are recommendations for payment levels and penalties for stalling tactics; and

(c) somehow avoid all the hangers-on, who get their cut, get rid of fees for passing on data … the worst examples being insurance companies themselves … but not stop genuine claims by vast legal bills.

April 2013

Written evidence from the British Vehicle Rental and Leasing Association (BVRLA) (WL 46)

1. Overview of Response

1.1 This memorandum is submitted by the British Vehicle Rental and Leasing Association on behalf of its members and their customers, the BVRLA represents the interests of more than two million business car drivers and the millions of people who use a rental vehicle each year.

1.2 The cost of motor insurance for the vehicle rental industry has rapidly escalated to a crisis, as the costs associated with motor accident claims and related motor insurance costs reach unsustainable levels. The increasing cost of compulsory motor insurance currently creates the greatest risk for the profitability and sustainability of our industry and the vehicle rental industry is calling on the Government to take urgent, decisive action that will bring relief in the short and long term. Figures which we have collated show that over the last six years the number of personal injury claims which our members receive has increased from 17% of accidents to 25% of accidents. In addition, the average cost of each claim has more than doubled over the last four years.

1.3 The BVRLA's response to the Ministry of Justice's consultation on reducing the number and costs of whiplash claims is contained at Annex A and fully reflects the view which we would like the Transport Committee to consider.

1.4 Key comments for the committee to consider are:

— The BVRLA is fully supportive of the proposal to introduce an independent medical panel as this approach will be able to objectively assess all whiplash claims. We believe this will go some way to reduce the number of fraudulent whiplash claims currently being made. Furthermore, adopting this approach will help to ensure that only genuine claims are paid which will reduce costs for all UK businesses.

— More could be done to help further reduce the costs associated with whiplash claims by ensuring that a claimant is not able to recover damages greater than 2.5% of the Judicial Studies Guidelines for the most serious personal injury, unless a permanent and serious impairment has been sustained and can be proven.

2. Who we are and what we do

2.1 The BVRLA is the trade body for companies engaged in the leasing and rental of cars and commercial vehicles. Its members provide rental, leasing and fleet management services to corporate users and consumers. They operate a combined fleet of 2.75 million cars, vans and trucks, buying nearly half of all new vehicles sold in the UK.

2.2 As well as lobbying the Government on key issues affecting the sector, the BVRLA regulates the industry through a mandatory code of conduct. www.bvrla.co.uk

3. Specific Questions

1. *Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"?*

3.1 We believe the Government is correct, the Government's Compensation Recovery Unit shows there were 347,740 motor injury claims registered in 2003–04, nine years later the same statistics show 828,489 motor injury claims registered for 2011–12. 66% of these are categorised as whiplash. This 120% increase in claims is despite lower vehicle traffic volumes in 2011 than in 2004, falling road usage and a 20% decrease in the number of injuries reported to the police in accidents during the period 2006–11. Non-motor claims, such as employer's liability and medical negligence, rose at a much more modest 21% over the same timeframe, meaning that personal injury costs have been growing at a far faster rate than costs associated with other liability issues.

3.2 The majority of these claims are for subjective soft tissue injuries, which are often impossible to disprove. Association of British Insurers figures show that whiplash accounts for two thirds of motor insurance personal injury claims, twice the European average. While compensation payments can be beneficial for those who claim them, these costs increase liability exposure and must therefore be covered by insurers and businesses involved in the motoring sector, such as vehicle rental companies. These costs are often passed onto customers through higher costs, including higher rental rates and increased insurance premiums. According to research by the Association of British Insurers, whiplash claims are estimated to total £1.9 billion each year, an estimated

14% of the total cost of personal injury claims (£14 billion per year). This is in comparison to just £8 million spent by the NHS for treating patients with whiplash every year.

3.3 The above figures help to demonstrate that there is some truth in the Government describing Great Britain as the "whiplash capital of the world".

2. *Whether there are other steps which the Government should be taking to reduce the cost of motor insurance*

3.4 We would suggest the Transport Committee considers recommending further reforms to help reduce the costs associated with whiplash claims. This could, for example, be achieved by ensuring that a claimant is not able to recover damages greater than 2.5% of the Judicial Studies Guidelines for the most serious personal injury, unless a permanent and serious impairment has been sustained and can be proven. This approach would provide certainty and clarity for all parties involved. If there is a dispute then the small claims court provides a solution to bring claims to a resolution at a proportionate cost.

3.5 The committee may be aware that a similar approach has been taken in other common law jurisdictions which have been affected by rising insurance costs. We believe that lessons can be learnt from experiences in other jurisdictions which share the similar origins of our legal systems. Australia, Canada, and Ireland have, for example, all responded decisively to manage the spiralling cost of motor insurance given the detrimental effect to the wider economy. Each country mentioned recognised that unfettered access to the courts, regardless of severity of damage or costs of delivering compensation, was unsustainable and appropriate measures were implemented.

3.6 A key strategy for maintaining affordable motor insurance adopted in the Canadian and Australian jurisdictions was to limit recovery for non-serious personal injuries. A number of methods, including caps, deductibles, and financial thresholds have been introduced as a means of identifying non-serious injury.

3.7 For example, in Alberta, Canada a cap on payouts was set at $4,000 (around £2,500), while in Nova Scotia, New Brunswick and Prince Edward Island it was set at $2,500 (around £1,600). In the years between 2003 and 2011, average premiums fell in all of these provinces. The cap was a success in terms of reducing the severity of injury claims experience, reducing the frequency of minor injury claims, and stabilising premiums. Another reform implemented in Ontario was a requirement that an injury had to be a "permanent and serious impairment of an important function" to seek recovery through the civil justice system.

3.8 The common experience has been that objective tests create greater certainty. By introducing the approach adopted by other jurisdictions, which largely looked at the process of identifying a genuine claim, had the desired outcome. This was introduced without the need to impose arbitrary factors which were difficult to prove, such as the speed of impact as applied by the German judiciary.

Annex A

BVRLA RESPONSE TO THE CONSULTATION BY THE MINISTRY OF JUSTICE ON REDUCING THE NUMBER AND COSTS OF WHIPLASH CLAIMS

Executive Summary

We welcome the opportunity to comment on the proposals to reduce the number and costs of whiplash claims.

We are pleased that the Government has recognised there is a need to remedy two areas where the current arrangements are imperfect:

(i) the difficulties in diagnosing the injury; and

(ii) the nature and cost of the court system that can work against insurers when challenging suspect claims.

It may be helpful to explain that the vehicle rental industry is a major consumer of compulsory motor insurance and the sector would be unable to offer its services to the public without it. Regardless of whether a vehicle rental company or car club purchases motor insurance on the open market or operates through a "captive" the impact of increased liability costs is having a major impact on the industry's ability to deliver an efficient low cost mobility solution to consumers and businesses.

We fully support the proposal to introduce an independent medical panel as this approach will be able to objectively assess all whiplash claims. We believe this will go some way to reduce the number of fraudulent whiplash claims currently being made. Furthermore, adopting this approach will help to ensure that only genuine claims are paid which will reduce costs for all UK businesses.

However, we would ask that the department goes further to help reduce the costs associated with whiplash claims. This could, for example, be achieved by ensuring that a claimant is not able to recover damages greater than 2.5% of the Judicial Studies Guidelines for the most serious personal injury, unless a permanent and serious impairment has been sustained and can be proven. This approach would provide certainty and clarity for all parties involved. If there is a dispute then the small claims court provides a solution to bring claims to a resolution at a proportionate cost.

The department may be aware that a similar approach has been taken in other common law jurisdictions which have been affected by rising insurance costs. We believe that lessons can be learnt from experiences in other jurisdictions which share the similar origins of our legal systems. Australia, Canada, and Ireland have, for example, all responded decisively to manage the spiralling cost of motor insurance given the detrimental effect to the wider economy. Each country mentioned recognised that unfettered access to the courts, regardless of severity of damage or costs of delivering compensation, was unsustainable and appropriate measures were implemented.

A key strategy for maintaining affordable motor insurance adopted in the Canadian and Australian jurisdictions was to limit recovery for non-serious personal injuries. A number of methods, including caps, deductibles, and financial thresholds have been introduced as a means of identifying non-serious injury.

The common experience has been that objective tests create greater certainty. By introducing the approach adopted by other jurisdictions, which largely looked at the process of identifying a genuine claim, had the desired outcome. This was introduced without the need to impose arbitrary factors which were difficult to prove, such as the speed of impact as applied by the German judiciary.

Specific Comments

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

We agree that an independent medical panel, using a standard report form should be used for assessing whiplash claims. However, we do not believe this is enough as it will not reduce the volume of claims. We would suggest the Government consider introducing a threshold for personal injury claims resulting from road traffic accidents that requires:

(a) objective evidence of injury documented by an independent medical practitioner, and that the injury is not predominantly:

  (i) a sprain,

  (ii) a strain, or

  (iii) a whiplash associated disorder injury, and

(b) the injury would entitle the claimant to recover damages of greater than 2.5% of the Judicial Studies Guidelines amount for the most serious personal injury, unless a permanent and serious impairment has been sustained.

By taking this approach we believe that the Government will be able to ensure that only genuine claims are paid and reduce costs for UK businesses. This type of approach or using predictable damages as is used in Spain, Italy and France is a logical step in facilitating access to justice and adds a layer of transparency and certainty into the claims process.

Question 2: *If no, how would you address the problems listed at paragraphs 35 to 39 of part two of this consultation document?*

As we have mentioned above we believe that a threshold for person injury claims needs to be introduced.

Question 3: *Which model should be used for the independent medical panels—Accreditation, national call-off contract or some other variant?*

We believe that accreditation would be the best way forward as it will ensure independence and should be a cost effective way forward.

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?*

From a cost perspective we believe that a sample of assessment for audit purposes should be sufficient.

Question 5: *How should costs be dealt with and apportioned?*

We believe that the costs should be covered by the at fault party in the claim unless the case is proven to be fraudulent in which case the fraudulent claimant should cover all costs.

Question 6: *Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

We would support the approach of increasing the threshold to £5,000 for all RTA PI claims as this will reduce costs for all parties. To future proof the threshold we would suggest index linking it to inflation in order that all claims that are intended to be captured by the increased threshold, remain within the small claims track going forward.

Question 7: *Will there be an impact on the RTA Protocol and could this be mitigated?*

Whilst the volume of claims will increase we don't believe this will impact on the protocol.

Question 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

If the Government is serious about reducing insurance premiums for motorists we believe there needs to be some form of legal restriction on the types of claims that can be pursued along the same lines as was recognise for the Criminal Injuries Compensation Authority.

Rising Insurance Costs in the Vehicle Rental Industry

The cost of motor insurance for the vehicle rental industry has rapidly escalated to a crisis, as the costs associated with motor accident claims and related motor insurance costs reach unsustainable levels. The increasing cost of compulsory motor insurance currently creates the greatest risk for the profitability and sustainability of our industry and the vehicle rental industry is calling on the Government to take urgent, decisive action that will bring relief in the short and long term.

We recognise the Government's wider policy objectives to support jobs and growth in the UK, however the rising cost of motor insurance are hampering the rental sector in supporting these objectives. Feedback from our smaller members has been that some insurance companies have put disproportionate requirements, for example requiring tracking devices to be fitted to new vehicles, before insurance can be accessed. This type of costly investment, at a time when the volume of claims has not increased, has resulted in some small businesses seriously considering their product offering and in some cases it has been a contributing factor in a number of smaller operator closures.

It is no surprise that the excessive cost of motor insurance is driven by the high (and still increasing) cost of claims. As has been well reported by the ABI, its members are operating with combined ratios above 1600%, meaning losses are outstripping premium and expenses.

Our members, who have introduced alternative methods of risk financing to reduce the reliance on motor insurance, are suffering the same net effect as motor insurers. In other words, while the amount paid in motor insurance premiums may be reduced, the claim cost increases cannot be avoided.

Figures which we have collated show that over the last six years the number of personal injury claims which our members receive has increased from 17% of accidents to 25% of accidents. In addition, the average cost of each claim has more than doubled over the last four years.

The controllable cost items such as, reducing the ease and number of claims brought for minor personal injury, reducing the disproportionate legal costs involved in delivering compensation, and reducing the cost of providing replacement vehicle solutions, must all be the target of change.

Closing Comments

We trust our comments will help to add value to the debate on how to reduce the number and costs of whiplash claims. Should you require any additional information or clarification then please do not hesitate to contact us.

April 2013

Written evidence from Elaine Hughes (WL 48)

I present this evidence specifically to the Transport Select Committee which is considering evidence on reducing the number and costs of whiplash claims.

As far as I am aware, I am the only person researching the road traffic accident compensation system where injury claims have a value of less than £10,000, studying towards a PhD. I have been researching the issue since January 2011 but my interest in this area commenced in 2005. I have been a practising solicitor since 1997, practising almost exclusively in personal injury claims. As such, I request permission to give oral evidence to the committee.

Summary

- Research shows the increase in the number of road traffic accident claims has been caused by nsurers selling their own insured's claim onto panel solicitors. Research should be carried out and insurers forced to disclose data of how much the increase in claims has been caused by insurers selling claims onto their panel solicitors, usually without knowledge of the injured person to clarify who has caused the increase in the number of claims.
- There is no data which shows rising car insurance premiums have been caused by increased numbers of accident claims. Whilst the number of claims has risen, data should be disclosed by insurers, the ABI and through the RTA portal which should be subject to independent and impartial scrutiny to assess whether there has been a reduction in the amount of compensation an accident victim receives and the true cost of claims to an insurer. This data is easily obtainable. My research shows insurers are paying the lowest amount to settle claims than at any other time possible £4,000 to £4,200 for injuries, vehicle damage and solicitors costs for around 95% of road traffic injury claims.
- I am not aware the insurers have disclosed any data to show the number of fraudulent/exaggerated claims each year. I would be surprised if these claims form anything other than a tiny number of the number of claims annually having little impact on the cost of insurance. The insurers should be made to disclose the data. Medical evidence obtained in claims by panel solicitors firms who are on the insurers panel is poor. Medical evidence should be obtained from a properly experienced expert, independent from any commercial constraints such as "panels" or where fees are deferred until the end of the claim. The standard of reports obtained from GP's appears poor compared to those reports from consultants who often charge similar fees. The insurers should be forced to disclose data if they claim these issues have an effect on car insurance premiums.
- There has never been any research carried out as to the levels of solicitors costs in accident claims and if costs have been driven up, the causes of the same. The reduction of fixed fees to £500 from April 2013 will force the majority of accident claimants into the hands of panel solicitors firms in relationships with the insurers and eventually to deal with insurers direct. Claimants in these arrangements receive lower compensation than if they choose who acts for them and the insurers have not disclosed any data/research to the contrary. The fees are not viable when an independent practice has to use marketing to attract new clients. The cost of acquiring each claim is at least £400 per claim. The abolition of recovery of ATE (after event insurance) insurance is a travesty. Who funds at least £500 of medical report fees and at least £995 of court costs if the claim is lost? Claimants have to insure against losing and having to pay these costs even if they don't have to pay the Defendant's costs under the rules introduced in April 2013 and the ATE premiums come out of already low compensation monies compared to other countries. Accident victims have a bargain basement process but this is not access to justice.
- The Government should disclose all data relating to the setting of levels of fixed costs, insurers should disclose data, to be independently scrutinised, supporting their claims and then the civil justice system should be submitted for a full inquiry. Without any research into what costs are in the civil justice system, whether costs are driven up and if so, by whom, accident victims are being denied any proper access to justice.

Whether the Government is correct in describing Great Britain as the "whiplash capital of the world"

1. From the Committee's own previous reports the number of accident claims reported to the Compensation Recovery Unit is as follows[33]:

2000–05	*2005–06*	*2006–07*	*2007–08*	*2008–09*	*2009–10*	*2010–11*
Average 395,735	466,097	518,821	551,905	625,072	674,997	790,999

2. It is significant that the number of claims have risen since 2005. This was the time my interest in road traffic accident claims arose. I started my own practice in 2005 and it was apparent that road traffic accident claim instructions were almost none existent to when I left my previous practice in 2004. Prior to 2004, road traffic accident injury claims formed a significant part of the instructions in any solicitors practice, typically known as the "bread and butter" work.

3. From my research it soon became clear that due to the lifting of the ban on referral fees most motor vehicle insurers had entered into commercial arrangements with solicitors firms who were then on the insurers "panel". The typical business model that operates between insurers and panel solicitors firms is that within an hour of an insured person reporting being involved in a road traffic accident to their insurance company, the insurance company then sells the claim on to the panel solicitors firm. This extends not only to car policies but to van and motor cycle policies and I suspect encompasses all motor vehicle insurance policies. These "referrals" almost without exception are made without the knowledge of the insured accident victim. More importantly, the accident victims are not aware that a significant amount of the profit costs the panel solicitors firm should be paid to properly handle the claim, in terms of the amount of time spent on the claim, by an appropriately experienced fee earner is being eaten up by the vast referral fee being paid by the solicitors firm to the insurance company. For many years solicitors firms have been running claims for a mere 16.67% the profit costs they were being paid (£1200 fixed costs, paying £1,000 for the referral). It is nothing short of scandalous that there has never been any research carried out, since fixed fees were introduced, looking at the standard of the work and whether accident victims are receiving a proper amount of compensation. My early research shows every claim has been or would have been undervalued when handled by the insurer's panel solicitors firm.

4. The insurers have continually perpetuated the myth through the press, without any evidence in support, that "greedy ambulance chasing lawyers" and claims management companies are responsible for driving up the number of road traffic accident claims. The National Accident Helpline have disclosed research which suggests that no more than 2% of all road traffic accident claims, since around 2005, have emanated from any source other than the insurers selling their own insured's accident claims to solicitors on their panel. In their research, the National Accident Helpline state that as they are one of the larger independent claims generating companies, their data is representative of the industry as a whole. Therefore, the increase in the number of people claiming for injuries arising out of a road traffic accident claim is as a result of the insurers own practices of selling claims on and encouraging people to make a claim when perhaps they would not have done:

Period	*RTA claims registered with the CRU*	*All claims registered with the CRU*	*RTA as a % of all claims registered with CRU*	*RTA enquiries generated with NAH*	*All enquiries generated with NAH*	*RTA as a % of all enquiries generated with NAH*
2004–05	402,974	755,875	53%	12,474	42,263	30%
2005–06	466,097	674,422	68%	13,232	44,433	30%
2006–07	466,097	710,784	72%	15,690	46,266	34%
2007–08	551,905	732,750	75%	15,264	47,140	32%
2008–09	625,072	812,348	74%	16,953	58,331	29%
2009–10	674,997	861,325	78%	17,454	59,077	30%

5. When the insurance companies practices became apparent to me I began contacting The Association of Personal Injury Lawyers (APIL), FOIL (Forum of Insurance Lawyers) other organisations such as the AA, ABI, Mr Dominic Clayden [UK Claims Director, Aviva] at Aviva and MP's. I have had meetings with various people since around 2006 expressing my concerns and the complete lack of evidence being used to support the insurers contentions. At pages 9 to 31 of my written submissions are recent letters I have written.[34] In 2011 I wrote to all 38 insurers who underwrite motor insurance requesting evidence to support their claims that personal injury claims have caused the rise in motor insurance premiums. What is striking is not one of the insurers acknowledged my request. Mr Clayden, who was written to personally, twice, has never replied to my request for data/research. The ABI have similarly been unhelpful. Whilst the AA have acknowledged my concerns, again, despite requests, they have never supplied data or research to support their allegations. None

[33] The Cost of Motor Insurance, Fourth Report Session of 2010–11, volume 1, and Follow Up Report, Twelfth Report of Session 2010–12

[34] Not published

of my contact with any of the press organisations, who report the insurers contention that car insurance premiums have risen to do the increase in road traffic accident claims have ever acknowledged my contact.

6. Insurers hold the data as to where road traffic accident injury claims emanate from. They should be made to disclose their data so this myth can be dispensed with.

Whether it is correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims

7. Insurers have, over the years, quoted various ratios of the amounts added to insurance premiums due to the cost of accident claims. I have never seen any evidence in support. Obviously insurers have this data and they should be made to disclose it.

8. It was reported at one of the previous Transport Select Committee hearings that the Institute of Actuaries hold data as to the number of injury claims and the amount paid out per claim. If this is correct, this evidence/ data should be disclosed immediately as again, I do not believe it is mathematically possible for accident claims to have caused the rise in motor insurance premiums.

9. My opinion is that insurers total outlay for a road traffic accident claims, certainly for claims with a value up to £10,000 has reduced significantly over the years, particularly since costs for handling road traffic accident claims were fixed in 2003. Since fixed costs were reduced in April 2010 to £1200 for unissued claims, I would suggest if data were disclosed it would show that the total outlay for the majority of claims, possibly 95% or all RTA claims would be £4,000 to £4,200. This comprises £1200 fixed costs paid to solicitors for handling the claims, around £1,000 to £1,200 fixed costs paid to car repair garages for the damage sustained to vehicles and around £1,600 compensation for the injury claims. I would suggest this represents the smallest outlay per claim than at any other time. The nature and extent of fixed cost agreements with car repair garages should be considered urgently as there are reports of poor repairs with parts being glued together instead of being replaced. It has been alleged to me that RBS received a "paint rebate" from one of the pain manufacturers last year of £7 million. Again, this needs to be factored into the amount paid out by the insurers, just as much as the amount they have received in referral fees. Just Car clinic, in 2010 reported just £24 profit per £1,000 car repair[35] (page 32). This affects the total amount paid out per claim and should be part of the consideration. If these are significant the insurers could be paying out significantly less than £4,000 for the total amount of the claim for the majority of RTA claims. Since I started practising in accident compensation claims I have seen the amount insurers pay out for compensation for injuries, repairs for vehicle damage and solicitors costs reduced significantly so I would be surprised if the insurers can disclose data to support their position that claims have been responsible for rising costs of motor insurance. Disclosure should be insisted upon. The ABI have also gave oral evidence in a previous Transport Select Committee hearing that the average awards paid out in compensation claims is increasing by 20%. Again, they should be forced to disclose this because from my research, the amount paid out in compensation for injury claims has significantly reduced as the fixed costs solicitors are paid for handling the claims has reduced. Data collected from the road traffic accident claims portal should be disclosed for independent and impartial scrutiny as should data disclosed from the insurers.

10. It is disingenuous to say that a significant number of accident claims are due to exaggerated, misrepresented and fabricated claims. Engineering evidence exists to distinguish whether it is reasonable for injuries to have occurred in an accident claim. Insurers have the opportunity to defend these claims and where they do so, the claims come out of the fixed costs regime. It is interesting that where these claims exit the fixed costs regime it increases costs (and of insurance premiums) so any justification of reducing fixed costs to combat fraud has the opposite effect. The insurers should be made to disclose what percentage of claims are proved to be fraudulent with documentary evidence in support. I have heard of claims where people have been involved in accidents where it is alleged no injuries can have been sustained, yet when a claim is made, the insurance companies have never challenged the claim, claiming it is cheaper to pay out than the defend the claim. With qualified one way costs shifting (QOCS) being introduced in 2013, this position will only be made worse. QOCS is where if a claimant loses a claim the successful defendant (in effect the insurance company) does not recover their costs. This means it is going to be much cheaper to pay out the claim rather than defend it. Again, a reform introduced on the basis of one benefit but having the complete opposite effect.

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

11. I reiterate what I say above. The insurers should be forced to disclose their data as to what percentage of claims have been proven to be fraudulent, or exaggerated. I would be very surprised if this was nothing other than a tiny proportion of all claims with little impact on contributing to the cost of motor insurance. Until the insurers disclose this data and the size of the problem, if any, are identified, there can be no useful contribution to the issue.

12. In my opinion, there is no issue with medical evidence obtained from an independent consultant, experienced in preparing reports in accident claims. There is a significant issue in the quality of the medical reports obtained, particularly by panel solicitor firms, when claims are handled in volume. Such reports are

[35] Not published

usually obtained from GP's using pre-determined software to prepare reports. Attached to my evidence are two medical reports obtained on the same client who has given permission for the reports being used. The first medical report dated 1 June 2010 prepared by a GP[36] (pages 33–41) was obtained when the claim was handled by the panel solicitors firm, instructed by my clients motor insurers on my clients behalf, without their knowledge of any referral fee being paid. The report was obtained whilst the client was still suffering with the symptoms of the injuries sustained in the accident. This is typical of all the claims I have seen which have been handled by panel solicitors firms. The medical expert is instructed within weeks of the accident when there is no indication how long it will take to recover from the injuries. The appointments last around 10 minutes. The typical prognosis is that the injuries will resolve within 4–6 months of the accident. My experience is that I have only had one client, in 18 years that has made a full recovery within 6 months of the accident. I would suggest my clients are typical of the types of people involved in accident claims so that if claims pursued through panel solicitors are settled within 6 months of the accident the majority of the claims are being undervalued. The second report was obtained by my firm from an independent orthopaedic consultant[37] (pages 42–54) and my client has been left with permanent symptoms. The length of appointment with consultants can be up to an hour. The difference in value between the claims is thousands of pounds and so my clients claim would have settled for thousands of pounds less than my client deserved.

13. I do not believe anything will be served by the Government setting up a panel of medical experts unless there is some independent and impartial control on who is appointed. There is a risk that a panel fetters the right of an accident victim choosing which medical expert they wish to use. My concern is that due to the poor quality of medical reports obtained by panel solicitors firms over the years, described by Mr J Straw MP as "third rate", and the typical settlement of around £1,600 the insurers will shortly be knocking on the Governments door saying that as the majority of claims settle at around £1,600 medical evidence should be dispensed with. This is an issue which should be the subject of a full inquiry into the adequacy or not of compensation obtained by accident victims since fixed costs were introduced.

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

14. Fixed costs were introduced in April 2003 for road traffic accident compensation claims with a value up to £10,000. No data or research has ever been disclosed as to how this formula for fixing costs was arrived at. I have made a Freedom of Information Request to the MOJ on more than one occasion and my request has been declined. This should be disclosed without delay, as should any data used to reduce fixed costs in 2010 and 2013. My concern is that most of the research used to set fixed costs has been provided by Professor Paul Fenn who is the "Aviva Chair of Insurance" and this has to raise questions about conflict of interest when the MOJ refuse to disclose his reports/research.

15. As far as I am aware, no research has ever been carried out to determine what level of solicitors costs are let alone a correct level of costs to ensure an accident victim receives an appropriate level of compensation, the claim being handled by a suitably experienced fee earner. Lord Woolf, in his report in 1996 stated that average solicitors costs for handling accident claims were £2,500 but more importantly, that there was no research that had ever been carried out into the level of costs and that research should be commissioned. It is now 17 years since solicitors costs were an average of £2,500 which were apparently not complained about by Defendants insurers. If insurers did have complaint they had recourse to a court for, what was then taxation (now assessment) so a Judge can determine whether costs had been reasonably incurred, and if not, they would be reduced. Overheads of a practice have significantly risen, comprising fuel costs, professional indemnity insurance, practising certificate fees, postage costs and staff costs (minimum wage) yet profit costs have been reduced by 80% as at April 2013 for the bulk of accident compensation claims work without any consideration of whether accident victims are receiving proper representation and consequential thereof, the appropriate level of compensation.

16. With the reduction of fixed costs to £500 for road traffic accident claims with a value up to £10,000 the figures now make most smaller practices unviable:

100 cases per fee earner x £500 per claim	£50,000.00
Less acquisition costs (advertising—£400 per claim)	£40,000.00
Other overhead costs, practising certificate, professional indemnity insurance, CPD courses, lighting, heating, rent, postal costs	£14,000.00

17. Even increasing the number of claims or fee earners makes little impact. When reducing fixed costs to £500 no account has been taken that non-insurer panel solicitors firms have to acquire claims through advertising and, more importantly, to run 100 cases costs a practice £50,000 up front in disbursements to obtain medical records (£100 per claim) and medical reports (typically £400 per claim).

18. This move alone will result in the majority of accident compensation claims into the hands of insurers and their panel solicitors firms when there are questions as to whether there are conflict of interest issues when a limited number of insurers are instructing a limited number of panel solicitors firms. Independent practices are now ceasing to carry out personal injury claims completely or have ceased trading.

[36] Not published
[37] Not published

19. Statistics should be obtained as to the impact of successive reforms to see whether there is market distortion and again, whether this has impacted on settlements for accident victims as my research shows that it has. This is particularly important as Nick Starling, Director of the Association of British Insurers stated on BBC news in March 2011 that the reason insurers use panel solicitors firms is to "control" the market. The insurers have further controlled the market with legal expenses insurance. Despite a European Directive that there should be no restriction on the freedom of choice of to instruct a solicitor of the policy holders choice in the event of a claim, insurers have refused to indemnify policyholders in road traffic accident claims from the start, only offering cover if court proceedings need to be issued. I have written to Mr Starling twice[38] (pages 9–11 and 21–22), and never received a reply to my request for evidence.

20. I also raised issues around 2006 that legal expenses insurance was really a "capture" mechanism and not really insurance at all when panel solicitors firms were instructed. In a true legal expenses policy the firm instructed by the accident victim would be paid regardless of whether the claim was won or lost. It has been alleged to me that firms handling claims on an insurers panel, supposedly under the terms of the legal expenses insurance had agreements with the insurers not to claim from the insurance company under the terms of the policy if the claim was lost. This is further market distortion by the insurers. Again, this should be investigated.

21. I also raised concerns with APIL around 2006 regarding their Executive Committee members participating in reforms when acting as "stakeholder" on behalf of accident victims. My concerns were that a significant number of EC members were employed at firms that appeared to have commercial arrangements with insurers buying accident claims with a referral fees. My concerns were that referral fees were rocketing meaning claims were being handled for ridiculous amounts, sometimes for a few hundred pounds. This potential conflict of interest needs investigating because I fail to see how APIL could be in a position to participate in negotiations as a "stakeholder" about what were appropriate costs to be paid for handling accident claims if their members were at firms handling claims for less and less money. Was there a robust defence of costs on behalf of accident victims or were APIL and for that point MASS (Motor Accident Solicitors Society) in a situation where they had a conflict? This is where the system declined as far as I am concerned. I wrote to APIL on 2 November 2011[39] (pages 18–19) and again, never received any reply.

22. Effectively we now have an accident compensation process which is run purely on economics without any consideration of how claims are being run, all on the premise that car insurance premiums will be reduced. It is illuminating that the day after the reduction of fixed costs to £500 per claim was announced LV insurance, John O'Roarke [Managing Director, LV Insurance] warned that car insurance premiums are not expected to go down. The state is interfering with access to justice and the free market and I know of no other market where the state dictates the payment of costs—accountants, estate agents, independent financial advisers etc.

23. With fixed costs there is no incentive for a defendants insurer to act reasonably. Only this last week I have spent 3.5 hours on the telephone pursuing one motor insurer for some information to issue court proceedings and still I have not received the information. This is common place.

24. In April 2013 the Government brought in new rules which prevents accident victims recovering after the event insurance which, if the victim has no other insurance, prevents against having to pay any costs if the claim is lost at trial. This is on the basis of qualified one way costs shifting (QOCS)—in the event the claim is lost and the claimant acts reasonably, they will not have to pay the defendants costs. Without considering the uncertainty of litigating without any insurance in any event, no consideration has been given as to who funds the disbursements. If an accident victim issues court proceedings and loses the claim, whilst they may not have to pay the defendants costs somebody has to pay for the medical report costs (typically £500) and court fees (typically £995) and it is for this reason insurance has to be taken out. The 10% increase in damages will not cover this increased cost and accident victims should not have to pay money out of their compensation as levels for general damages (pain, suffering and loss of amenity) are way too low in the UK anyway.

25. The system is rotten. Whilst accident victims have access to a "process" where claims are "commoditised", there is no "access to justice" as claims are being significantly undervalued and rushed through at the behest of insurers. The fiasco in the miners compensation claims should serve as a warning that when costs are cut to the bone firms will carry out the minimum amount of work with the lowest experience of staff. A significant number of miners claims were undervalued despite a decent level of fees for handling the claims. Successive Governments have been naive accepting what the insurers say at face value without any evidence in support.

Whether there are other steps which the Government should be taking to reduce the cost of motor insurance

26. There should be a full public inquiry as to how the insurers have been able to dictate the process without any evidence in support and without any robust defence of an accident victim's right to pursue a claim for compensation with proper representation, remunerated at a proper level.

27. I have also submitted an article from the Law Society Gazette website[40] (page 55) which claims that the MOJ driven civil justice cuts have been driven by Treasury demands. This is on the basis that costs in

[38] Not published
[39] Not published
[40] Not published

clinical negligence claims are rising. Again, there has been no consideration and research as to who causes costs to rise in clinical negligence claims. Almost without exception, clinical negligence lawyers advise me that the NHSLA deny liability in most claims and wait until the final moment to admit liability or make an offer to settle when costs have inevitably spiralled upwards. Without any research into what costs are in the civil justice system, whether costs are driven up and if so, by whom, Claimants are being denied any proper access to justice. This is important as I received minutes of a meeting last year between, insurer, MOJ and NHSLA representatives where the MOJ representative is alleged to have said that the working group was "pushing at an open door" as far as the Government is concerned. It is quite clear from that document that the Government and Defendant lobby want the so called "trivial claims" to disappear to leave the "serious/ real claims".

28. It was alleged to me a few weeks ago that at the meeting between Mr Cameron and the insurers in February 2012, it was agreed that in return for reducing legal costs paid in road traffic accident claims insurers would carry on insuring properties in the flood risk areas. I have no idea whether this allegation is true but none of the measures introduced by successive Governments has achieved a system where accident victims obtain representation, to achieve a proper settlement in the event of an accident,despite paying increasing insurance premiums in an expectation that if they have the misfortune of being injured in a road traffic accident they would receive appropriate compensation.

29. From my research and what has been alleged with me it is disingenuous to suggest all the reforms to the civil justice system have been done on the back of rising car insurance and fraud. There has been no research, proper consultation or consideration of the fundamental right to bring a claim under the system of tort law. I have no doubt that the raising of the small claims limit for personal injury claims to £2,500 has already been decided despite ongoing "consultations". All this will do is force a significant amount of "trivial" claims, to disappear completely as accident victims will find the system too bewildering to pursue a claim. How do accident victims know how to arrange medical evidence, who is an appropriate expert to instruct and what is a proper level of compensation? The rest of the "trivial" claims will be run by the insurers themselves with the inevitable consequence that claims will be undervalued. I have never failed to beat the insurers first offer on compensation on behalf of my clients and this is typical of the independent solicitors I have spoken to. If there had been any will to develop a system that worked in the interests of accident victims the Government would have engaged properly with the profession, commissioned proper independent research and been transparent rather than having meetings behind closed doors.

[Appendices not published]

April 2013

Written evidence from David Sedar (WL 49)

Abstract

This paper outlines a proposal to permit Insurers to challenge, and hopefully defeat, fraudulent claims for whiplash injuries.

The proposal utilise Telematics in the innocent party's vehicle to record the exact speed, location and G-forces of an impact to demonstrate that whiplash could not reasonably have occurred.

Introduction

It is well known that a large proportion of claims for whiplash injuries are fraudulent or exaggerated. Often the "accident" has been staged and the "injured" parties encouraged (by solicitors) to exaggerate their degree to maximise the claim value. Insurance companies appear powerless to halt this increase, which is costing each British motorist an additional £90 per year in average insurance premiums. In the past three years, claims for whiplash rose by a third to 570,000, which has cost insurers £2 billion a year. Up to half of these claims are believed to be fraudulent.

Legislation

I understand that in Germany there is a presumption that whiplash injuries can only result from accident impacts at greater than 6 mph. I suggest that a similar law be enacted in the UK, based upon medical evidence.

Proposal

My proposal is that a Telematics device be supplied to insured drivers that can be self-installed and will record the exact details of any accident. Following an accident the device can be posted to the Insurer to extract the evidential-grade data supporting a defence against any claim for whiplash injuries by a third party.

Public Acceptance

It is well known that the British public strongly dislike the idea of being tracked, and is vocal in rejecting most GPS-based systems that record their movements. The device does contain a GPS receiver to determine date, time and location, but only for the 30 seconds prior to impact. The existing device does contain a GSM module, but this will be disabled and could be excluded on future models. No vehicle location data is ever transmitted anywhere. G-forces at the point of impact are recorded along with the Vehicle Identification Number (obtained from the OBD data).

Installation

The existing, and any future, devices plug into the On Board Diagnostic (OBD-II) socket below the steering wheel of all European cars manufactured since 2004 (diesel) or 2001 (petrol). The device is small, unobtrusive, self-powered, has no user controls and can be installed by the driver in around 30 seconds. Once plugged in, no further action is required of the driver; it is literally "fit and forget".

The device can be unplugged and taken to a second vehicle if necessary.

Cost

The existing device from Taiwanese company ATrack cost is under £100 in small quantities, and undoubtedly could be re-designed and manufactured in the UK for considerably less.

Future Work

An analysis of existing accident and injury data needs to be undertaken to establish the speed and/or G-force level below which whiplash is deemed cannot occur.

April 2013

Written evidence from Andrew J Parker (WL 50)

I read with interest in the Times, Friday 15 March, that you are currently chairing a committee in connection with cervical whiplash injuries. I have been a Consultant Ear, Nose & Throat Surgeon at the Royal Hallamshire Hospital here in Sheffield and Senior Lecturer in ENT at the University of Sheffield for over 20 years and I have had an interest in these injuries for some time now.

I am uncertain as to whether or not you will be taking evidence from anyone in my profession but I have noted a dramatic increase in these so called "injuries" in the last few years particularly in respect of my medicolegal practice.

The predominant alleged effects are those of the development of tinnitus (which is impossible to prove) but of particular interest to me is whether hearing loss develops. My review of the evidence is that any relationship between neck trauma and hearing loss is at best tenuous and on the balance of probability generally they are unrelated.

If you require any elaboration in this respect then please contact me again but I think that it is appropriate that your committee looks at these aspects.

April 2013

Written evidence from NewLaw Solicitors (WL 51)

NewLaw Solicitors is a law firm specialising in Claimant personal injury litigation. NewLaw was founded in 2004 in order to provide an ethical legal solution to the genuinely injured customers and policyholders of insurance companies and brokers. The firm employs in the region of 330 people, predominantly from its Head Office in Cardiff. Recent expansion has led to the business opening offices and creating further employment in Bristol and Basingstoke. NewLaw prides itself in assisting those innocent victims suffering from catastrophic spinal injuries (to include paraplegia and tetraplegia), brain and amputation injuries to rehabilitate and return to as close a normal life as possible.

NewLaw is committed to:

- Supporting the fight against fraudulent claims.
- Investing to create proactive practices and reduce settlement times.
- Supporting initiatives to simplify the personal injury claims process.
- Working within an appropriate regime of Fixed Recoverable Costs (FRC).
- Maintaining access to justice.
- Delivering legal services of the highest quality to innocent accident victims.

— Reinvesting revenue to support vulnerable seriously injured claimants.

NewLaw responded to the Ministry of Justice enquiry directly and through APIL (the Association of Personal Injury Lawyers). We are responding to this Select Committee enquiry ourselves and this evidence has been specifically written for your consideration. We would also be happy to provide oral evidence to the Select Committee if you believe that would be helpful. We have confined our responses to the questions you pose where we have the most information to contribute.

Is the Government correct in describing Great Britain as the "whiplash capital of the world"?

There were 488,281 whiplash claims in the year to March 31—a decline of 59,124—according to the Department for Work and Pensions' compensation recovery unit, which collects claims data from insurers.

There is a perception that the Ministry of Justice is reacting to pressure from the insurance industry and to date has undertaken a one sided approach to consultation. The Ministry of Justice has been led to believe that rising motor premiums are due predominantly to the legal costs of personal injury litigation, with little, if any, empirical evidence to support such a view.

NewLaw would contend that a number of factors to include decimated investment income and certain behaviours within the insurance industry have had a substantial impact on the price of motor insurance premiums. This impact may be more significant than the effect of the legal costs of personal injury claims.

This would seem to be substantiated by the fact that shop around comprehensive motor insurance premiums fell for two consecutive quarters, prior to the implementation of any of the recent reforms relating to personal injury claims.

It should also be borne in mind that whiplash injuries are genuine and can be extremely painful. Every scientific study conducted has confirmed that these are genuine injuries and that they can occur at low speeds.

Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

The insurance industry's own estimate that the cost of whiplash claims from road traffic accidents to the average policy-holder is £90 per year is something of a misleading and disingenuous statement. The alleged figure of £90 per year relates to all "whiplash" injuries and not simply fraudulent or exaggerated cases. Any examination of the premium should reflect that fact.

The cost of genuine claims must be deducted from the alleged figure of £90 per policy in order to identify the actual extent of the purported issue. It should be recognised that the figures quoted by the Association of British Insurers (ABI) in relation to the cost to the policyholder of fraudulent cases are utterly inaccurate and unreliable. The ABI has no sustainable empirical evidence in support of these figures.

It is worth looking in detail at why the ABI is pressing for change. If the insurer's case is lost, the genuinely injured accident victim ought to be entitled to recover the legal costs of pursuing the claim. This has been a fundamental principal of common law in England and Wales for hundreds of years. If this principal is eroded, defendants will seize the opportunity to drag out the settlement of genuine claims, raise spurious challenges, pursue unsustainable liability arguments, and seek to under settle the claims of injured victims. Some of our most vulnerable members of society would suffer as a direct result.

The true driver behind the insurance industry's agenda is to create a no risk environment in which insurers can seek to avoid providing indemnity for genuine claims. It has nothing to do with challenging fraudulent claims.

The proposed reforms represent a fundamental misunderstanding of the insurers' actual incentives in seeking to raise the damages threshold for Small Claims. Such reform would lead to significant windfalls for the insurance industry, would incentivise defendants to adopt all of the wrong behaviours and would pose an outright threat on access to justice.

What is the likely impact of the proposals on access to justice for claimants who are genuinely injured?

The Government itself recognises some possible impacts when it sets out three key reasons why legislation might not be appropriate in its own consultation document. Firstly, there would be a reduction in access to justice resulting from injured parties either not claiming initially or not challenging rejections of valid claims.

Secondly, given the limits on cost recovery, the claimant is more likely to be self-represented under the Small Claims track and there is a risk that claims will not be presented with equal skill as the defendant is likely to be represented professionally.

The third risk is that, without representation, individuals with valid claims may be more likely to accept settlements of less than the amount which would provide fair compensation for the injury they have suffered. We are aware of anecdotal evidence that insurers already approach genuinely injured accident victims with direct offers of compensation with a view to binding those victims into a full and final settlement before they receive the benefit of legal advice. Such an approach will almost always leave the unrepresented Claimant

under compensated. There is a real risk that genuine symptoms may deteriorate or at best not recover, leaving accident victims with permanent symptoms that are detrimental to their ability to work or lead a normal life.

All three of these are legitimate reasons for caution—but we are specifically concerned about the impact changes to the law would have on those with Catastrophic Injuries.

NewLaw employs one of the United Kingdom's largest team of specialist solicitors dealing with serious injury claims. Our solicitors work alongside charities to enable the innocent victims of spinal, brain and amputation injuries to return their lives to some degree of normality. Such cases are extremely complex and require conduct by extremely experienced solicitors in these areas. Our team is broken down into specialist units that deal with spinal injury, brain injury and orthopaedic injury respectively. Without the advice and assistance that we bring to such people, injured through no fault of their own, their lives would be turned upside down.

These cases can take several years to settle, on average 3½ years and sometimes much longer. The solicitors that run such cases are highly experienced and as a result are expensive to employ. It can quite easily cost several hundred thousand pounds to fund a single solicitor to run a small caseload of serious injury claims to conclusion. Such funding is provided largely by the turnover of lower value cases—without the "smaller" whiplash claims passing through the legal sector, we will not be able to continue supporting the higher cost, higher risk catastrophic claims.

Our concerns are also shared by the charitable sector which supports people with catastrophic injuries:

"The proposed changes carry the risk of undermining the ability of solicitors such as NewLaw to provide representation to seriously injured claimants. This assistance is required to help in moving on with life after their traumatic ordeal. The Limbless Association offers our full support to NewLaw in opposing the proposals and will assist in any way we can to help support these vulnerable people."—David White, Chief Executive Officer, Limbless Association

"Typically, children's cases involving an injury to the brain run over many years and subsequently, are very costly. Family finances suffer greatly as parents are forced to give up employment to become their child's carer. Any changes to the law that prevent families from seeking compensation will be detrimental for the future care needs of those who desperately need the support that a successful legal case can provide".—Rachel Ritter, Fundraising Manager, Child Brain Injury Trust

"The Spinal Injuries Association is concerned that, in the event of the Ministry of Justice following through with its plans, personal injury law firms that specialise in Spinal Cord Injury claims, such as New Law, will no longer be able to support the higher risk cases, leaving Spinal Cord Injured people at the mercy of less professional solicitors without sufficient knowledge in their condition."—Dan Burden, Head of Public Affairs, Spinal Injuries Association

The phrase "small claim" is somewhat misleading, as in reality the sums at stake represent a considerable amount of money in the hands of the innocent victim. A claim for £2,500 is not a small claim in the eyes of the majority of claimants—especially the most vulnerable in society. For example, a claim of £5,000 could represent several weeks lost earnings due to an injury incurred and is not a minimal amount for the individual effected.

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

New Law does not believe the proposed changes will reduce motor insurance premiums—but there will be a significant economic consequence of any change in the law that will impede significantly the work of personal injury lawyers to support adversely affected people.

In actual fact, Motor insurance premiums have fallen for the last three consecutive quarters, before any of the pending reforms have been implemented. The shop around cost of comprehensive car insurance has fallen by over 4% in the last 12 months, the largest ever annual fall on record. The data used to compile these statistics ends as at the 31 March 2013 and so is entirely unaffected by the reforms implemented in April 2013.(British Insurance Premium Index—AA).

Before undertaking any additional measures that would impinge further on access to justice and increase job losses in the professional services sector, NewLaw believes that the insurance industry ought to deliver on its promise of decreased premiums.

Any such reduction must be measured against the existing trend. Premiums must be seen to fall at a greater rate than the natural underlying trend that was evident prior to the implementation of reforms. If they do not, this supports the contention that there are other factors inherent within the insurance industry that need to be addressed in order to ease the pressure on premiums.

There is also the risk of the hidden and unintended consequence that further draconian reform might breathe life back in to the claims management industry. Claims management companies would look to move into any gap in the market left behind by solicitors. Such companies would offer services to injured claimants to assist them in the pursuit of their claims. This would throw members of the public back into the hands of an industry that is not regulated by the Solicitors Regulation Authority (SRA). Litigation services, as far as solicitors regulation is concerned, are considered to be sufficiently high risk to remain on the list of reserved legal activities.

Members of the public would be moved out of the protection of the SRA regulatory regime and into the hands of claims management companies. Whilst there is a degree of regulation for claims management, this was never intended to cover pseudo-representation in litigation and in any event does not go anywhere near as far as the regulation afforded by the SRA.

This is hardly the consequence that the Government is looking for. It would not reduce premiums, would impede access to justice, and would encourage speculative working practices from a claims management industry which is already growing in other sectors.

April 2013

Written evidence from John Firth, Consultant Neurosurgeon (WL 52)

"Whiplash" suggests a vicious injury to head and neck in a motor vehicle accident.

Its dynamics are the rapid, cyclical extension & flexion of head & neck on fixed torso.

The victim's torso is fixed by the seat belt, the head and neck being free to move when subjected to longitudinal vehicular acceleration (Gx), as in a road traffic accident.

Compulsory seat belts are thus one cause for the increasing incidence of "Whiplash". Even though the near-universal provision of head restraints and now air-bags means that actual whiplash—head and neck flailing—is either prevented or minimised.

There are several elements to the phenomenon. They include:

1. Human anatomy and its imperfect adaptation to erect posture.

2. Normal age-related human spinal degeneration.

3. Habitual slouching ("kyphotic") posture, which degrades the normal visco-elastic shock-absorption and damping properties of neck and inter-vertebral discs, while slackening the neck muscles. This ensures maximal opportunity for neck injury by minimum acceleration insult.

4. Such insult may be the first introduction of the individual to their likely inevitable, posture-exacerbated, age-related degenerative head and neck pain.

5. Continued kyphotic slouching, after the event, inhibits recovery and promotes accelerated degenerative progression.

6. Hysteria, the media of outrage and, on occasion, greed.

7. Reasonable terror for untold mischief, particularly when symptoms are progressive, the anatomy of the situation is not explained and appropriate management (restoration and maintenance of lordotic posture—Guards' Sergeant-style) is not instituted.

8. A lucrative market for alleged victims, doctors and lawyers alike.

9. Diagnosis and management depend on a full and thorough history, which is then tested by examination. This takes time—at least 40 minutes. Often over an hour. The individual's situation then has to be explained to them and appropriate management instituted & monitored.

10. Successful management requires the exclusion of other pathology (hence the detailed history) and the determined, round-the-clock restoration and then habitual maintenance of lordotic posture. In 18-year old recruits, with 24-hour military discipline, vicious drill sergeants, firing squads, fear of death or worse, it takes 6-weeks' basic training ("square-bashing") and then 3-months in a decent training regiment before physiological lordotic posture becomes habit and is backed up by the development of the necessary associated paraspinal tonic musculature to maintain it. Twice this period is a reasonable in middle-age.

11. If postural restoration is pursued, then the individual is likely to be better off in the long run. Their propensity for posture-exacerbated spinal degeneration will have been demonstrated and managed in a timely fashion. Subject to their continuing "good" (lordotic) posture, they will remain comfortable over the years, while neck and spinal symptoms await their still-slouching peers.

12. As always in medicine, it is the unique individual patient, here the RTA victim, that matters. Taking time to define that individual's situation can restore their self-confidence and set them up constructively to enjoy the rest of their life. Failing to do so results in the present morass of misunderstanding and misery—at huge, unnecessary and avoidable cost to Society at large.

April 2013

Written evidence from Slater & Gordon LLP (WL 53)

1. Introduction:

1.1 The House of Commons Transport Committee produced a report in March 2011 focusing on the cost of whiplash claims. The report concluded lawyers are responsible for adding £90 to the average motor insurance policy amounting to a two billion pound industry as a result of road traffic claims.

1.2 It is our contention that the Committee and thereby the Government have been misled on the real reasons behind the rise in personal injury motor claims, with particular regard to whiplash claims, and by extension premiums. An Ipsos MORI poll that Slater & Gordon commissioned has revealed that Insurers are responsible for instigating more claims than any other sector. The Insurance Industry uses a range of strategies that generate multiple revenue streams at the expense of the motorist. We will provide compelling evidence that the Insurance industry practices at present lack transparency and accountability, which ultimately contributes to the increase in insurance premiums. Furthermore these practices confuse and mislead consumers and policy makers.

1.3 The issues however, to be kept at the forefront of this debate can be put quite simply. Firstly, if a person is injured in a motor vehicle accident and suffers loss and damage, they ought to be compensated for that loss from the at-fault driver/insurer. This is surely the very essence of a mandatory insurance scheme.

Secondly, victims of motor vehicle accidents should not be deterred from making such a claim for an injury of any type against an at-fault driver/insurer. Whiplash or a cervical spine injury is well understood as the most common type of injury following a motor vehicle accident given the precarious nature of the neck and cervical spine and the consequences of a sudden acceleration/deceleration. Often these conditions do not just involve a soft tissue injury but can involve the vertebral and intervertebral discs with life long consequences.

Thirdly, when an injured person proceeds with a claim, they must clearly understand; their statutory obligations to make a meritorious claim; the consequences if they breach those obligations; the nature of the relationship with the person who is handling that claim; ie whether they are an employee or agent of the insurance company; and be provided with advice about their right to seek independent advice from a third party.

Fourthly, we should not expect to see a reduction in the overall claim numbers unless we focus on:

(a) understanding the actual number of fraudulent claims. If the results are compelling, we should seek to engage all stakeholders to achieve a reduction in such claims. There are a number of mechanisms to achieve this.

(b) improvement in the availability of diagnostic tools such as MRI scans to understand cervical spine pathology and rehabilitation treatments to facilitate early recovery and improved treatment outcomes.

(c) reduction in the number of road traffic accidents through increased funding of road safety campaigns and a debate about who should have a financial obligation to contribute to such campaigns.

(d) improvements in vehicle design and a program to influence purchasing decisions of motorists when selecting vehicles to ensure safety comes first.

Our research will show that the insurance industry has been responsible for a rise in the number of whiplash claims by actively offering early assistance to motor vehicle injury victims. This may well represent good corporate practice in providing a positive client experience; however the industry cannot then seek to complain when participation in the scheme is increasing and then lay the blame on the motoring public for seeking their right to legal redress from an at-fault driver/insurer.

The legal process for managing claims arising from road traffic accidents has just gone through major reforms with the introduction of the portal system and a further cap on legal fees. The impact of these changes has not yet been experienced by the sector. We are now in a mature market where we would expect scheme participation to stabilise. The efforts of this Committee, with respect, should be to focused on the issues raised above (a)–(d) so as to ensure that access to justice for genuine victims of road traffic accidents is not restricted or impaired by misleading information as to the real cause behind the rise in the number of claims. If addressed, both the insurance industry and more importantly the motoring public will benefit.

1.4 In relation to the question of transparency of the industry, whilst the recently implemented referral fee ban aims to curtail the practice of information sharing and case capture by insurers, several insurers are now seeking to replace referral fees with an alternative model by entering the legal service market. This will give those insurers with legal practices greater motivation to generate claims and greater opportunity to distort the costs of claims in the market. Without transparency on the detail of financial arrangements within insurance

profits and premium structures and without adequate oversight and regulation to protect the consumer it is a concern that premiums will continue to rise and the causes will continue to be misdiagnosed and misattributed.

1.5 The Transport Committee's follow up report, published on 13 December 2011, highlighted the increase in car insurance premiums. The annual rate of increase remains well above inflation at 16.4% and quoted premiums for younger drivers continues to rise. In December 2012, the Government launched a consultation in response to a 60% rise in personal injury claims related to road accidents since 2006, despite a 20% reduction in the number of reported accidents.

SUMMARY

In this response paper we seek to demonstrate that there is a real risk that victims of road traffic accidents with a genuine neck or cervical spine injury will be dissuaded from pursuing their proper entitlement to compensation for their injuries and losses. The insurance industry exploits its position to make large profits from the sale of aggressively marketed claims, whilst, at the same time, creating a smoke screen for that activity and promoting in the media the statistically unsupported assertion of mass fraud on the part of uninjured claimants. There are multiple issues that impact this environment being primarily road safety, vehicle design, injury management and the claims process.

2. *What is Whiplash or Cervical Spine injury?*

2.1 Much knowledge has been gained during the past few years about the nature and cause of whiplash injuries. Contrary to negative media campaigns whiplash is a recognised clinical condition which can, in extreme cases, include life-long symptoms around the world.

Whiplash is an injury to the neck caused by the neck bending forcibly forward and then backward, or vice versa. The injury usually involves the muscles, discs, nerves, and tendons in the neck. Many whiplash injuries occur when a person is involved in rear-end automobile collision. The term "whiplash" represents the multiple factors associated with the event, injury, and clinical syndrome that are the end-result of a sudden acceleration-deceleration trauma to the head and neck. By way of illustration:-

Figure 1

A SCHEMATIC DRAWING OF THE INITIAL HEAD-NECK MOTION DURING REAR END IMPACT (PHASE C: EXTENSION MOTION), (SVENSSON ET AL, 2000)

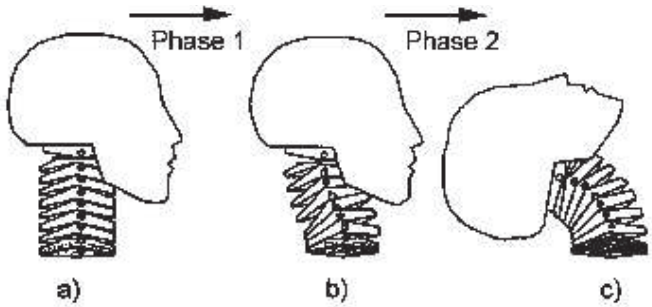
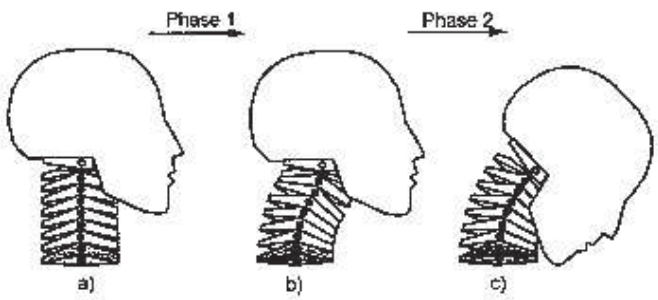


Figure 2

SCHEMATIC DRAWING OF THE HEAD-NECK MOTION DURING A FRONTAL COLLISION AND ALSO THE REBOUND MOTION IN REAR CRASHES (PHASE B: PROTRACTION MOTION, PHASE C: FLEXION MOTION), (SVENSSON ET AL, 2000)



2.2 The extensive literature suggests that the most common injuries due to whiplash involve the zygapophyseal joints (Yoganadan *et al*, 1999), the intervertebral discs and the upper cervical ligaments (Barnsley *et al*, 1998). Other injuries may occur for example nerve damage (Svensson *et al*, 1993) and muscle

injuries (Barnsley *et al*, 1998). In this respect, headache and neck pain are the dominating symptoms followed by pain in the shoulder girdle. The third most common symptom is paresthesiae and weakness in the upper limbs (Barnsley *et al*, 1998). The majority of occupants who report neck pain after a crash also report pain elsewhere in the body (Chapline *et al*, 1999).[i]

2.3 Scientific studies performed around the world by leading experts from *L. Barnsley* to *J. Chapline* and *Deans* clearly show that whiplash is a clinical condition arising from all types of vehicle crashes, but the typical mechanism involves rear-end collisions.

2.4 In fact analysis of police reported tow-away crashes from Queensland and Victoria (Australia) between 1987–98 show a significantly higher whiplash injury percentage risk for the struck vehicle compared to the striking vehicle. This is consistent with other studies (Morris *et al*, 1996, Krafft 1998, Jacobson *et al*, 1999)

QLD Data, %Whiplash Injuries from DCA 301,302,303,304 Crashes	**All Vehicles**
Vehicle 1 (frontal)	
No. whiplash injuries (frontal crashes)	308
Total no. of frontal crashes	7874
% Whiplash Injuries	**3.91%**
Vehicle 2 (rear)	
No. whiplash injuries (rear crashes)	1938
Total no. of rear crashes	8117
% Neck Injuries	**23.88%**

Figure 4. Queensland whiplash injury data for two car crashes only.

VICTAC Data, % Whiplash Injuries from DCA 130, 131, 132 Crashes	**All Vehicles**
Vehicle 1 (frontal)	
No. whiplash injuries (frontal crashes)	85
Total no. of frontal crashes	1119
% Whiplash Injuries	**7.60%**
Vehicle 2 (rear)	
No. whiplash injuries (rear crashes)	589
Total no. of rear crashes	3355
% Whiplash Injuries	**17.56%**

Figure 5.Whiplash injury data from Victoria for two-car crashes only

2.5 There is currently a significant level of on-going research by leading experts into car-safety mechanisms and appropriate head restraints for both low and high severity rear-end crashes. Monash University research identified that for lower severity rear crashes factors like the head restraint and seat back geometry and cushion properties are more important; at higher severity rear-end crashes the seat force-deflection characteristics are more important. The research has also revealed that a head restraint should prevent extreme hyperextension of the neck and minimise the relative motion between the head and torso. However the study revealed that head restraints alone are not enough to prevent all whiplash injuries.

2.6 There are calls by leading research institutions to conduct further research into establishing the exact link between the whiplash movement and the whiplash injury alongside a detailed analysis of car safety features in order to reduce the whiplash motion following a road accident collision.

3. The ABI's Changing Position on Whiplash

3.1 The ABI's November 2008 report provided statistics on the rise of whiplash claims describing it as a "societal problem". Within the report it encouraged simple changes to reduce the number of accidents:

- Safe distancing.
- Safe seating.
- Better Diagnosis and targeted rehabilitation.
- Improving the compensation process.

3.2 The report also emphasised the importance of early intervention by way of rehabilitation.

3.3 Since the publication of this report, there has been a significant increase in whiplash claims, whilst the number of other forms of accident claims has decreased. The insurance industry has also moved away from their previous position of improving vehicle safety and utilising early intervention of treatment by way of rehabilitation. Instead, it has sought to firmly place the emphasis on the role of solicitors and fraudulent claimants in pushing the rise of whiplash claims and thereby the cost of premiums. Within this spectre; the industry has failed to disclose their role in aggressively pursuing and instigating whiplash claims as a profit-seeking model. Furthermore they have failed to adequately fulfil their obligation to implement sufficient

safeguards in preventing the rise of spurious claims, if their assertions of a rise in such claims are in fact supported by statistical data.

4. Research on Behalf of Slater & Gordon Lawyers

4.1 Slater and Gordon Lawyers commissioned research through IPSOS MORI that has revealed that 7 out of every 10 whiplash claims result from an approach to the consumer by an insurance company or from an approach arising from the sale of their databases.

4.2 Evidence gathered by the Office of Fair Trading ("OFT") suggests that private motor insurance premiums paid in the UK rose by around 12 % between 2009 and 2010, and by a further 9% in the first three quarters of 2011.

4.3 One of the incentives for the insurance industry has been to capture cases and improve profits through a referral fee system. There is a policy requirement on the insured driver to notify his or her insurance company following an accident. We know that at the moment they receive notification of an accident by their insured driver, insurers make enquiries as to a potential injury claim by the motorist and often any other passengers involved in a road traffic collision. Car insurance is mandatory, and as such insurers are able to reap the benefits of a mandatory "tax" on drivers.

4.4 That insurers have profited from referral fees is well understood by industry analysts and by way of example, in September 2011 shares in the Admiral Group fell by nearly 5% following the Ministry of Justice's announcement to abolish referral fees. This highlights how embedded the referral fee system became for the insurance industry to generate claims.

Analysts warned the ban would impact profits at the Group. The Group acknowledged that approximately 6% of its profits come from referral fees.

4.5 Several insurers are now seeking to replace referral fees with an alternative model by entering the legal service market. So far, Direct Line, Admiral and RSA are considering establishing or investing in legal firms, which analysts say would allow them to retain profit margins from personal injury work. However, the Chief Executive of AXA, Paul Evans, warned that such moves will do nothing to aid consumers or prevent motor insurance premiums from remaining artificially high.[41] We agree with AXA's concerns. The only way to lower the cost for drivers is through improved oversight and transparency of all aspects of insurer procedures and profits.

Currently the insurance industry fails to disclose the level and extent of its promotional involvement in approaching victims of road traffic accidents in submitting claims. This promotional involvement leads to a rise in the number of claims. This increase in participation is not as a result of an exploding "compensation culture" by the British motoring public.

We do recognise and congratulate responsible insurers for providing their customers with the range of benefits afforded by their insurance policy following a road traffic accident. We are however concerned at the lack of independence when an insurer is both the policy holder and legal advisor for the customer without a clear demarcation in the legal/policy service delivery. This is open to potential exploitation as the policy provider can force or imply that legal advice is definitive and the customer has no recourse for independent verification.

5. *What Motivates Individual Claims?*

5.1 The sample confirmed that the highest influential factor in pursuing a claim was due to the approach of an insurance company at 7 (rounded) out of 10).

5.2 Of the 7 out of 10 approached by insurers, 4 (rounded) out of 10 say they would not have pursued a claim without the prompt by the insurer. This shows a high level of influence that the insurance companies have over those people's decision to bring forward a whiplash claim.

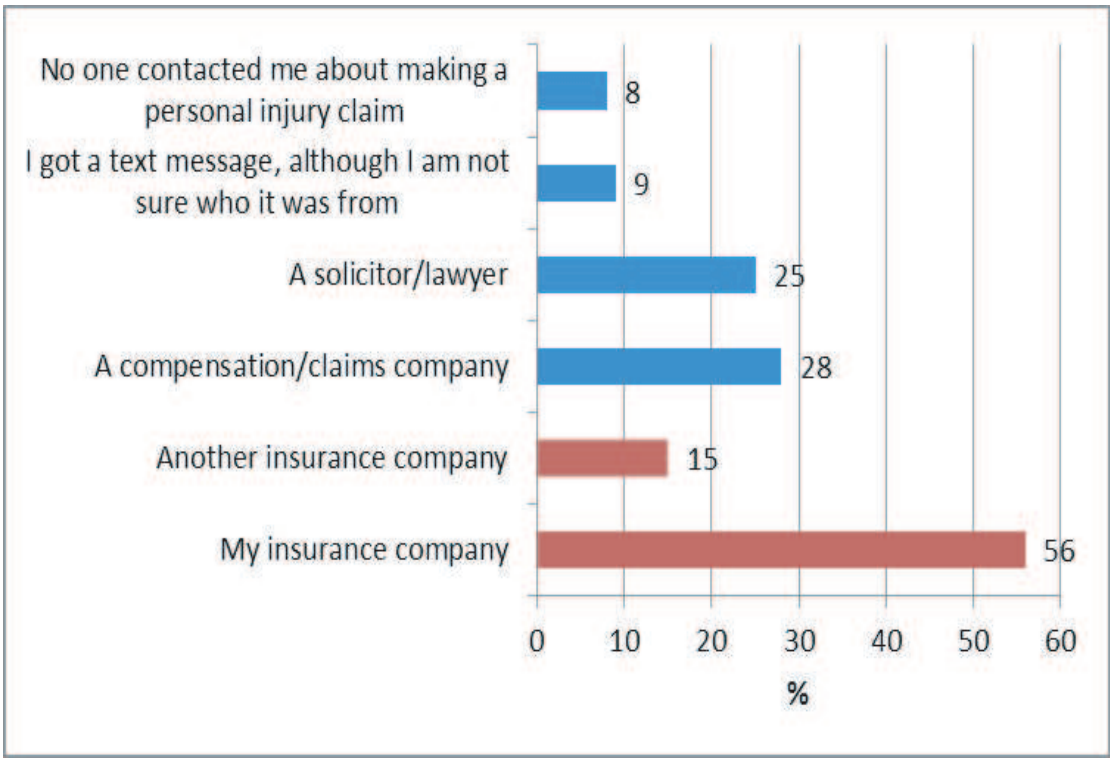
5.3 Of our sample, 7 (rounded) out of 10 (including those with text messages[42]) Claimant's reported that they were approached either directly by their own insurance company or another insurance company. Using national statistics of 600,000 claims for whiplash, this would equate to almost 420,000 claims being pursued either by individuals own insurance company or being approached by another insurance company.

[41] http://www.ft.com/cms/s/0/99fa9198–0f26–11e2–9895–00144feabdc0.html#axzz2FJxIxtPE (Financial Times, 7 October 2012)

[42] Note that text messages are generally generated through the insurance company database, which has a strong influential factor in persuading potential motorists to pursue a claim

Figure 1

QUESTION—WHICH, IF ANY, OF THE FOLLOWING CONTACTED YOU ABOUT MAKING A PERSONAL INJURY CLAIM?



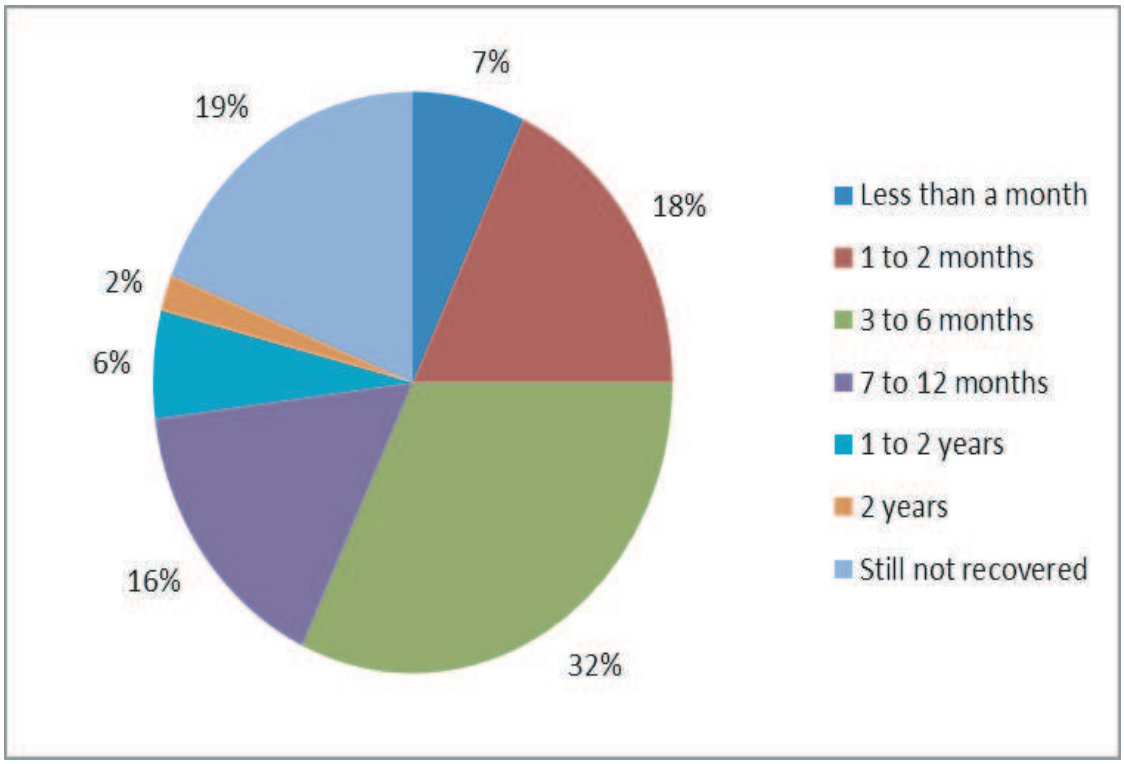
5.4 Extrapolating from our sample size this would lead us to approximate that of the 400,000 Claimants, 4 out of 10 (160,000) are highly influenced by their insurance company or another insurance company to bring a claim. The average value of a whiplash claim (excluding legal costs) is £3,750. On a conservative basis this equates to £600 million worth of whiplash claims being pursued as a result of the influence of insurance companies alone.

6. Recovery from Injury

6.1 Despite the insurance industry's claim of an increase in fraudulent claims, 60% of our sample of Claimant's reported taking at least three months to recover from their symptoms with 720 of those reporting neck pain and 450 of those reporting restricted movement. (See Figure 2 below).

Figure 2

RECOVERY FOLLOWING INJURY



6.2 The sample also confirmed that they required a combination of at least three treatments to treat the symptoms with 69% relying on painkillers, 58% relying on physiotherapy and 51% relying on anti-inflammatory drugs.

7. Insurance Industry Overview

7.1 In June 2011, the Department for Transport released road casualty statistics for the year 2010 and made some interesting comparisons with 2009. There were 208,648 casualties in road accidents reported to the police in 2010. This includes slight and serious injuries as well as any fatalities. This number represents a 6% drop from the equivalent figure from 2009. However the number of claims made for whiplash since 2009 has increased.

7.2 The insurance industry points to solicitors pursuing these claims without disclosing the insurance industry's own role in actively pursuing potential Claimants and (as shown by our research) influencing Claimant's to bring a claim. The assertion by the insurance industry is therefore misleading.

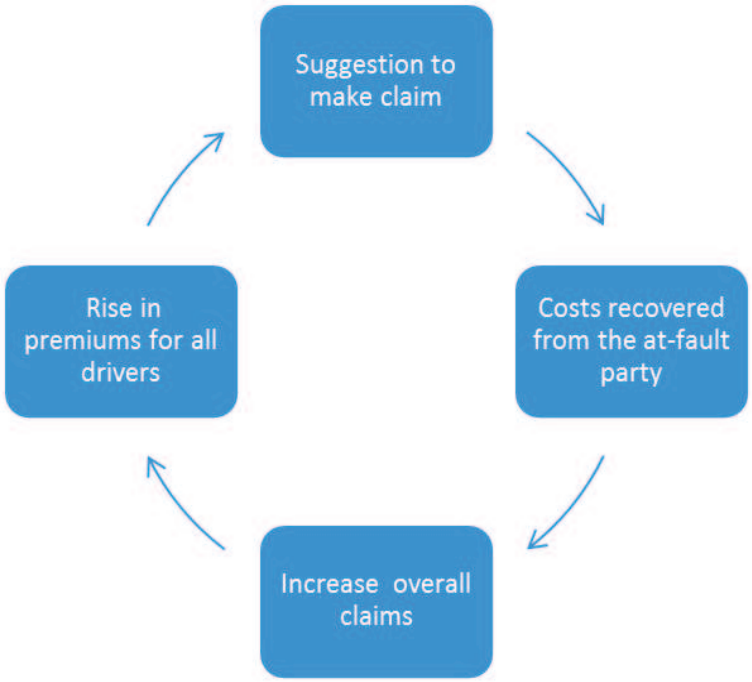
7.3 It is widely known that insurers share personal data information of the insured driver. It is also known that garages pass on details of road traffic accidents to their panel insurers for a fee.

7.4 Insurers also frequently incorporate an add-on which provides legal cover. The claimant is then referred to the insurer's panel solicitor. This is not a recommendation based on quality. In fact, the insurer receives a referral fee.

7.5 We believe that this creates a self-serving cycle for the insurance industry which maintains its profit creating model whilst passing the burden of premium increase to the tax-paying insured driver. (See figure 3)

Figure 3

SELF-SERVING CYCLE FOR THE INSURANCE INDUSTRY



8. Third Party Capture

8.1 It is now a common practice, following a road traffic collision for the insurance company of the at-fault driver to make contact with the injured party in order to reach an agreement and pay an award for settlement. Insurers are not adequately regulated or monitored when carrying out Third Party Capture. Whilst the ABI has issued a voluntary "Code" this is not compulsory and only applies to their members and therefore not all insurers. There are concerns that many legitimate claims are being under-settled through little or no legal advice to protect the Claimant's legal position and long-term treatment needs.

9. Conclusions

9.1 We submit that whiplash is a genuine clinically based condition, which is supported by a wealth of clinical and research data by leading experts around the world.

9.2 We challenge the insurance industry's assertion that fraudulent claims are driving an increase in insurance premiums in the absence of any reliable national data. We call on the Government to set up a consultation group with all relevant stakeholders to develop a unified approach to the question of fraud. This may involve creating a national data-base and a requirement that insurers improve their communication to policy holders and their representatives of their obligations and the potential consequences when a fraudulent act occurs.

9.3 There is a need for a body to oversee the management of all personal data held by the insurance industry.

9.4 In short, it is right that responsible insurers actively notify people, who are injured and suffer loss and damage, of their policy entitlement. However, insurers should not then lay the blame for the rise in the number of whiplash claims on the shoulders of the UK motoring public. Our evidence clearly shows that sensationalist headlines pointing to an increase in the number of claims cannot be attributed to a perceived "compensation culture" created by victims of accidents. There is currently limited transparency and accountability on the real drivers behind the increase in the number of whiplash claims.

9.5 We are concerned that that the insurance industry's move towards an alternative business structure will limit the consumers' ability to obtain *independent legal advice* without a clear demarcation in the legal/policy service delivery by the insurer.

9.6 We urge the committee to resist from making any further changes to the legal funding structure for transacting this work until the full financial and social impact of the changes are known.

9.7 We agree with the Transport Committee that injured people regardless of their income should be afforded access to justice through appropriate legal redress and access to rehabilitative medicine.

9.8 Slater and Gordon welcome this call for evidence and submit this paper to further widen and support the Transport Committee's inquiry into whiplash claims.

April 2013

REFERENCE

[i] Taken from published research conducted by Monash University (Australia) Monash Injury Research Institute

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Supplementary written evidence from Slater & Gordon LLP (WL53A)

METHOD AND SAMPLE

Methodology: Online

Sample: People (age 16+) who have suffered a whiplash injury following a road traffic accident and made a personal injury claim within the last 3 years.

Panel: Ipsos MORI in partnership with panels from Research Now, Toluna and SSI.

Region: UK (excluding NI).

Sample size achieved: 900.

Questionnaire length: 5 minutes.

July 2013

Supplementary written evidence from Slater & Gordon LLP (WL 53B)

ONEPOLL METHODOLOGY

Methodology:	Online
Sample:	People who have suffered a personal in the last 10 years
Region:	UK
Sample size achieved:	500 independent sample
Questionnaire length:	5 minutes

PERSONAL INJURY CLAIMS

- Of the 500 personal injury claims studies, more than half (53%) were for road accidents.
  - Women were more likely to have claimed for a road accident (59% v 46%).
  - While more men experienced more accidents in the workplace overall (28% v 13%).
- Three quarters of road accidents result in whiplash (76%) while injury to a limb, shoulder, ankle occurred for over a fifth (21%).
  - Over one in ten road victims suffered a fractured or broken limb.
  - Workplace accidents most commonly result in injuries to limbs, but 28% received a fracture or break.
- The average claimant's accident occurred over four years ago.
- But over a third still suffer pain from their injury (36%).
  - Psychological disorders are most likely to cause repeated pain (61%) followed by back injuries (56%).
- The average person is in pain at least 12 times a month from their injury.
  - Men experience slightly more bouts of pain per month (13 v 11).
  - Workplace accidents cause the most repeated pain at 15 a month, while road accidents cause 10 a month.
  - A fifth of whiplash victims (19%) experience at least 16 instances of pain a month.
  - While those seeking to their own solicitor or lawyer suffered the most at 13 times a month.
- The average person takes pain killers or medication to cope with their injury 10 times per month.
  - Men take medication slightly more than women (10.45 v 9.37).
  - Those whose accidents occurred 8–10 years ago take the most medication at 14 times a month.
  - While those who sought lawyers independently took painkillers the most (12 times).

- — 63% of claimants say their accident impacts their work lives.
  - — While those whose accidents occurred in the last 1–3 years are most likely to take toll at work (70%).
- — The biggest impacts to working life to the 113 people were:

I had to take a lot of time off work—39%.

I can't do some of the duties I used to—like heavy lifting—27%.

I find it hard to focus on work—24%.

I often call in sick—17%.

I feel like I am less likely to get promoted now—16%.

I had to reduce my hours—15%.

I had to quit my job—14%.

I was dismissed from my job—13%.

I feel like my colleagues have to help me perform my duties more than they did before—12%.

I had to take on a different role within my company—11%.

- — Over a quarter of claimants had their personal lives impacted by their injury (28%).
  - — Those in road accidents were the most likely to have had their personal life disrupted (33%).
  - — Mostly through not being able to sleep well and being unable to exercise.
- — The top 30 reasons for the 138 people who said their personal life was hampered were (in order):

1. I had to take a lot of time off work.
2. I can't do some of the duties I used to—like heavy lifting.
3. I find it hard to exercise.
4. I don't sleep as well.
5. I'm not as agile.
6. I don't go out as much.
7. I can't walk as easily.
8. I have lost confidence.
9. I don't have much energy.
10. My sex life has been affected.
11. I find it hard to focus on work.
12. My driving has been affected.
13. I often find myself avoiding certain activities.
14. The pain has made me moody and less fun to be around.
15. I still struggle to do everyday tasks.
16. I find it difficult to do household chores.
17. I always have to think about how activities might aggravate my injury.
18. I can't get in the shower/bath as easily.
19. I often call in sick.
20. I feel like I am less likely to get promoted now.
21. I had to reduce my hours.
22. I had to quit my job.
23. I was dismissed from my job.
24. I can't pick up my child/grandchild very easily.
25. I find it hard to take care of my appearance.

26. I have to avoid rides at theme parks.

27. I feel like my colleagues have to help me perform my duties more than they did before.

28. I can't dance.

29. I had to take on a different role within my company.

30. It's hard to lean back and let a hairdresser wash my hair.

- One in seven whiplash claimants feel their chances of promotion have suffered hugely because of a reduced ability to work.
- More than one in ten whiplash victims had to take a different role in their company after the accident.
- Three in ten whiplash victims (29%) have difficulty walking, a fifth struggle with day to day tasks and a quarter say their driving has been affected.
- The average claimant was awarded £5, 230 in damages.
  - Men are generally awarded more than women receiving £5, 793 v £4, 755.
  - Sufferers of whiplash were awarded the least at £3,374 while broken limbs got £7,756.
  - Those whose accidents took place longer ago received more in damages overall.
  - Those who sought out independent lawyers received more in damages at £6, 552.
- Over a fifth (21%) were left out of pocket when comparing the damages they were awarded against the cost of the accident to them personally.
- Those claimants who were left out of pocket were £9, 165 in the red because of their accident.
  - Workplace accidents put people out of pocket most at £14,110.
  - While the average whiplash victim loses £6,599.
- More than one in ten claimants had to buy specialist equipment in order to function after the accident.
  - The most commonly item forked out for was a special bed, followed by a foot stool or pillow.
- The most likely course of action for victims after their accident was to find their own independent lawyer/solicitor to deal with their claim—41%.

July 2013

Written evidence from HCML (WL 54)

WHIPLASH-TYPE PROBLEMS

Recent concern has emerged regarding both the number of claims for whiplash—type injuries, and how they are managed. Evidence has also emerged that this kind of claim is inflating the cost of U.K vehicle insurance, and there for affects all of us. This two part report provides a summary of proceedings from a recent scientific conference held in London on the topic of "tackling the whiplash culture" by considering whether there is a better way of doing things. The first part covers important background information by addressing key questions, and the second part provides a set of key recommendations and action points.

SUMMARY OF RECOMMENDATIONS

Classification of Whiplash Associated Disorders (WAD)

A: Insist on the international classification rather than "diagnosis" for all documentation.

B: Avoid "whiplash" language and jargon, it can exacerbate the problem and perpetuate disability.

C: Distinguish minor neck injury after a vehicle collision from chronic neck pain and disability.

Claims and compensation process

D: Accept cases and claims if and only if classification has been completed.

E: Ensure that Whiplash claims are not inappropriately or irresponsibly encouraged, and that the claims process does not encourage illness behaviour.

F: Establish and use independent assessment centres.

Treatment and Rehabilitation

G: Make accurate information about WAD available to public and healthcare providers.

H: Promote the early use of evidence-based treatment and clinical management.

I: Manage providers with case management to avoid over-medicalisation: do just what is required using a stepped approach.

Part 1—The "Whiplash Problem" in Perspective

Views and opinions about whiplash injuries are many and varied, with evidence less easy to come by. In trying to understand whether there is a problem in the U.K and why it may have developed, there is need to look at a wide range of issues and how they interact with each other.

Why is there a problem with "Whiplash" and "Diagnosis"?

The term "whiplash" has become everyday parlance referring ambiguously to a very diverse range of things. Allowing it to remain so is linguistic laxity. Initially the term referred to a mechanism of injury, then became shorthand for types of neck injury, and has ended up a catchall term. Importantly, it is used in place of other diagnostic terms. That is, a person is said to have "whiplash", and this is now widely used in medical documentation. This approach overlooks that any type of "whiplash-associated disorder" or "WAD" is a subset of neck pain. It includes the implicit assumption that causality is known and well defined. It lacks information about the severity of the problem, or how it can be most effectively treated and managed. A "diagnosis" is typically used to determine the causes of symptoms, mitigations for problems, and solutions to issues. The catchall term "whiplash" simply cannot deliver these hallmark aspects, and to continue it as a surrogate diagnosis is careless and unhelpful.

Can whiplash-associated disorder be reliably categorised?

Yes, with respect to; the nature of the clinical problem, its severity, and what is likely to be the most effective way of treating it and helping the injured person get on with their life. However, this does not by itself differentiate the causes. Knowing how someone's neck pain started can only be based on it being reported by the person, witnessed by an observer, or both. Each is prone to error, and depend on how people attribute cause and effect. This is not to a trivial issue, especially for the claims and compensation process.

Does it matter what language and terminology is used?

Yes, it does. There is good scientific evidence that casual beliefs and attributions following car crashes predict the persistence of disability, over and above the severity of the initial complaints. Under the principle of "do no harm" this indicates that it is prudent to ensure outcomes for the injured person are not made worse by attributing neck pain to whiplash-type injury unnecessarily. Clearly, this applies mostly to the less severe end of the injury spectrum, but this is by far the greatest number of cases that present. For clinicians this means avoiding a speculative tissue diagnosis, and instead using a simple descriptive classification.

Can whiplash-associated disorder be differentiated from other types of neck pain?

No, clinically and physiologically they cannot be differentiated (unless they are severe injury). This has an important implication: effective treatment and rehabilitation for most cases of WAD is the same as that for other types of neck pain. What works, for whom, and when, it is the same and we should expect similar outcomes. It can be argued that the only major difference lies in our interpretation of "whiplash", and what we do about it. This requires consideration of the claims process and all that surrounds it.

Can neck pain be confused with whiplash-associated disorder?

Yes. Neck pain is a very common experience; as is other soft tissue pain such as pack pain, arm pain etc. On a given day up to 20% experience neck pain, and across a given year about 40% of us do. It is an episodic experience that usually returns at some stage. That is, once we've had it, we are more likely to have it again. Inevitably some people involved in traffic collisions will feel pain during the following days, weeks, or months. The question as to whether that is always whiplash-type pain is very difficult to determine because they are clinically indistinguishable. This means calling it "whiplash" is heavily dependent on the attribution made by the individual, by clinicians and others. The situation is even more complex when neck pain persistent or chronic. This occurs in between 5% and 20% of people, depending on how it is defined. While it may appear counter-intuitive, it is important to note that mistakenly attributing neck pain to a whiplash event can occur easily, but that this may be unhelpful to obtaining the best health outcome for the person.

Can whiplash-associated disorder be prevented?

Preventive efforts include vehicle design, road engineering, and driver education seems to hold considerable promise. Analysis of most statistics lead to the conclusion there has been a general improvement in rates of road fatalities and severe injury. However, the situation remains obscure for less severe injuries. There is a clear paradox: the number of minor injuries on roads reported to the police has steadily decreased, while the number of claims has steadily increased. This means it is unclear whether preventative efforts have had any actual effort on less severe injuries. The only thing that is absolutely clear is that they have had no impact on reducing the number of claims.

Can Persistent (chronic) problems be prevented?

The answer is "probably", based on the collective evidence for all types of soft-tissue pain and injury, and that specific to WAD. To date, more effort has been put into seeking prognostic factors than on looking for interventions that might prevent chronicity. As with all types of musculoskeletal problems the prominent role of psychosocial factors in the development of persistent pain and disability is also evident in WAD. Evidence has demonstrated a greater potential to prevent pain-related disability than chronic pain itself, and this can generally be considered cost effective.

Why does the claims and compensation process matter?

Discussions surrounding the topics of injury, pain, suffering, blame, compensation, claims etc. Often involve strong opinion, emotive argument, and over-simplification of viewpoints into "lobbies" or "camps". Over time these often end up effectively as a vested interest, needing to be defended. Space does not permit a full consideration of these complex and subtle issues. However, it is possible to briefly look at why the process of making claims can make a difference. There is evidence that compensation processes can impair health outcomes, and that this finding also applies to WAD. Both the quantity and quality of this can be reviewed and debated, but it is not easily dismissed as trivial or irrelevant. Even if these data are considered as only indicative, it obligates us to consider the potential role of the claims and compensation process in negatively influencing outcomes for problems such as WAD, and should not be easily dismissed. It does not in any sense suggest there is no role for claims or compensation, or that symptoms such as pain should be trivialised. What it does suggest is that the process of how claims are initiated, managed, and concluded should be considered with a focus on achieving the best health outcomes and ensuring that nothing is done to undermine this. This is an important challenge, not least because solid rational explanation is so needed in this area.

What would be a "better way of doing things" look like?

There would be primary prevention that is demonstrated to be effective in reducing the number and severity of neck injuries.

Every case of WAD presenting for healthcare should be classified by grade (ie nature and severity):

Classification criteria—Bone and Joint Decade Task Force, 2008

Grade 1: No signs of major pathology and no or little interference with daily activities

Grade 2: No signs of major pathology, but interference with daily activities

Grade 3: Neck pain with neurological signs and symptoms

Grade 4: Neck pain with signs of major pathology

For every case the type of clinical intervention (treatment and rehabilitation) can be initially matched to WAD grade, using an evidence-informed pathway. This approach would be outcome-focused, taking into account both symptoms and level of function. The claims and compensation process would be designed so that it does not inadvertently encourage attributing neck pain to whiplash-type injury. Effective case management would be provided to ensure early access to necessary and appropriate treatment and rehabilitation. This would provide objective oversight of cases without being invested in provision of services. Finally, independent expert centres capable of assessing complex and slow-to-recover cases would be developed. These would be capable of providing definitive second opinion, resolving disputes and causation, and devising effective management plans for long-term persistent cases.

What underlying principles are required to do things better?

A "smarter" approach to WAD needs to focus on the entire spectrum from new cases, prevention of chronicity, through to managing long-term cases. A selective focus on the area invites problems in the others. The fundamental principle required is to tackle the less severe grades of WAD. (ie grades 1 and 2) proactively with an evidence-based approach. This involves provision of information and advice, symptomatic relief, positive expectations for recovery, and focus on maintaining activity. Most should never need to enter a compensation process, and encouraging that should be avoided due to the potential for worse outcomes. The same principles apply to grade 3 cases, although the range of interventions offered might be wider and require slightly longer time frames. Rapid identification of slow-to-recover cases should lead to intervention and clinical management designed to prevent long-term disability. Chronic cases need to be identified and managed as chronic neck pain cases, not subjected to serial ineffective therapy that assumes chronic pain is merely the same acute problem.

Part 2—Tackling Whiplash problem

Approaches to problems such as whiplash associated disorders (WAD) based on simple solutions have little or no track record of success. For these types of problems it seems we are destined to live in a house of many paradigms, and necessarily must find smarter approaches that are sufficiently comprehensive and robust without

being over-complicated. Initially this may appear daunting, but we argue that there is much that can be done both simply and in a common-sense fashion without additional cost or resources. However, we urge readers to think of this as a package and not as a "smorgasbord" to pick and choose from.

The major focus for tackling WAD must be centred on the needs of the person. Nothing can be gained from denying the existence of symptoms. By definition these are subjective, and only the person can feel them. As already noted, neck pain for any reason is a very common experience. However, there are a number of key things that can be done based on the available evidence.

An evidence-synthesis approach to three "big questions" about whiplash-associated disorder

In an ideal world everything would be based on optimal evidence, but controlled experimental trials are neither viable nor practical for many of the big questions about the whiplash field. This means there is an important role for evidence synthesis to provide a buttress for best practice and policy-making. We need to ask, "what could actually make things better?" A set of recommendations is made across three main areas: classification/diagnosis; claims and how they are managed; and, treatment and rehabilitation.

1. *How should whiplash-associated disorders be classified?*

Recommendation A: Insist on classification according to criteria established by the international Bone and Joint Decade Task Force on Neck and Pain Disorders in 2008 (this includes WAD).

- This is a foundation for effective clinical and claims processes and should include all key parties; ie A&E, GPs, medical consultants, physiotherapists, insurers, claims management companies, lawyers, case managers, and government departments such as DWP
    - Cost of implementation is minimal.

Recommendation B: Avoid irresponsible, alarming, and ambiguous "whiplash" language that can exacerbate the problem and perpetuate disability.

- Making accurate, consistent information and advice available to everyone is essential, in both printed format and internet-based
    - Cost of implementation is very low, since the material already exists in well-developed form and only requires suitable distribution methods.

Recommendation C: Distinguish the short term pain of minor neck injury after a vehicle collision from persistent/chronic neck pain and disability. They are separate entities requiring different treatment and rehabilitation.

- Monitor cases by duration and recurrences to ensure that serial ineffective therapy is not being delivered.
    - Cost implications should be negligible. It can be argued that responsible insurers and funders should be doing this already?

2. How should the claims be improved?

Recommendation D: Accept cases and claims if and only if classification has been completed according to the Bone and Joint Task Force criteria.

- The most effective approach is to ensure this is applied consistently by all relevant organisations, including insurers and government bodies.
    - There are no cost implications, this is a procedural measure.

Recommendation E: Ensure that whiplash claims are not inappropriately or irresponsibly encouraged and that the claims process does not itself encourage illness behaviour (eg individuals currently perceive they have to "prove" they are injured, which restricts potential for recovery).

- The most effective approach is to review existing incentives, and the roles of potential vested interests. It seems axiomatic to remove incentives for opportunistic claims behaviour by individuals or any other party (including accident/injury claims agencies, assessment/reporting agencies, treatment providers, etc.). A key operational issue is to enforce independence between those adjudicating claims and those providing services to claimants. Insurers and agencies should be encouraged to make cover decisions promptly wherever possible. An additional step that seems necessary is to promote the provision of consistent, evidence-informed information about WAD, and to ensure poor quality advice is challenged effectively. In general, this is best achieved using collegial pressure within the professions (medical, legal, insurance, etc.)
    - There are potential cost implications depending how this is done, however there should always be greater return for every £ spent.

Recommendation F: Establish and use independent assessment centres.

- These provide key services, but have no vested interest because they do not provide healthcare to the cases:
  - Clinical reviews of lack of progress, and devising an effective on-going management plan
  - Advise on managing difficult claimants, eg long recovery duration, lack of adherence to treatment/rehab, inconsistent presenting features, etc.
  - Assessments to identify claimants who may be making an opportunistic claim
  - Dispute resolution about claim attribution and causation
  - Review of services offered by health care providers and the standard of care delivered
- These should be established as cost-effective services

3. How should people with whiplash-associated disorder be treated and rehabilitated?

Recommendation G: Make accurate information about WAD available to public and healthcare providers.

- Information should be provided early- prior to claim (public health) and at the point of claim.

  Consistent forms and procedures across A&E, primary care and reporting agencies will help clinicians to move to a classification (as opposed to diagnosis) approach. They will also act as "training" aids, and can be supplemented by CPD initiatives.
  - The cost of implementation would be modest, especially if shared across agencies and sectors

Recommendation H: Promote the early use of evidence-based treatment and clinical management.

- This is effectively achieved by funding treatment and rehabilitation services only when they are evidence-based, and declining funding for all others.
- It means ensuring all cases are properly classified, giving accurate information and advice about neck and back pain associated with road traffic collisions, setting clear expectations of how long symptoms should last, maintaining a focus on activity and work, and delivering treatments with known effectiveness for minimum time required.
  - U.K experience (with insurers) is that this approach results in substantial cost savings and fewer claims, while maintaining high levels of customer satisfaction.

Recommendation I: Use a stepped approach to the provision of healthcare (based on the principle "only what's needed when it's needed") and guide treatment and rehabilitation providers (eg through case management) to avoid over medicalisation

- The emphasis is on preventing persistent pain and disability (loss of function)
- Engage professional associations of all types (medical, legal, insurance etc.) to promote evidence-informed approaches, and to discourage unnecessary medicalisation and over treatment

UK Insurer Experience

The effectiveness and benefits of the overall package of evidence-informed recommendations outlined above has been demonstrated in U.K. settings, in addition to other countries. For example, a large U.K. insurer has demonstrated that by using this sort of approach it is possible to: reduce musculoskeletal claims numbers, reduce claim duration, reduce total claim cost by 40%, improve functional outcomes including return to work, and to achieve all of this while increasing customer satisfaction. These findings also hold for whiplash cases.

What needs to be done?

First recognise that the situation can be improved. This requires re-examining basic assumptions, and looking for an effective approach that is not over simplified. Some recommendations may appear challenging to specific sectors or parties, but the overall goal is clear: ensure that those who are injured get early access to appropriate care (not to little or too much), and those who have little or no need for support or care do not have valuable resources squandered on them. For policy-makers and those involved in managing the processes there are three key actions: require classification of cases; remove incentives such as referral fees that distort behaviours; and, incentivise financial independence between key players, eg claims management services should not also be providers of healthcare services. Debate needs to be stimulated among all relevant professions (including medical, legal, and insurance. etc) so they become engaged in influencing their colleagues to adopt recommendations.

This report was prepared by Dr Nick Kendall who served as chairman for the conference "tackling the whiplash culture" held in London on 2 November 2011. The expert speakers consulted on the draft recommendations were: Professor Sir Mansel Aylward; Mr Matthew Avery; Professor Gordon Bannister; Professor Kim Burton; Professor J David Cassidy; Mr James Dalton; Mr Bernie Rowe; and Dr Doug Wright. Their support and expert advice is gratefully acknowledged.

May 2013

Written evidence from the Ministry of Justice (WL 55)

EXECUTIVE SUMMARY

1. This Memorandum provides the Ministry of Justice's written evidence to the Transport Select Committee's inquiry, announced on 15 March 2013, into reducing the number and costs of whiplash claims. This evidence informed the Government's consultation paper "Reducing the number and costs of whiplash claims" published in December 2012. The Government intends to take account of the recommendations of the Committee's inquiry before publishing its response to consultation.

2. Fraudulent, exaggerated and unnecessary insurance claims place a significant financial burden on each and every motorist. The Government is determined to reduce the number of such claims as part of its general strategy of supporting reductions in the cost of living and the cost of insurance premiums.

3. Government figures show that between 2006 and 2011 the number of reported road traffic accidents fell by 20%. Over the same period, there was a 60% rise in road traffic accident personal injury claims. 2012–13 figures show a small decrease in the number of whiplash claims and the Government is committed to working with stakeholders to continue this trend. Whiplash injuries have been estimated by the industry to account for nearly £2 billion of compensation payments a year, equivalent to 20% of the typical car insurance premium.

4. The Prime Minister held an insurance summit on 14 February 2012 to discuss the increasing cost of motor insurance premiums with the insurance industry. Between December 2012 and March 2013, the Ministry of Justice consulted on specific measures to reduce the number and costs of whiplash claims. The consultation considered two main areas for potential change: first, moving to independent medical panels, appointed or accredited by the court, to improve the diagnosis of whiplash injuries. Secondly, options for the level at which the Small Claims track threshold should be set for road traffic accident related whiplash claims and all road traffic accident personal injury claims to help ensure that we have the right incentives to challenge fraudulent or exaggerated claims.

5. In a wider context, the Government has also introduced, from 1 April 2013, substantial reforms to civil litigation funding and costs in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which take forward Lord Justice Jackson's recommendations. These changes to conditional fee agreements and the banning the payment and receipt of referral fees in personal injury cases will make a significant difference to the costs involved in civil litigation and the current culture of claims.

6. The Government expects the insurance companies to act on the commitment they made at the Prime Minister's summit in February 2012 to pass on to consumers and businesses industry estimated savings of approximately £1.5-£2 billion that could come from the reforms on both legal fees and future changes to whiplash claims.

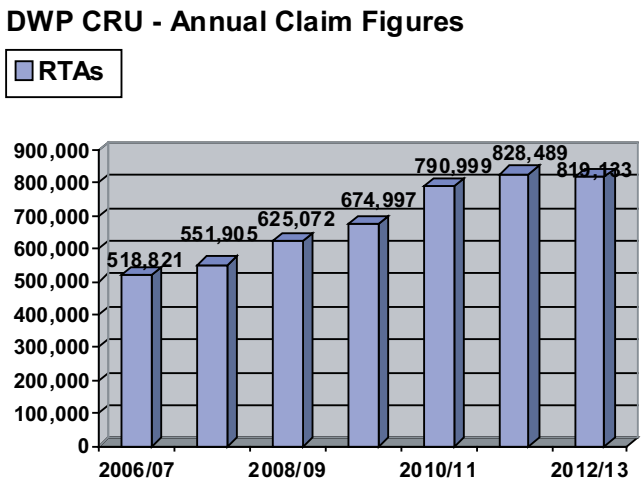
7. The Government welcomes the Transport Committee's inquiry into whiplash. It looks forward to hearing the Committee's recommendations and the ideas of other interested parties to put alongside the Government's proposals for reducing the number and cost of whiplash claims.

Is the Government correct in describing Great Britain as the "whiplash capital of the world"?

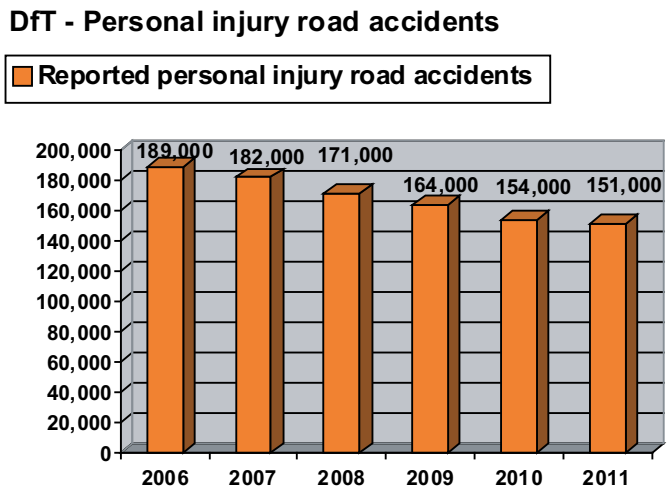
8. Available data indicates that whiplash claims are more prevalent in the UK than other European countries, although there have been no worldwide studies completed in this area. A European study from 2004[43] suggests that the UK recorded a high proportion of motor claims with bodily injuries compared with most other European countries (around 17% compared to around 9% in France) and of these claims the highest proportion related to cervical trauma (broadly whiplash)—around 76% in the UK compared with around 30% in Spain and around just 3% in France. See table 1 below:

Country	Number of claims (bodily + material)	Bodily injury		Cervical trauma compared with the number of bodily injuries	
Belgium	420 000	12%	or 50 000	No data available	
Switzerland	300 000	10%	or 30 000	approx. 33%	or 10 000
Germany	3 960 000	10.7%	or 424 000	approx. 47%	or 200 000
Spain	2 320 000	10.8%	or 250 000	approx. 32%	or 80 000
Finland	88 839	13%	or 11 574	approx. 8.5%	or 1000
France	2 500 000	9%	or 225 000	approx. 3%	or 6 750
Italy	4 700 000	18%	or 846 000	approx. 66%	or 558 000
Netherlands	600 000	8%	or 48 000	approx. 40%	or 19 200
Norway	165 378	9.1%	or 15 000	approx. 53%	or 8 000
United Kingdom	2 900 000	17%	or 493 000	approx. 76%	or 375 000

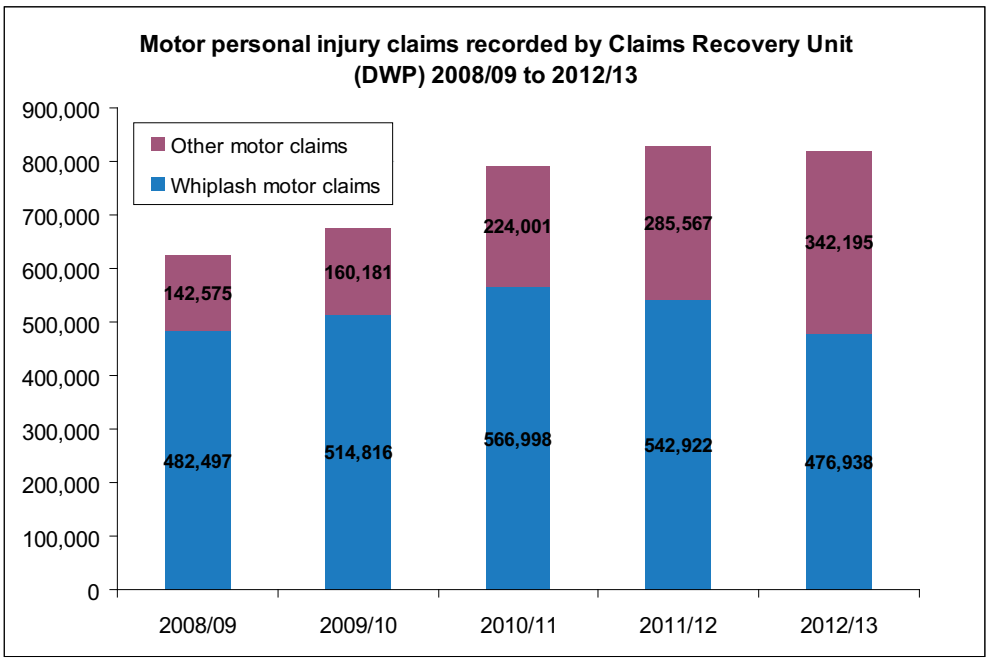
9. As stated previously, government figures show that between 2006 and 2011 the number of reported personal injury road traffic accidents fell by around 20%. Over a similar period (2006–07 to 2011–12), there was around a 60% rise in road traffic accident personal injury claims. In 2012–13 there was a small fall (of around 1%) in the number of claims compared to 2011–12.



[43] http://www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.pdf



10. Both Government and insurance industry figures also indicate that the majority of all road traffic accident personal injury claims are for whiplash injuries. Although, in 2012–13 the overall number of motor claims where injuries were described as whiplash fell to around 480,000 from around 540,000 in the previous year.



Is it correct to say that the costs of whiplash claims add £90 to the average premium and, if so, what proportion of this additional cost is due to "exaggerated, misrepresented or fabricated" claims?

11. Data published by the Association of British Insurers (ABI) estimates that the current total cost to the insurance industry of whiplash claims to be around £2 billion per year in compensation and legal fees. This compares to a cost to the industry of around £700 million in 2003. The ABI estimates that fraudulent motor claims worth £441 million were detected by the industry in 2011. According to industry figures the level of undetected fraud is currently considered to cost the industry around £1 billion a year.

12. In individual terms, there are a number of factors unique to each customer which affects the final car insurance premium he or she pays. The ABI estimates that on average approximately 20% of the cost of an average car insurance premium relates to the cost to the industry of dealing with whiplash claims. On the ABI figures, this equates to approximately £90 per car insurance premium (the average cost of a car insurance premium in 2011 being £440).

13. It is not possible to quantify what proportion of this cost relates to genuine, fraudulent, exaggerated or unnecessary personal injury claims. The statistics indicate the possible extent of the issue with rising whiplash claims. For example, there has been an increase in the number of claims per accident in recent years, and

insurance industry data previously showed that there were around 2.7 claims for whiplash damages made for every accident reported. The above data suggests that this figure may now be above 3 claims per accident.

14. The total cost of dealing with a personal injury claim is generally calculated by combining the damages awarded with the legal costs and other additional costs such as vehicle repair or credit hire. Various sources suggest that that the average claim is around £2,500[44], and there is evidence that suggests the majority of claims are less than £5,000[45]. According to the ABI 2012 key facts brief, the average cost of dealing with a claim is £4,527.

15. The cost of litigation in relation to these claims appears to be high relative to the compensation paid. An ABI report indicates that in motor claims of less than £5,000, for every £1 paid in compensation around 88p is paid to claimant lawyers[46].

16. These figures in this section have been provided by members of the insurance industry and have not been verified by the Government. They should be considered indicative only.

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

17. Whiplash is a complex issue and a range of actions from all stakeholders will be required for significant impact to be made on the number of current claims being made.

18. There is currently a societal problem with consumers believing that making a claim for compensation where none is necessary is acceptable because "everyone is doing it". However, insurance fraud is not a victimless crime; every fraudulent and exaggerated insurance claim that goes unchallenged means the premium of each motorist increases.

19. Concerns have been raised that the current system for claiming for whiplash injuries following a road traffic accident can encourage less meritorious claims. The increase in claims has had a significant impact with all drivers having to face unnecessary higher motor insurance premiums

20. The Ministry of Justice consultation document sought views on the creation a specialist accredited medical panel for whiplash injuries and on whether to increase the small claims threshold for personal injury claims arising from road traffic accidents from £1,000 to £5,000.

21. The Government is of the view that small value whiplash claims can be relatively straightforward and that the cheaper, simpler Small Claims track is a more suitable venue for them than the more expensive Fast track. Raising the threshold for personal injury claims from £1,000 to £5,000 would allow the majority of whiplash claims to be heard in the Small Claims court rather than the Fast track. The purpose of the Small Claims track is to provide an informal and low cost route for litigants to resolve disputes in a simple, straightforward way that is accessible and proportionate to value of the claim.

22. It would also allow defendants to challenge unnecessary or exaggerated claims in a more cost effective way than before. It will act as a deterrent to such claims if insurers challenge the level of damages being claimed rather than offering to settle for costs reasons, in a court track where claimants are responsible for paying their own legal costs (unlike the Fast track, parties cannot recover costs from the losing side).

23. It is not possible to quantify the number of claims that would be discouraged through improvements to the medical assessment process or through changes to the small claims threshold for personal injury claims. It is also unclear how the wider changes to the civil litigation landscape will affect case volumes and costs. The Government believes, however, that the reforms to civil litigation costs and the proposals in the recent consultation will have a significant impact on the costs incurred by insurers in personal injury claims. As a result, the Government expects legal costs to fall and insurers should to start passing on those savings to their customers through lower premiums.

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

24. The Government is committed to preserving access to justice for the genuinely injured. But that does not mean allowing exaggerated, misrepresented or fabricated claims to go unchallenged.

25. The question of raising the small claims threshold for damages for personal injury claims was last looked at in 2007, when strong arguments were made for raising the limit to address high legal costs. Respondents to the consultation also raised concerns that raising the limit would have an adverse effect on access to justice.

[44] Written evidence from AA motor insurance to the Transport Committee. The Cost of Motor Insurance, Volume I (March 2011). Written evidence page 62.
Data for a sample of RTA personal injury claims from one commercial source indicates that the median claim is for around £2,600. These data relate to three types of case only and only to a very small proportion of the total number of cases. Whether the data is representative of wider cases brought has not been verified.

[45] Written evidence from Saga group to the Transport Committee. The Cost of Motor Insurance, Volume II (March 2011). Written evidence page 19.
Data from the same commercial source as for footnote '4' indicates that more than 75% of claims are valued at less than £5,000.

[46] ABI, Tackling whiplash Prevention, Care, Compensation. November 2008

The final decision taken at the time was not to raise the limit but to take forward proposals to improve and streamline the claims process itself. This led to the current pre-action protocol and portal scheme. However, with the continuing rise in whiplash claims since then, and the impact these are having on the cost of motor insurance premiums, we believe the time is right to revisit this issue alongside the wider changes taking place in the civil litigation landscape.

26. Improving standards and the way medical assessments are handled are beneficial to all involved in personal injury work. Stakeholder sessions with representatives from the claimant, defendant and medical sectors indicated broad areas of agreement from all parties around the area of independent medical accreditation. We do not believe these or the Governments other proposals on whether the Small Claims threshold for personal injury claims should be increased will compromise access to justice for claimants.

27. The Government recognises that there are risks in such proposals. Some genuinely injured parties may be discouraged from claiming or from challenging a potentially low offer to settle. There is also a potential problem of "inequality of arms". Claims for injury following a road traffic accident will usually be brought by an individual seeking compensation for alleged injury from a defendant (usually an insurer). Given the limits on cost recovery, the claimant is more likely to be self-represented under the Small Claims track than the Fast track. Whilst the Small Claims track is designed with facilitating access to justice by self-represented litigants at its core, there is a risk that claims will not be presented with equal skill as the defendant may have legal representation.

28. However, the purpose of the Small Claims track has always been to provide an informal and low cost route for litigants in person to resolve disputes in a simple, straightforward way that is accessible and proportionate to value of their claim. The judiciary has a responsibility to ensure that self represented litigants are not at a disadvantage and understand what is required of them and when. In addition, no win no fee conditional fee arrangements will still be available for those with genuine injuries.

29. Significant advice and support is provided to self-represented litigants, including by Her Majesty's Courts and Tribunals Service. The Civil Justice Council has produced new guidance on how to bring a small claim for litigants in person, which is free to download from the Judiciary website (http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc). Many people also have included in their insurance policy "legal expenses" cover, a form of before the event (BTE) insurance cover. Following the implementation of the Government's reforms to civil litigation and costs, we expect a number of new innovative BTE insurance products to be developed for this market.

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

30. We welcome the Transport Committee's call for ideas on what more Government can do to reduce the cost of motor insurance premiums. However whilst Government can set the framework, including the legislative boundaries within which lawyers and others work, it can only do so much. It is for others, for individuals and lawyers, claimants and defendants to also step up to the plate with innovative ideas and ways all parties can work together to reduce the number and cost of fraudulent, exaggerated and unnecessary claims.

31. The Government has taken firm action to reduce the costs associated with civil litigation. There have been far too many claims being brought in to the legal system inappropriately, and once in the system they are being resolved too late at a high and disproportionate cost. Since the Prime Ministers insurance summit in February 2012 the Government has:

- introduced Continuous Insurance Enforcement, making it illegal to own an uninsured vehicle unless has a registered statutory off road notification;
- consulted on increasing the penalties for uninsured driving;
- implemented (on 1 April) Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (including fundamental reform of conditional fee agreements and a ban on the payment and receipt of referral fees);
- banned claims management companies from offering upfront cash incentives or other gifts to people who bring claims to them; and
- consulted on proposals to reduce the number and cost of whiplash claims.

32. The reforms implemented on 1 April 2013 will remove incentives for excessive litigation, and will make a significant difference to the costs involved in civil litigation and the culture of claims. In addition, the Department of Transport will also shortly be publishing a Green Paper on measures designed to help reduce premiums for young drivers, who pay more in insurance claims than any other group of drivers.

33. In addition, the Competition Commission is also currently investigating the motor insurance sector and is looking at the provision of credit hire and vehicle repair services. Uncontrolled costs in these areas can add a considerable extra cost to an insurance claim, which is ultimately passed on to consumers through higher premiums. The Government will consider carefully the results of this investigation and any recommendations made by the Competition Commission for improvements in this sector.

34. In terms of whiplash, the Government would like to see insurance companies addressing the behaviours which encourage excessive and unnecessary claims within their own business models. Following the referral

fee ban, lawyers can also be more active in checking claims are genuine before agreeing to represent clients to challenge claims.

35. The Government is keen to ensure that the number of unnecessary, exaggerated or fraudulent claims—which have led to high premiums and contributed to the growth of a compensation culture—fall. Since the Prime Minister's summit in February 2012 there has been a vigorous debate in the media about the issues around the high number of personal injury claims in England and Wales. Also during this period the Insurance Fraud Enforcement Division[47] of City of London Police, have made a significant impact on identifying and tackling insurance fraud.

36. The numbers of claims are now decreasing, but it is vital that all involved in this industry continue to work together to ensure that not only do the genuinely injured receive the compensation they deserve, but that those making unnecessary, exaggerated or fraudulent claims are effectively deterred from doing so. Greater co-operation between the insurance industry and claimant lawyers is vital to this process, and the Government encourages the sharing of data on potential fraudsters. Such co-operation is crucial to help to stop fraudulent claims at source.

May 2013

Written evidence from Re: Liability (Oxford) Ltd (WL 58)

Re: Liability (Oxford) Ltd is an independent provider of evidence-based information and guidance to UK liability insurers and other liability risk managers. The service covers a wide range of technical issues and has been established for 11 years.

The key medico-legal problem to address is the conversion of honest testimony[48] and medical opinion into legal fact concerning diagnosis and prognosis. It is my view that systematic error in this process is largely responsible for the permitting the disruptive effect of whiplash claims on the compensation system. Essentially, medical standards have been used in place of medico-legal standards. Industrial scale exploitation opportunities followed from this.

The consultation addresses diagnosis by asking who should be making the diagnosis, but without yet addressing exactly how and by what rules it should be done. So, this promises "more of the same", but by different people, or by the same people as now, but with a different name.

Prognosis is the key determinant of general damages once a diagnosis has been made, but this is not mentioned in the consultation.

I propose that diagnosis and prognosis should both be approached from the point of view of legal fact finding and that medical opinion is just a step in that process.

Q. *How do you convert honest testimony and medical opinion into legal facts?*

The key to this is a familiar-sounding rule:

> *In the absence of objective evidence of exception, and, but for the negligent act, the condition of the claimant will be assumed to have been, or ought still to be, the same as that of his peer group—ie those not recently exposed to a similar negligent act.*

There are those who assert that the above rule is already applied in legal fact finding and I agree that there are examples of this.[49]

When this rule is applied to research evidence:

- Based on data presented in some recent leading scientific reports, my estimate is that 45% of people given a whiplash diagnosis would not be *probably different* from their peer group. In the absence of exceptional evidence they would not be medico-legally diagnosed. There would be no claim.
- More than 70% of injured claimants would have a medico-legal prognosis of below three months.[50] So if there is a medico-legal diagnosis the compensation would be less than half the current standard.
- Around 16% to 20% of claimants, all else being equal, would have serious long term problems and should be compensated at a higher rate depending on causation[51] evidence.

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[47] http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/IFED/

[48] In my opinion, fraud detection is not within the competence of a medical examiner. Other parts of the system should deal with this issue.

[49] Eg, In noise-induced hearing loss the effect of negligence is measured relative to the effect of natural presbyacusis—which is measured in the relevant peer group not negligently exposed to excessive noise.

[50] This is well below the conventional *medical* prognosis period (over eight months on average).

[51] Largely determined using medical notes. There are no crash dynamics that explain chronic whiplash. Roughly 5% to 10% of people have a history of unexplained neck pain problems.

Using the proposed rule:

— The "bar would be raised", simply by employing the basic principles of the law and legal fact-finding.

— The consultation objectives would be achieved (by a different route to that proposed).

— The reform would be sustainable.

— Accurate predictable damages tools could be developed.

The proposal, if finessed and adopted, would have a wider effect on the disruptive potential of other largely subjective injuries such as mild traumatic brain injury.

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

I agree that the family GP is not always able to apply his skill purely on the basis of objective evidence in such cases. In this setting, the lack of: objective facts, audit and other feedback opportunities, helps perpetuate a mythology which may not be accurate and is probably not self-correcting.

The lack of objective facts, audit and feedback also allows the reports produced as a result of the MRO system to become systematically distorted by market forces.

Independent medical panels would sustainably solve this distorted mythology problem if: **facts** were established on the basis of legal principles, a system of audit was employed as part of its make-up **and,** the feedback from audit was **accurate**. Inaccurate fact-finding and feedback would create new problems.

A standard report form would only be of benefit if it reported the right details in the right way and interpreted them according to the right system of thought.

So, an answer to **Q1** begins with the following conclusions:

— Independent panels should increase the probability of objectivity but need to employ **accurate** legal fact finding and feedback if their findings are not to become just a new problem.

— Engaging a recognised authoritative body to set the standards to be used by this panel or these panels would make it more difficult to challenge the official interpretations. But what if they get it wrong? Internationally, the track record of such bodies is not good.

— Standardisation of forms is a matter of efficiency not policy; the policy issue is whether or not the contents and interpretations are accurate. Doing the wrong thing more efficiently is just "wronger".[52]

— Transparency is a policy issue; it is hard to see any justification for secrecy.

Overall: independence, standardisation and transparency are nice things, but there is no doubt that each of the above could be circumvented by an imaginative, resourceful, profit-making industry.

So…

The main unsolved problem is the current use of medical decision-making in place of common law decision-making. I propose that the medico-legal problem to address now is the conversion of honest testimony and medical opinion into legal fact. Here's how…

In place of a medical approach, the following proposed rule is consistent with the workings of the common law:

> *In the absence of objective evidence of exception, and, but for the negligent act, the condition of the claimant will be assumed to have been, or ought still to be, the same as that of his peer group—ie those not recently exposed to a similar negligent act.*

Normally, claimants will *not* have objective evidence of exception. The proposed rule is effectively a preferred choice of baseline fact.[53]

The choice of baseline acts principally through the medium of diagnosis but through this: causation, harm assessment, foreseeable benefit from rehabilitation and, prognosis are also modified.

(1) Diagnosis is the art of identifying difference. In the absence of evidence of exception, the diagnosis is made by comparison to the appropriate peer group. If a person is not probably different from that peer group, then he is probably not injured. To diagnose in such a case would require exceptional justification.

(2) If injured, then the degree of harm is measured relative to the state of the peer group. Again subject to exception.

[52] To partly quote Russ Ackoff.

[53] One of the attractions of adopting the proposed rule is that there is no need to doubt the veracity of the claimant's statement of prior perfect health. It can be regarded as an honest statement, but should not be regarded as a legal fact unless there is good reason to do so. The burden is on the claimant.

(3) The foreseeable benefit of rehabilitation eg physiotherapy, is in returning the injured person more quickly to or with greater probability to the population-normal.

(4) Prognosis will be a prediction of when he will return to the norm for his peer group.

The mechanics of the problem

It can be shown that in cases where diagnosis involves the assessment of common subjective symptoms and common signs, medical diagnostic thresholds are by design, well below those that would satisfy a balance of probabilities test.

Detail:

Medical research, which rightly informs *medical* practice, is based on the maximisation of the area of the ROC curve.[54] The effect of this for whiplash injury, a high proportion of which is not all that different from the normal peer group, is that medically preferred diagnostic thresholds are well below those that would satisfy a test based on the balance of probabilities.[55]

When the injury is extreme, this threshold shift effect is unimportant (a broken leg is accurately diagnosed under both schemes), but when the injury is not much different from the normal presentation, this fundamental incompatibility of approaches has significant effects.

It can be shown mathematically that in this latter case, the probability of difference is ~ 25%, when the ROC curve area is maximised. The medical approach diagnoses as injured, people who are not probably different from normal.

Whiplash research, which is based on a medical approach, will also systematically describe people as injured who are in reality not probably-injured.

This has had a strong effect on causation, and prognosis research.

Causation

When viewed under the lens of the proposed rule,[56] much of what is now regarded as self-evident becomes non-factual. For instance, there is probably no relationship between: head restraint position, head position, delta v, direction of impact and, injury frequency. Those who have been educated with a conventional physiological model of whiplash injury mechanism will be surprised by this, but these findings are in my opinion compatible with the proposed rule when combined with a balance of probabilities test.

Prognosis

When viewed under the lens of the proposed rule, those who are correctly diagnosed mostly return to population-normal by three months and, but for a special subgroup, prognosis beyond six months is extremely unlikely.

The special sub-group is remarkable in one key respect—pain hypersensitivity. This can be objectively measured—but simpler tests of it are very hard to fake. This group has a poor prognosis and comprises roughly 16% of people who experience a whiplash event. Causation is still mysterious and some people will have been pain hypertensive before the accident. Physiotherapy provides no benefits. Compensation should reflect their plight and true cause.

Curiously, the foreseeability of benefit from physiotherapy has not been altered by looking at it from the proposed rule's "point of view". It is perfectly clear, even with medical standards, that physiotherapy does not have a foreseeable effect on indemnity. It simply doesn't do any measurable good, no matter how you measure it.[57] Why it is paid for under an indemnity policy is a result of precedent set when injury and treatment were much more clear-cut. Lack of foreseeable contribution to indemnity should give rise to a re-evaluation of its provision under an indemnity policy.

So:

Medical opinion, if informed by medical research will not automatically be compatible with common law decision-making. If the proposed rule is accurate then the broad body of research could be re-analysed from a rule-compatible point of view and examiners re-educated in the light of these findings.

As a pilot project I have made this re-analysis to a very limited extent. I now believe it is worth doing systematically, but would suggest this be done/overseen by an expert body.

Does this meet the aims of the consultation?

Given the preliminary results of viewing the science from a proposed-rule point of view, it seems evident that the needs for independent diagnosis, prognosis and audit can be met. In the process, the number and cost of whiplash claims would be reduced.

[54] The greater the area the fewer false positives and false negatives.

[55] This can be shown mathematically.

[56] In the absence of objective evidence of exception, and, but for the negligent act, the condition of the claimant must be assumed to have been, or ought still to be, the same as that of his peer group—ie those not recently exposed to a similar negligent act.

[57] ie, both medically and, according to the balance of probabilities.

Medico-legal diagnosis protocol

In a representative peer group, there is pain, limited neck movement, disability related to neck problems, soreness, dizziness, headache and other symptoms/signs. These are perfectly normal and usually unexplained. Often they are unnoticed until asked about. In the absence of objective evidence of exception the claimant must be assumed to have been and ought still to be roughly the same as his peer group. That baseline is the fact, unless there is objective evidence to the contrary.

Each of the above symptoms/signs has been measured in representative normal populations.[58] Average presentation and expected range of presentation are now well known. Measurement precision is well known. It is therefore possible to define diagnostic thresholds which meet the test of "probably different from normal".

These thresholds can be used as the basis for medico-legal whiplash diagnosis.

At the moment, the neck disability index is probably the best tool for this purpose. It is widely used in whiplash research and can be directly related to prognosis using the data collected by researchers.

A rule-compatible medico-legal protocol can be prepared. It would include ROM, pain palpation, questionnaires, pain hypersensitivity tests etc but unlike now, very clear legal diagnostic thresholds will be provided for the examiner to help him form a judgment. There would also be accurate guidance on those causation issues that fall within the competence of a medical examiner.

Use of the protocol could be a pre-requisite for submitting claims. Medico-legal panel membership could be conditional on demonstrating accurate use of the protocol.

Audit

Having re-evaluated a small sample of the medical literature:

- In 70% of probably injured cases the prognosis should be less than three months from the date of the accident.
- There would need to be a good reason for providing a longer prognosis, these reasons can be obtained from the medical literature (once adjusted to be compatible with the proposed rule).
- 16% to 20% would have evidence of cold pain hypersensitivity and would have a prognosis longer than six months.
- There would have to be an exceptional reason for recommending physiotherapy. If this was provided for more than 5% of cases this would need to be explained.

Deviation from these and other expectations would trigger a closer examination of the work of that examiner or panel and could be explained by any unusual case selection effects. There is no need to routinely re-examine closed cases or to peer review existing cases. This in part answer to question 4, concerning peer review.

Further work

The above figures and conclusions are based on a *preliminary* analysis of recent papers which provided usable data.[59] There are many more research projects where the data was obtained but not usefully presented in the final publication. It could be obtained.

The proposal is that an expert body obtain this data and use it, from a proposed-rule point of view, to:

- Define legally objective diagnostic thresholds [and their acceptable tolerances].
- Define legally objective audit criteria [and their acceptable tolerances].
- Develop a medico-legal examination protocol and standard reporting form.
- Develop a system to be used for audit.

Where is the evidence?

None of the detailed calculations, case law, mathematical methods, publication references etc, are included in this consultation response. The aim here is to illustrate a usable principle and outline its effects. If there is an appetite for pursuing this line of reasoning then the consultation process and subtending works can be adapted to that end.[60]

[58] That is, people who have not recently experienced a no-fault whiplash accident.

[59] Papers usually focus on the results of complex analysis but without providing the raw data in a form which can be used to guide legal fact finding.

[60] It might be useful to meet with DoH policy leaders to discuss this idea and proposal before the conclusions to the consultation are set in stone.

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?*

Medical reporting organisations, whether they are called independent medical panels or have some other name, should collect statistics on:

- the number of cases seen,
- the number diagnosed as injured,
- the prognosis period offered in those diagnosed,
- recommendations for physiotherapy,
- the number of cold pain hypersensitive cases identified and the prognosis attached,
- etc.

Ratios should be in line with audit criteria based on the *right reading* of scientific research. The MRO/panel will then be responsible for any system-wide deviation.

Peer review of individual case notes could from part of the justification of variance if any is found.

Re-examination of claimants would be a possibility, paid for by the MRO.

System-level peer review would seem to be the best option. The MRO/medical panel should administer data collection and QA.

A separate levy should be paid to an organisation set up to monitor the independent medical panels, review the audit criteria in the light of new research, review the ML exam protocol and report form, and present reports to the enforcement authority.

If there is a licensed medical panel system then there is no good argument for accepting the occasional report made by the claimant's own GP. It follows that there is no need to set up a separate system of peer review for this offering.

CONCLUSION

The consultation should develop further to include the exploration of a potential incompatibility between medical decision-making and legal decision-making. This may lead to a more appropriate medico-legal examination, standard report and, enforceable audit.

May 2013

Written evidence from True Personal Injury Solicitors (WL 59)

It seems from the attached Daily Mail article that the Justice Secretary has pre-empted the findings of Whiplash Consultation and the Transport Select Committee investigation in whiplash claims and will press ahead with increasing the Small Claims limit from £1,000 to £5,000 come what may. It therefore begs the question, "Why did the government consult on raising the Small Claims limit when it had already decided to do exactly that?"

http://www.dailymail.co.uk/debate/article-2319638/Chris-Grayling-You-fought-little-guy—lets-insurance-giants.html

What is worrying is that the government has swallowed hook, line and sinker the insurance companies assurance that they will pass on any savings and reduce insurance premiums. If this was going to happen insurance companies would have already passed on the enormous savings they are already making by reducing the cost of legal expenses insurance. The government introduced Qualified One Way Costs Shifting (QOCS) to reduce the cost liability to the claimant if a case was lost and thereby remove or reduce the need for After the Event (ATE) legal expenses insurance. The result is that ATE insurance is now only required to protect a claimant from failure to beat a Part 36 offer and, as a consequence, the premiums for these polices have dropped from between £300 to £400 to between £75 to £150 (a drop of least 60%).

Last week I obtained motor insurance quotes from Direct Line, Aviva and Esure and the quotes included legal expenses insurance that was priced at between £26 and £27, which is the same as I was quoted a year ago. Given that Before the Event (BTE) and ATE legal expenses insurance insure the same thing, please can you tell me why BTE legal expense insurance premiums have not reduced?

It is clear that insurance companies are already reneging on their promise to pass on any savings and are, at the same time, selling motor legal expenses insurance that, given the introduction of QOCS, is possibly not needed.

May 2013

Supplementary written evidence from True Personal Injury Solicitors (WL 59A)

I am writing to you again about one particular issue that has been overlooked during the consultation process, and this concerns the heavy handed practice adopted by many insurance companies of alleging or insinuating fraud where no evidence exists.

There is no doubt that some claimants pursue fraudulent claims. I know this because during the 20 years I have been practising as a claimant lawyer I have had the misfortune to occasionally represent claimants who, based upon the evidence that was obtained during their claim or at trial, were found to be pursuing false claims. The outcome for those claimants was justifiably harsh in that they were ordered to pay all of the defendant's considerable legal costs, which in those cases ranged from £5,000 to £20,000.

However, I have also acted for many claimants whose legitimate claims have been rejected because the defendants' insurance companies, without evidence or justification, suggested or alleged that their claims were false.

In one case my client and his family were returning home at midnight after visiting friends when their car was hit in the rear by another vehicle. The force of the collision was severe, causing their vehicle to be written off, and injuring my client and his passengers. Although the defendant admitted responsibility for the accident, his insurance company questioned the validity of the claims on the basis my client's vehicle was old and in poor condition, that he sold his damaged vehicle shortly after the accident, and because the defendant could not accurately describe the occupants of my client's vehicle. The defendant also questioned what one of my client's passengers was doing at the accident location at that time of night when she was the mother of a young child. Needless to say the case proceeded to a full trial where the claimant and his passengers were fully vindicated and the defendant was ordered to pay substantial damages and costs.

In another case my client, together with his wife and teenage son, were injured when their vehicle was rear-ended by another vehicle as they slowed down to negotiate a tight bend. Even though the other driver admitted he was responsible for the accident, their claims were rejected by the defendant's insurance company on the basis my client's son knew one of the passengers in the other vehicle, and because they had obtained evidence that suggested to them that my client and his family had been involved in 21 other accidents.

Whilst my client and his family (not unlike a significant proportion of the population) admitted to having had other accidents in the previous 10 years, they had had no involvement or connection whatsoever with most of the accidents referred to by the insurance company. My client continued with his claim, notwithstanding the risk of incurring considerable legal costs, and was eventually successful with his case settling just before trial.

And in another case my client and his family were visiting a disabled relative when their car was hit by a vehicle which failed to stop at a give-way line. The force of the collision was enough to write off my client's car and to injure my client and his passengers with all of them requiring medical treatment. In this case the other driver's insurance company rejected the claims and said the accident was "indicative of a staged/contrived accident in that it is said to have involved multiple occupants, on journeys for no discernible reasons, involved in an accident for no discernible reason resulting in multiple personal injuries...". My clients were justifiably upset and angry; not only had they been injured as a result of an accident that was not their fault, they also had to suffer the indignation being labelled fraudsters. Court proceedings were issued but shortly before a full trial, and no doubt after realising the Claimants would not be browbeaten, the insurance company settled the claims.

The point I am making here is that whilst there are no doubt a significant number of fraudulent claims, there are, in my experience, many claims that insurance companies categorise as fraud without any proper evidence or justification. I am also in no doubt that when representatives of the insurance industry told the Transport Select Committee that 7% of all claims were fraudulent, this figure included claims, such as those I have described above, that were assumed to be fraudulent because they had characteristics in common with the insurance companies fraud indicators (eg multiple occupancy, accident late at night, ethnicity, age of claimant's car etc).

The insurance industry's fraud statistics will also include legitimate claims where fraud is alleged or insinuated by an insurance company but where the claimant, having been properly advised of the consequences of pursing a fraudulent claim, decides not to continue. When an insurance company states or implies that a claim may be fraudulent, a solicitor acting for a claimant must advise them of the consequences of pursuing such a claim. These consequences are that if the claim is found to be fraudulent the claimant could face criminal proceedings and a prison sentence under the Fraud Act, and furthermore they would be personally liable to pay all the legal costs which could easily exceed £20,000.

In my experience, when faced with these consequences, there are very few genuine claimants who are brave enough to continue with their claim.

As I have said, there is no doubt that some claimants pursue fraudulent claims and, as is the case, they are and should be severely punished, however the problem is not as wide spread as the insurance industry alleges. The insurance industry's claim that 7% of injury claims are fraudulent simply cannot be accepted because, for the reasons I have set out in this letter, it is not based on any valid or reliable evidence and is, quite frankly,

nothing more than an underhand attempt to persuade the government to raise the small claims limit and thereby deny proper access to justice to thousands of injured claimants.

It amazes me that the insurance industry, which though it's miss-selling of insurance products on an industrial scale, such as payment protection insurance and endowment polices, has demonstrated that it cannot be trusted in its dealings with the general public, is treated as a credible witness in this matter.

June 2013

Written evidence from James H Geddes (WL 60)

I understand that you are currently looking into the price of car insurance and in particular the way in which car insurance prices are inflated due to claims' companies and whip lash injuries. Is it possible that the Committee could extend its remit and look at the postcode lottery in connection with car insurance.

I work in the life insurance sector and I am deeply concerned at the way car insurance companies are exploiting the post code excuse for increasing the cost of car insurance. Yesterday I tool my grandson to buy his first car and the salesman asked if he lived in Blackburn and when he said that he did not he was told that he was lucky as some car insurance companies would not even quote for an experienced driver if he/she lived in Blackburn . To prove a point I recently completed a comparison website application for a Ford Fiesta car and inserted an address in Accrington and came out with a quote for almost £900. When I altered the address to Hereford the quote came out at £560. This is scandalous!

This postcode lottery is not restricted to Blackburn but also every town and district in the North West who have a high percentage of immigrant residents are treated the same way.

I lived on the West Pennine moors until March of this year and then moved into the village of Turton less than three miles down the road. Unfortunately Turton has a Bolton postcode. As soon as I contacted my car insurance company to inform them of this move I was informed that my car insurance would be increased by £81 .66 for the remaining six months of the policy, a rise of 33% which I think is disgusting. Had I not had a 75% no claims record my insurance for a 2003 Honda would have been £2,400 simply due to having a Bolton postcode even although I live five miles from Bolton. Can this be classified as Treating Customers Fairly?

I am certain that if my company decided to increase the sum assured of life policies on a post code basis the PRA and the FCA would quickly be accusing us of miss-selling and not treating our customers so why are these regulators allowing the side of the industry to carry on with these exorbitant charges.

According to LV the grouping of insurance risks for cars are set by the British Insurance Association and these are only a guide line and they can charge what they like and they certainly do so.

Car insurance is the next financial scandal which will hit the Britain and you have the power to stop it now and I urge you to do so. It would certainly be well received by the car owners of this country and would assist all the people who live in these postcode areas.

I look forward to the government taking some positive action to curtail this licence to "print money" by the car insurers. I know that the government have very little control over petrol prices but at least you should be able to do something about this post code lottery.

May 2013

Written evidence from Tim Grylls (WL 61)

I recently read an article in the 7 May edition of Plymouth's *Evening Herald* entitled *Whiplash fraud increases cost of living—MP.* A reference to the Transport Committee's inquiry prompted me to look for further details.

I have explored www.parliament.uk and note that evidence for the inquiry was invited on 15 March for submission by 15 April. I have some anecdotal evidence regarding whiplash claims and have the following thoughts for your consideration.

- Employees in claim management businesses should not lead or encourage potential claimants to exaggerate, misrepresent or fabricate claims.
- All telephone conversations between employees in claim management businesses and potential-actual claimants should be recorded, especially the initial contact call, and the transcripts submitted with any claim.
- Employees in claim management businesses and claimants should, at every step of the claim process, be required to sign declarations confirming their statements are the truth, the whole truth and nothing but the truth, and which remind them of the ethical, social and criminal consequences of failing to comply with those requirements.
- Review whether compensation payments for whiplash injuries in cases where there is no independent evidence from scans or photographs etc should be payable at all.

— Review downwards the levels of compensation payments for whiplash injuries *perhaps in line with the Criminal Injuries Compensation Authority's tariffs*, especially in cases where there is no independent evidence from scans or photographs etc.

May 2013

Written evidence from the British Insurance Brokers' Association (BIBA) (WL 62)

BIBA are pleased that the Transport Select Committee are investigating whiplash.

We thought it would help the committee to see our formal response to two recent Government consultations which we feel are relevant to the Transport Select Committee investigation.

— MOJ consultation on reducing the number and costs of Whiplash Claims.

— MOJ consultation on Claim Management Regulation, Proposals for amendments to the conduct of authorised person's rules.

Our two key points we would like to make to the Transport Select Committee are:

Claims Management Companies—Insufficient Regulation

1. The regulation of claims management companies is woefully insufficient.

BIBA believe that much more appropriate rules, (similar to those of the Financial Services Authority regulations of insurance intermediaries) should apply CMC's.

CMCs have a far lighter system of regulation and supervision than insurance intermediaries do and considering the fact that 700 of them have seen their authorisation removed in the last five years demonstrates that their section needs far stronger rules and tighter supervision.

The FSA Rules below underpin the regulation of Insurance Intermediaries and we believe it is vital that they also apply to claims management companies:

The Principles

1	Integrity	A *firm* must conduct its business with integrity.
2	Skill, care and diligence	A *firm* must conduct its business with due skill, care and diligence.
3	Management and control	A *firm* must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4	Financial prudence	A *firm* must maintain adequate financial resources.
5	Market conduct	A *firm* must observe proper standards of market conduct.
6	Customers' interests	A *firm* must pay due regard to the interests of its customers and treat them fairly.
7	Communications with clients	A *firm* must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
8	Conflicts of interest	A *firm* must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9	Customers: relationships of trust	A *firm* must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10	Clients' assets	A *firm* must arrange adequate protection for clients' assets when it is responsible for them.
11	Relations with regulators	A *firm* must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.

Identifying the Genuine Whiplash Claims

2. We believe a panel of independent medical experts should be introduced in order to identify both true and fraudulent whiplash claims, we also believe improvements to medical—legal evidence should be developed. These measures should help reduce the £2 billion cost of whiplash which is paid by innocent policyholders. Full details are included in the attached.

SUMMARY

We think the select committee should focus on these two key issues.

Should you wish to discuss our key points in more detail or the consultation responses, I am more than happy to arrange a meeting with you.

May 2013

Written evidence from Road Safety GB (WL 63)

We the undersigned fully endorse the proposals outlined in Submission Number WL41 from Roger Carter that the Motor Insurance Bureau role should be expanded and data on all road accident claims be provided to it direct from insurers and made available to all Highway Authorities, Police, Emergency services and other appropriate bodies.

We believe that the provision of this data will enable:

- a significant reduction in road traffic collisions as Highway Authorities will know 100% of road accident claims as opposed to the current level of 7.9% and thus develop better informed and more focused specific improvements to road safety,
- a significant reduction in accident claims with savings to insurers, motorists and the economy,
- a significant enhancement to the cost effectiveness of road safety improvements and programmes,
- a reduction in spurious or fraudulent whiplash claims,
- a reduction in costs to emergency services,
- a reduction in loss to GDP,
- an enhanced ability to design in safety in highway design and layout, and
- an improved ability to identify and address those road user behaviours that contribute to collisions and casualties.

We also believe that a Pilot Trial would provide the evidence to prove this and to allow the benefits to be fully calculated and appreciated (see attached project/trial plan).

We have formed a working group to take this further, namely to develop the full detail of the data requirements and parameters, the operational requirements, consider legislative implications and requirements, and undertake a trial and evaluate the benefits. We request the Committee to support and endorse this approach and to recommend to Government that it support and take an active role with us in the development and implementation of this approach.

Officials from the Department for Transport and the Highways Agency were involved in the meeting and all discussions leading to the submission and fully support the process of Highways Authorities obtaining and using data on road traffic accidents to bring about road safety benefits.

Road Safety GB
ADEPT
Chief Fire Officers Association
Royal Borough of Windsor and Maidenhead
Berkshire Fire and Rescue Service

Trial to evaluate, validate and quantify the level of accident reduction and cost-savings to insurers, motorists, emergency services and the economy which can be achieved through obtaining 100% of road traffic collision data.

1. Obtain accident data from insurers to cover all road traffic accidents occurring within the Trial area over a period of one to five years (was this the right timescale for data to be valid? This should include the costs of each accident to insurer wherever possible).
2. Establish level of accidents, type, sites and costs. (Cross reference with Police data where available). Costs to include as far as possible:
   (a) Insurance claim cost to insurers.
   (b) Emergency services costs against personal injury accidents (police, fire & rescue, NHS). Seek data on emergency services costs of attendance at damage only accidents.
   (c) Cost to business and economy through delays/disruption/lost productivity etc.
   (d) Any other costs arising which should be considered.
3. Map sites and data to GIS to provide graphics/maps showing numbers and accident numbers and aggregate claims costs (further breakdown between injury and damage only). Any other types of data output which will help in understanding/illustrating/modeling for the trial etc.

4. Create a breakdown of types of site and causes; rank individual sites by:
   (a) Total costs of accidents, and
   (b) Number of accidents within each type of site grouping (injury/damage only),
   (c) And any other breakdown appropriate for statistical/analytical purposes.
5. Look for any data which might suggest that there were relationships between accidents and physical design/structure/speed limits/traffic volumes etc and if so investigate/evaluate further and how this might be used in modeling and design (designing in safety based on data).
6. Investigate and determine scope for remedial works with Cost Benefit Analysis [CBA]—considering ranges of options and costs and any innovative approaches which might be found.
7. Programme and budget for works determined and agreed; schedule and carry out works with monitoring commencing at each site as it was completed.
8. Sources of funding.
9. Monitor results—and assess from all perspectives eg:
   (a) Accident reduction and improved safety.
   (b) Insurance claims cost reduction potential.
   (c) Insurance costs reduction potential.
   (d) Emergency services costs reduction potential.
   (e) Loss to economy reduction potential.
   (f) Enhancement to traffic modeling software.
   (g) Enabling testing of highway design and layout against accident data.
10. Do these justify additional funding to Highway Authorities in future years and the potential sources for this (eg if loss to economy can be reduced and GDP enhanced is there a case to be made to the Treasury).
11. Any other evaluations which should be included.
12. Produce a full recommendation to Government on how to proceed to implement this system nationally. This would also need to consider the level of data and accuracy required from insurers and whether this would require legislation to achieve this.

June 2013

Written evidence from Jean McLennan (WL 64)

My husband had a minor accident when a car reversed into our stationary car in a supermarket car park about two years ago. Since then we have been plagued by phonecalls from claims management companies endeavouring to induce him to make a claim for injury saying that amounts which have ranged between £1,000 and £2,500 have been set aside for him. He has had no injury whatsoever and in spite of telling every caller that, they persist, some phoning more than once attempting, in my view, to induce a fraudulent claim. I am led to wonder to what extent the claims for whiplash have increased as a result of similar calls from these companies to other people.

Incidentally, I have already complained about the proliferation of these calls to the government department that regulates claims management companies, to our insurer, to the Information Commissioner and Telephone Preference Service as well as British Telecom. No one seems to be able to do anything to stop them.

Even so long after the incident, we have had several calls recently in one week. Our telephone number is ex directory. The callers know all about the where, when and who of the accident. How did they get that information?

We have not kept a note of the number of calls but it must be in excess of 50 by now.

How many people being bombarded in this way will "cave in" simply for peace or be tempted by the easy money.

It is insidious that the practice above is increasing motor insurance premia.

I am an honorary sheriff in Scotland and have been considering discussing what is happening to our local Procurator Fiscal with a suggestion that the Crown Office in Scotland consider a test case against one of these companies for attempting to induce fraud. I may yet do that.

June 2013

Written evidence from the Association of Regulated Claims Management Companies (ARC) (WL 65)

Yet again, the legitimate CMCs that make up the vast majority of the industry are completely ignored whilst the few bad apples using cold calling centres (amongst other unscrupulous methods) are being used to represent the whole industry.

What is never mentioned is the fact that the vast majority of CMCs provide access to justice for those in impoverished and often ethnic communities by having shop fronts on the high street. These people do not have access to the solicitors they need, often facing a language barrier as well as a logistical barrier due to the fact that there are no law firms with a presence on the streets in their area and the advertising used by those law firms simply does not reach them. These people are entitled to claim, and should not face any barriers in their path to justice; whether it be for PI or financial mis-selling. Law firms have singularly failed to deal with reaching these clients properly, and so CMCs have provided the conduit.

CMCs also provide assistance to claimants to ensure their case is run properly and efficiently. They know (unlike the claimant) exactly how the claim should be run, and will chase up the solicitors and keep the claimant advised appropriately, which is another thing law firms can be guilty of not doing well enough.

Of course we have all come across the cowboys in the industry when receiving unsolicited text messages and calls, and of course something should be done to bring a stop to the few companies that operate like this. But the answer is not to swipe with a broad brush and close down all CMCs, regardless of whether they are legitimate or not.

In addition, this is not to even mention the increase in unemployment this would cause. By closing the legitimate CMCs, more good, honest workers will be unemployed; both CMC employees and solicitors working in- house, furthermore many small to medium sized law firms will lose their main source of work, as despite the referral fee ban, many relationships have continued working within the rules set under LASPO.

By closing all CMCs (and as a knock-on many small PI solicitors) the market will fall into the hands of a minority group of large ABS style firms, running in cahoots with the insurers. This ultimately means less choice for the claimant, less competition in the market, and yet somehow we doubt it will mean less costly motor insurance premiums for the population of Britain. Perhaps Des Hudson as CEO of the Law Society should consider what he wishes for, as if he gets it the position of many of his Society's own members may well be dramatically worsened.

June 2013

Written evidence from Charles Kinniburgh (WL 66)

Could the insurance industry not offer cheaper car insurance that excludes a claim for whiplash ?

On the grounds that significant whiplash injury is much rarer than the present claim rate suggests, I would choose this option provided the reduction in premium fairly reflects the lower costs for the insurer.

If this were offered and the uptake was good, it might well reduce the level of whiplash claims.

So the question is why doesn't the insurance industry offer this option? Maybe the insurance industry actually likes whiplash claims so they can charge higher premiums.

June 2013

Written evidence from Terry Wiseman (WL 67)

1. Last year I was contacted on no less than 11 occasions by companies telling me 'you have recently had an accident have you made a.....'? I had had no such accident and, to me, this was a clear inducement to commit fraud. They told me I'd had an accident!!!! There can be no defence of this practice—it has to be banned.

2. Last year my daughter was involved in an insignificant 'supermarket shunt' accident for which she was not to blame. She had witnesses—but she found, at policy renewal time, that a claim had been not only been brought against her for damage and 'whiplash', it had been paid out without any reference to or consultation with her, and a consequent effect on the cost of her policy . Her subsequent protests were completely trashed and dismissed. I had always believed that before any just settlement could be reached in any dispute, transport or otherwise, the views of both parties had to be heard. After this scandalous skullduggery, she changed insurance companies. Surely this has to be classed at best as insurance company negligence, at worst, insurance company condoned fraud?

June 2013

Written evidence from John Waugh (WL 68)

I watched your committee interviewing insurers and medical experts on Television to-day. No doubt the issue of high motor insurance premiums is one which Parliament regards as of such significance that, if possible, steps could be taken to legislate in a way which might help reduce premiums by tackling the problem of illegitimate or exaggerated claims yet I can not see how to achieve this without infringing an individual's right to engage legal assistance to obtain compensation. To set eg mandatory scales of compensation for any type of injury invalidates the common law entitlement to be indemnified appropriately taking account of circumstances other than the severity of an injury—eg psychological impact, individual differences of commitments, earnings and ability to continue with previous physical types of activity. Such features are those which are currently assessed and examined by solicitors and taken into account in reaching a settlement. Whilst it is generally accepted that amounts earned by solicitors and other intermediaries are excessive (sometimes more than the settlement figure) you can not remove lawyers from the claims process unless the Department of Transport sets up a division with legal staff to advise and represent injured parties who would then not be allowed, by a legislative measure, to engage a private solicitor or representative for car injury claims. The public are very much in the dark regarding the structure of motor insurance premiums.

Traditionally a high percentage related to vehicle damage cover and something like one third of a premium for Comprehensive policy was charged for Third Party cover. To-day Third Party cover represents the most substantial part of the premium and it has, of course, resulted from what is called the "compensation culture" of which "whiplash "claims are proving costly..That should not mean limits on compensation should be introduced with government approval. It is really the problem for insurers and one which is amplified by the greed of private legal professionals.. The insurers know this and, typically -like the bankers- are seeking your help to reduce their liabilities -not to help the public but to enhance profits. There are thirty odd million motorists paying high premiums on which insurers make substantial investment profits (as confirmed by an actuary you spoke to) and obtain supplementary income from private solicitors. Their paying out "more than £1 for each £1 of premium" may be true but does not reflect profits taking account of supplementary earnings.

As a former insurance underwriter and claims executive I, long ago, took the view that R.T.A. compulsory third party injury insurance should be incorporated with Road Tax at uniform rates related to the c.c. of a vehicle, and claims dealt with through the Department of Transport as described above. In fact I suggested this to Harold Wilson when he was in office and he replied that it sounded worth looking into. It seems he didn't. Now might be the time?

June 2013

Reducing the Number and Costs of Whiplash Claims

RESPONSE FROM THE ASSOCIATION OF BRITISH INSURERS

THE ABI

The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute over 90% of the insurance market in the UK and 20% across the EU. Employing more than 300,000 people in the UK alone, it is an important contributor to the UK economy and manages investments of £1.8 trillion, over 26% of the UK's total net worth.

The ABI has an interest in the UK's civil justice system from a number of different perspectives. We recognise the importance of promoting access to justice, but providing compensation to claimants has become far too expensive. The ABI supports the Ministry of Justice's commitment to reform and to reducing the number and costs of whiplash claims.

Executive Summary

- The ABI warmly welcomes the opportunity to respond to the Ministry of Justice's Consultation Paper (CP17/2012) "*Reducing the Number and Cost of Whiplash Claims*". The work that the Ministry is leading, to improve the RTA personal injury claims process, is an important component of the Government's wider programme of reform to improve the civil litigation system for the benefit of consumers, which the ABI continues to support.
- The ABI supports the Ministry's approach to tackling the whiplash epidemic. In our response to the consultation we have identified the key issues and have looked to set out a broad direction of travel. We have set out the industry's views on solutions to a number of the issues but recognise that there will still be detailed work to be undertaken. We are happy to work with the government and wider stakeholders to help take forward the detailed work that is required.

— The ABI supports the Ministry's proposals to improve the quality of medical evidence used for low-value personal injury claims resulting from a road traffic accident. Despite the well-known difficulties, it is also important to improve the diagnosis of whiplash by seeking to develop objective assessment criteria. In addition, further work needs to be done to train medical experts on the bio-mechanics of a whiplash injury so that they can comment on the likelihood of a claimant experiencing symptoms at the level reported: based not only on the claimant's self-reported symptoms; but also on non-medical information in relation to the collision that has allegedly caused the injury.

— The ABI supports a national call-off contract but considers that this option should include a requirement for accreditation of medical experts. We propose the establishment of a Board whose responsibility it would be to accredit those medical experts providing medical evidence in support of a personal injury claim arising from an RTA. Accreditation would need to be underpinned by a set of standards that all stakeholders should agree as representing what a competent doctor should consider when assessing a whiplash claimant and should be an on-going process that requires regular updating to ensure medical experts understand and remain familiar with the latest clinical best practice.

— The ABI agrees that the Small Claims Track (SCT) threshold should be raised to at least £5,000 for all road traffic personal injury claims. This should be done as part of a wider package of reforms. We believe that the Ministry, in consultation with the wider Government and other stakeholders, should work towards implementing the much needed changes to the RTA personal injury system as soon as possible but no later than 31 March 2014.

— Predictable damages should be introduced. They provide certainty and clarity for both claimants and compensators and will ensure that any offer of damages made by a compensator is fair, reasonable and transparent. If a satisfactory resolution of a claim cannot be achieved, the small claims court provides an appropriate arena for self-represented claimants to bring claims to a resolution at a proportionate cost. Where liability disputes remain unresolved the SCT mediation process should be promoted as a simple and effective way for self-represented claimants and insurers to resolve the issue.

— The ABI considers that the RTA Portal and underlying protocols could be adapted to provide a simple and effective method by which self-represented claimants could file claims without the need for legal representation. The information provided by the claimant should be sent directly to the relevant medical expert, via the portal, together with disclosure of documents relating to vehicle damage and comments from the defendant. The medical expert should then be able to process the medical report through the portal, in order that it is equally available to all parties. We also consider that the RTA Portal could be adapted to assist compensators in conducting initial anti-fraud and money-laundering checks, which currently should be completed by claimant lawyers.

— There should be no incentives to a claimant filing a fraudulent or exaggerated RTA personal injury claim. Any finding by the Court of fraud or exaggeration on the part of the claimant should automatically mean that the entirety of their claim is struck out in addition to the claimant losing any qualified one-way costs protection that may apply.

Part One—The Issue

1. The ABI fully supported Lord Justice Jackson's review of the cost of civil litigation and the Government's decision to enact a number of the recommendations of this report in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). We believe that LASPO will help bring greater cost proportionality into the civil litigation system by reforming "no win, no fee" funding arrangements and banning referral fees.

2. The ABI has always maintained, that LASPO, of itself, when taken with the 10% uplift in general damages and the introduction of qualified one way costs shifting will not bring significant cost savings to the motor insurance industry and tackling whiplash claims is the key to significant reductions in the costs facing the industry, a message the industry delivered to Government at the Prime Ministerial insurance summit in February 2012. What LASPO should deliver however, is a behavioural change amongst claimants, such that there are fewer incentives for claimants to bring the frivolous and exaggerated claims that have been seen with increasing frequency in recent years. This behavioural change, coupled with the anticipated vertical and horizontal extensions of the RTA protocol to be implemented by the end of July 2013 and the reduction in fixed recoverable costs to be implemented in April 2013, is expected to remove some of the unnecessary costs from the system that can be passed on to the premium paying public through lower motor insurance premiums.

3. The Ministry of Justice notes in its consultation paper that there has been a sharp rise in the number of whiplash claims in recent years. There are two main factors behind this rise. The first is the dysfunctional compensation system which has led to a growing compensation culture in the UK. Aggressive marketing by Claims Management Companies (CMCs) and the referral fees paid by claimant solicitors for the contact details of those involved in motor accidents, have led to a steep rise in the number of personal injury claims in general, and whiplash claims specifically, in recent years. The most recent figures published by the Compensation Recovery Unit (CRU) demonstrate that some 828,489 RTA personal injury claims were reported in the year

2011–12 up 60% since 2006–07[61] and this is at a time when the number of reported RTAs is falling, down 20% in the period 2006—10.[62]

4. The second factor, which has contributed to the first, is the lack of an objective test for "minor" whiplash injuries. Whiplash is like a headache or backache: it is self-reported with no physical evidence of injury. Insurers cannot prove someone does not have a whiplash injury any more than a claimant can "prove" that they do. The term "whiplash" is itself problematic. A soft tissue neck sprain which occurs in a car accident is clinically indistinguishable from other sources of neck pain. As such, some people with existing neck complaints are diagnosed with a whiplash injury. This means that whiplash claims can be paid out by insurers on no more objective evidence than the word of a claimant that they suffered an injury in a car accident. The same concerns are also applicable to psychological injury suffered as a result of minor road traffic accidents, which insurers have reported are on the increase.

5. In order to address the increasing cost and frequency of RTA personal injury claims, the Government committed to work with stakeholders to identify ways to tackle the problem. As part of this, the Government announced its intention to consult on increasing the SCT limit from £1,000 to £5,000 and introducing independent medical evidence for RTA claims.

6. In its consultation, the Government identifies four key areas it intends to focus on to address the whiplash epidemic which the ABI supports:

- improving diagnosis;
- developing standards for diagnosis;
- challenging questionable claims; and
- tackling the perception that exaggerated claims are acceptable.

7. These four key areas, combined with the behavioural changes expected to result from the implementation of LASPO and the anticipated reduction in fixed recoverable costs in the RTA Portal, should go some way to help contain the whiplash epidemic.

8. In their study[63] of the phenomenon of chronic whiplash, Schrader et al concluded that whiplash injuries, and particularly "late (chronic) whiplash", are rare in countries where: 1) there is no auto insurance; 2) personal injury lawyers do not practice; and 3) whiplash injuries are nearly non-existent without the medico-legal incentives inherent in developed countries. These findings were further supported by research[64] by Ferrari, who noted that in Greece "chronic whiplash syndrome" is also rare.

9. The conclusion is that the differences in the number of whiplash claims across jurisdictions noted by Schrader et al and Ferrari (which are in themselves the subject of academic debate) are not a result of physiological differences. It would also seem reasonable to assume that the general car pool in England and Wales has higher safety standards than the general car pool in Lithuania. If those assumptions are correct then the prevalence of chronic whiplash in England and Wales must result from some other underlying factor. That factor is the medico-legal incentives that operate in the system and this merits further consideration beyond the scope of this consultation exercise.

10. A public policy debate is required as to whether the greater good for society is achieved by the many paying increased premiums in order that a few can receive high levels of compensation for minor RTA injuries. It is important for the public to have their say on whether: 1) they support a medico-legal system with high compensation awards for personal injury claims, with the consequent impact on insurance premiums; or 2) they support lower compensation awards for personal injury claims with subsequent reductions in premiums. Ultimately, insurers will price their policies based on the compensation framework in place and, in our view, a greater understanding is needed of the trade-offs involved in such a debate. The ABI considers that this consultation outlines steps that are in the right direction of travel in containing the whiplash epidemic. However, they are very much the first rungs on the ladder when it comes to tackling the ingrained culture of financial compensation for minor injury. The ABI has set out in our response to Part Four of the consultation other potential options which the Government may wish to consider to help address the whiplash epidemic in the UK.

Part Two—Better Medical Evidence

Introduction

11. The ABI supports the focus on improving the current medical evidence in RTA personal injury claims. The ABI considers that there are many aspects of the current medico-legal reporting process that could be improved to ensure the medical evidence for both physical and psychological injury in RTA claims is more robust, accurate and cost-effective.

12. At present too many medical reports give a subjective history of the claimant's symptoms which will often have resolved prior to medical examination of the claimant. Furthermore, there is no objective analysis

[61] http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/
[62] http://www.official-documents.gov.uk/document/cm84/8425/8425.pdf
[63] "Natural Evolution of Late Whiplash Syndrome Outside of the Medico-Legal Context" Schrader et al
[64] "Whiplash is a social disorder—How So!", British Columbia Medical Journal, Robert Ferrari

of whether such an injury was sustained, or was likely to have been sustained, in the circumstances of the RTA. This is particularly the case for "minor" whiplash claims, which on an increasingly frequent basis now also incorporate claims for psychological injury.

13. It is important not to lose sight of the need for improved techniques to assess and measure the level of whiplash injury sustained. Further research and training on objective indicators is vital in challenging the whiplash epidemic and objective indicators need to be factored in to the medical reporting process. We address this issue further in Part Four of our response below.

14. Unless there is real progress in the diagnosis and treatment of whiplash and other subjectively reported claims, the benefits of the Ministry's proposed reforms to the system for obtaining medical evidence and raising the SCT threshold, will be diluted by a failure to address the underlying issues. We note that the Government is working to deliver better guidance on whiplash injury and its diagnosis. The insurance industry has produced guidance on whiplash in the past, funding "The Whiplash Book" which was launched in 2003 (*annex A*). The booklet was targeted at those with whiplash, as well as medical professionals in emergency rooms and GPs. It contained information about the best way to treat whiplash. The ABI fully supports producing better guidance and we would welcome the opportunity to work with the Government, the medical profession and other stakeholders in taking such objectives forward.

15. As part of the consideration of diagnosis and treatment, further thought needs to be given to the timing of medical reporting. If a report is obtained within days of the accident then it is difficult to assess how the symptoms will progress. If it is too late and symptoms are fully resolved then the expert can, at present, do little more than report the history as provided by the claimant, which adds no value to the process at all. As noted above, the majority of these claims are for acute whiplash injury and, according to APIL,[65] only one in five whiplash claims continue for over a year. This means that the timing of claim notification is of significant importance. Consideration should be given to incentivising the early notification of claims and we have addressed this in more detail in Part 4 of our response below.

The Problem

16. The ABI considers that there are two main problems with the current medico-legal reporting system: the lack of independence of those producing the medical reports and the quality of the reports being produced.

Lack of independence

17. The current system does not allow for sufficient independence or transparency in the way in which medical reports are obtained, which leads to concerns over the reports that are produced.

18. A number of claimant solicitor firms have strong financial links to the medical reporting organisations (MROs) that they instruct and the MROs exist to make a profit out of providing medical evidence. The ABI is aware of a number of personal injury solicitors firms who have now set up their own MRO which they will use exclusively in order to obtain medical evidence. Partners in the firm of solicitors are often the directors of the MRO as well. In addition, a number of Claims Management Companies (CMCs) have now purchased MROs. These financial links erode independence even further.

19. Given the lack of transparency in the arrangements between the MROs and their panel of experts, including price structure, there has been a growing concern over the lack of independence in medical reporting and ultimately in the reports themselves.

20. Insurers have reported several instances which have given rise to concern over MRO practices. Several insurers have highlighted reports of doctors carrying out in excess of 2,000 medico-legal reports a year in addition to running their own GP practice. We have also been advised that claimants are often triaged over the phone before their consultation and many have limited time, just a few minutes, with the medical expert prior to that expert giving their diagnosis and providing a prognosis period. The ABI considers that in those situations the medical expert does not have sufficient time to fully consider the nature of the accident, the history of the injury, the claimant's medical history and the likelihood of whether the accident could have actually caused the claimed injury.

Quality of medical reports

21. Many medico-legal reports simply report the claimant's history of symptoms which have resolved by the time of the consultation. This adds little, if anything, to the claimant's report of the accident and, in circumstances where the claimant says that they are fully recovered, the medical report offers little value.

[65] http://files.apil.org.uk/campaigns/the-whiplash-report-2012.pdf

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

Question 2: *If not, how would you address the problems listed at paras. 35–39 above?*

Question 3: *Which model should be used for the independent medical panels—accreditation, national call-off contract or some other variant?*

MoJ proposals

22. The lack of an objective test for soft tissue and psychological injuries, particularly whiplash, will impact on the effectiveness of any new system that is introduced. However, of the proposals currently being consulted on, the ABI would support the introduction of a national call-off contract, linked to appropriate accreditation.

23. The ABI envisages that a national call-off contract would be set up and managed by a board, on which representatives of interested stakeholders could be asked to sit. This could potentially include: Government; judiciary; RTA claimant interest groups; compensators; and medical experts. It would be for the Government to decide exactly what functions the board would have. However, we envisage that their primary function would be to establish a panel of medical experts. The board/panel could function along the following lines:

- The board would ensure that the panel is constituted so that there are medical experts available to all claimants whatever their location;
- Accredited experts could apply to be listed on the panel for specific geographical areas. MROs could apply, but all individual doctors, rather than the MRO itself, should be accredited;
- The panel would be sent standardised joint instructions together with an upfront payment of a fixed fee;
- Having received the instructions the panel would place the claimant with a local accredited medical expert who could provide an appointment within a specified time frame, so there would need to be some diary management function (we understand that there are software solutions available that can facilitate this—see below);
- The panel/expert (depending on set up) would then write to the claimant to provide details of the appointment; and
- The panel and board should be self-funding but not profit making so those doctors that wish to become accredited would pay for becoming so. Each will need to make a commercial decision as to whether this is line of work that they wish to pursue.

24. The board would work to create a system for accreditation of experts (see below). They should also oversee the creation of standardised instructions, reports and a system of peer review.

25. In summary the board's functions would be as follows:

- The board would agree an approved accreditation process for experts that wish to be signed on to the panel;
- They would work with all stakeholders to prepare a standard format report;
- They would work with all stakeholders to prepare standard format instructions—which would include disclosure of the relevant documentation from both sides; and
- They would work to set up a system of audit by peer review as part of any accreditation/re-accreditation process.

26. Whatever new system is introduced, there are a number of features which will be critical to ensure its effectiveness. These features are:

- A structured and compulsory accreditation process.
- Improved training for medico-legal experts.
- Standardised medical reports.
- Standardised instructions.
- An element of peer review.
- Guidelines for GPs and hospital staff for treatment and advice for those presenting with minor whiplash injuries following an RTA.

Accreditation

27. The ABI considers that accreditation should be obtained by an expert before they can be signed on to the national call-off contract. It would be for the Board to determine precisely what an accreditation process should encapsulate. However, we consider that accreditation should be an on-going process that needs to be updated regularly, for example every three years.

28. The accreditation should involve an element of continuous professional development which would ensure that the expert is up to date on latest developments in whiplash injury and include an element on an expert's

duty being to the court, as detailed in CPR Part 35. It should also include updated training on biomechanics, such that an expert is in a position to comment on whether the accident *could* have led to the level of injury complained of by a claimant rather than the medical expert merely reporting the self-expressed symptoms of a claimant.

Improved training for Medico-Legal Experts

29. Much of the problem with current medico-legal reporting arises from the fact that the medical professional carrying out the assessments bases their diagnosis solely on the claimant's description of events. If medical experts were asked to consider the medical history of the individual claimant and the circumstances of the accident, they would be in a better informed position to comment on the claimant's symptoms. An important element of a doctor's training would be an improved understanding of biomechanical forces, which could be a real benefit in assessing whether an injury was sustained, its nature and extent.

30. Linked to this may be a need for training in open questioning, so that the medical expert is better able to determine the veracity of the history provided. When chronic whiplash is reported then the medical expert should be able to demonstrate that they have validated the responses that the claimant has provided.

31. There should be a greater emphasis on training those preparing medico-legal reports on their duty being to the Court and not to the instructing party and the need for independence in their reporting. This should also be part of the accreditation process.

Standardised Medical Reports

32. An important aspect of any reformed medical evidence system will be a standardised medical report in an electronic format. The ABI strongly supports a standard report format being introduced for RTA medical reports. Work should be carried out with representatives from compensators and claimant interest groups, together with medical experts, such that a standard report incorporates all the information required by stakeholders to assess the extent and value of the personal injury.

33. Where a diagnosis of chronic whiplash is made there should be a requirement that the expert reviews the claimant's medical records in order to better understand whether there are underlying causes that have led to the on-going symptoms and to support the diagnosis.

34. The MoJ consultation document states "where a doctor performing the assessment was in significant doubt over the presence or absence of a whiplash injury or over the likelihood of significant lasting damage, they would be invited to express the degree of uncertainty". The ABI strongly supports this approach and believes that the standard medical report should be amended to help facilitate this.

35. Historically, there has been a move away from using the claimant's medical records during an examination, as this is not cost effective. However, while the ABI is not advocating the use of medical records in every case, the cost implication has reduced due to the increasing move to electronic storage of medical records. Furthermore, in the past the standard fee for producing the medical records has not been reflective of the administrative costs involved. Given the importance of accessing these records, the ABI believes that the fee should be reviewed by the NHS.

Standardised Instructions

36. Another key aspect of any reformed system should be a standardised approach to instructions. A standard form instruction must be drafted in collaboration with medical experts to ensure they are provided with all relevant information about the accident, so that they can comment on the likelihood of a particular claimant receiving an injury of the severity reported given the nature/mechanics of the accident in which they have been involved. Claimants should also be required to disclose any previous personal injury claims they have made so the medical expert is aware of the claimant's full medico-legal history.

37. It is also vital that a medical expert should have sight of documents pertaining to the damage to the vehicle, including images of the damage incurred and any relevant descriptions of the accident circumstances from the claimant (and the defendant where liability or causation is disputed). Without these documents the expert will be unable to comment on the likelihood of the claimed injury being sustained.

Joint Reports

38. In order that all of the relevant information is provided to the medical expert, at the outset the instructions should be joint instructions and the report should be available equally to claimants, insurers, and (for contested claims) the courts at the time that it is produced. If a claimant does not agree with the prognosis provided, they should have the opportunity to obtain further evidence at their own cost. However, the ABI considers that simultaneous disclosure would be a further step towards more independence in medical reporting.

Question 4: *Do you consider that an element of peer review should be built in to every assessment, or only for a sample of assessments for audit purposes?*

Peer Review

39. The ABI consider that an element of peer review as part of the accreditation process would be essential to ensure that standards are consistently high and to give increased confidence in the system. However desirable peer review in each case may be, the cost and delay created by this would be prohibitive in low value claims. Peer review (probably as part of an audit process) would also play a part in establishing whether experts are producing an unfeasibly high number of reports, such that it becomes clear that sufficient time has not been allocated to individual claimants.

Developing technology

40. MROs have historically been of benefit to the claims process, in providing administrative support to ensure that medical evidence can be sourced in an efficient manner, as well moving away from unnecessarily expensive orthopaedic reports, for low level injuries, to GP reports.

41. However, depending on the nature of reforms that are ultimately introduced, technological developments mean that the need for the administrative role played by the MROs will be reduced in the long term. Integrated software programmes exist that would enable direct instruction of a medical expert or through the Board (see above). If this approach were to be adopted, it could work along similar lines to that suggested in paragraphs 23–25. There is more than one software provider in the market that provides similar solutions and, subject to the providers being approved by the Board, would be able to compete to provide software solutions direct to experts.

Reporting as standard for all RTA Claims

42. Insurers do not consider that it is feasible to limit reforms in obtaining medical evidence to whiplash claims. It is the job of the medical expert to diagnose a whiplash injury and therefore if a different system is put in place for a specific category of injury then the claimant/defendant will have to pre-judge the diagnosis prior to instructing the expert.

43. The ABI considers that a medical panel could be used for all RTA personal injury medical reporting. This would create a far simpler system whereby all stakeholders know exactly how the medical report will be obtained, determined solely by the nature of the accident rather than the nature of the injury.

44. The ABI believes that this reformed system would be suitable for all RTA personal injury claims up to a value of £25,000 (the limit of the proposed extension to the RTA portal due to come into effect July 2012). Above this value, injuries can often be complex and, as such, a simple and straight forward medical reporting process as currently being consider may not be appropriate to ensure the needs of claimants with higher value injuries are met.

Question 5: *How should costs be dealt with and apportioned?*

Medical reports

45. In any new system, insurers should meet the cost of the medical report fee. The fee should be sent with the instructions to the expert/panel. This means that in making payment at the time of instruction any element of late payment charge is stripped out of the cost. The appropriate fee should be standardised and set by the Board. The fee should reflect the actual cost of obtaining the medical records and producing the medical evidence, and should recognise that referral fees will no longer be paid for medico-legal work. Furthermore, to ensure cost certainty and transparency, the fixed fee should be provided for in the Civil Procedure Rules.

46. The ABI considers that where a claimant is found to have been fundamentally dishonest, an insurer should have the option to recoup any fees that have been paid in respect of any medical report.

Board and panel

47. The board and panel should be self-funding but not profit making. Although the cost of this new system is still to be determined, the ABI envisages that it would be funded in part by the medical report fee, an element of which would reflect the costs of the administration involved. It is anticipated that this cost will be offset by a reduction in the administration requirements in producing medical reports as the current role played by MROs will be potentially reduced. In addition, funds would be raised by experts paying for accreditation.

Part Three—Increasing the Small Claims Track Threshold

Question 6: *Should the small claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

48. The SCT provides a legal process for resolving straightforward disputes, which is cost effective, accessible and efficient. Most importantly it achieves high levels of consumer satisfaction and comparable outcomes for legally represented and self-represented claimants.

49. Costs for dealing with simple low value personal injury claims have escalated out of all proportion with the issues that are involved in settling such claims. ABI statistics indicate that the average legal cost where general damages settled for between £1,000 and £1,500 is £1,617 in a sample of 85,364 cases. The average across cases where damages settled between £1,000 and £5,000 is £2,140. Although the aforementioned average figures will reduce following the reduction of fixed costs in the RTA personal injury scheme, legal costs both in and outside the Portal will remain disproportionate to the value of the claim and given that the impact on frequency will be minor, the overall legal cost will remain high.

50. *Which?*[66] carried out research into resolving disputes. In their survey of 1,000 claimants using the small claims court, they found that the main reasons for claimants using the small claims court were: for 22% because it would be quick; for 19% because it would be cheap; and for 30% because it would avoid having to use a solicitor. They also reported a high level of consumer satisfaction with 85% of claimants saying that they would use the small claims court again.[67]

51. Which? has said "the small claims court is a quick, easy and fairly cheap way for consumers to get redress. We think the £1,000 limit for personal injury claims is probably set too low. While you are clearly going to feel differently making a claim for personal injury than for a general consumer issue, we believe the small claims track is sufficiently consumer-friendly for this limit to rise without any detrimental impact on consumers"[68]

52. In 1991 the SCT was extended to cover claims for pain, suffering and loss of amenity (PSLA) with a value under £1,000 for RTA personal injury claims. In 1991 around 50% of personal injury claims would have been valued within the SCT threshold. By 2005 that had decreased to approximately 15% and by 2012, this number had fallen to approximately 9%.

53. The SCT limit has not been revised since 1991. In the 22 year period since 1991, in addition to general inflation, there has been a substantial rise in the number of low-value, uncomplicated whiplash claims. However, in the same period, as a result of claims inflation, even the most minor whiplash injuries have fallen out of the SCT threshold and are now dealt with in the fast track. Professor Paul Fenn's report "Evaluating the low value Road Traffic Accident process"[69] July 2012, indicates that the vast majority of the claims within that process settle for damages of around £2,000 (range of mean settlement £1,792.48—£2,099.80), this accords closely with data that the ABI have obtained on the level of general damages. The ABI considers that the SCT is the most appropriate forum to deal with these claims efficiently and in a consumer friendly environment.

54. Factoring in a near 10% increase in general damages following the latest Judicial College Guidelines and a further 10% increase in general damages to be introduced from April 2013 following the Court of Appeal's guidance in *Simmons v Castle,* these cases would probably have shown a range of mean settlement of £2,168.90—£2,540.75. Given this, it is vitally important that the SCT limit is not raised to a limit which would incentivise wide spread claims creep.

55. It is clear that very few, if any, claims following an RTA would fall to be dealt with under the current SCT procedure in the event of a dispute between the parties, unless the threshold is raised substantially. The vast majority of these claims are very simple and do not involve any complicated loss of earnings or other special damage claims, or any legal issues.

Raising the Small Claims Track Threshold for all RTA claims

56. As detailed above in our response to Part Two, there are concerns as to whether a claimant should be asked to self-diagnose whether they have a whiplash injury or otherwise. If different processes apply based on whether a claimant has a whiplash injury or is found to have some other injury, for example a soft-tissue injury of the shoulder, will undoubtedly cause confusion.

57. A far simpler system would be created if *all* personal injury claims arising from RTAs were treated in the same way. There is no logic in having one system for a neck sprain just because it is defined as a "whiplash injury" and a separate system for a back sprain arising from the same accident circumstances.

58. The ABI supports increasing the SCT threshold to £5,000 for all personal injury claims arising from an RTA. However, the ABI consider that the threshold should be index linked to inflation in order that all claims that are intended to be captured by the increased threshold, remain within the SCT threshold going forward.

66 *Which?* "The Consumer Perspective of Resolving Disputes through the Law"
67 *Which?* "The Consumer Perspective of Resolving Disputes through the Law"
68 *Which?* "The Right to Redress: Reforming the Personal Injury Compensation System"
69 http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/evaluating-traffic-accident-process.pdf

59. If there were a two tier system based on the nature of the injury sustained, there is a high likelihood that "gaming" of the system would take place in that reporting of symptoms would be manipulated in such a way that the reporting of whiplash claims diminishes but the reporting of other injuries rise in order to exclude the claim from any new system. On the basis that these are all minor injuries arising from an uncomplicated set of facts, there seems no logical reason for differentiating as to the appropriate route to follow in order to obtain compensation. It would also fail to address the increasing frequency of claims for psychological injury arising from an RTA.

Potential issues with increasing the small claims track

60. In their consultation, the Ministry of Justice identify three potential concerns with increasing the Small Claims Track:

— A reduction in access to justice.
— An "inequality of arms".
— Under settlement of claims.

We address each of these concerns below:

A reduction in access to justice

61. The ABI does not consider that increasing the SCT threshold would hamper access to justice. As the consultation paper highlights, the SCT is a user-friendly and simple route for settling straightforward low-value claims. The ABI recognises that there will be a need to work to assist self-represented claimants in understanding their rights under the new system and provide information on how they can file a claim. The ABI would welcome the opportunity to work with the Government, the Courts and other stakeholders in taking this forward. The ABI has already produced a third party assistance guide[70] which explains how the defendant's insurer or appointed claims handler can assist a self-represented claimant, and what a claimant's rights are when dealing with the at-fault insurer. The ABI is currently reviewing and updating the guide and we are happy to work with government to help raise awareness to a wider audience.

An "inequality of arms"

62. The ABI recognises that there is the potential for an apparent inequality of arms between the defendant and the claimant in an environment where claimants are self-represented. This is why the ABI has developed the *ABI code of practice for third party assistance*. The code sets out how insurers should engage with self-represented claimants to ensure that they are treated fairly.[71] Furthermore, the FSA's Principles for Business and, where relevant, the claim handling rules in Chapter 8 of the FSA's Insurance: Conduct of Business Sourcebook (ICOBS) provides guidance on interactions with self-represented claimants.

63. The small claims court is also familiar with situations where there is an apparent inequality of arms and is able to guide self-represented claimants through the court process.

Under settlement of a claim

64. The ABI understands the concern that claimants are not in a position to value the personal injury element of their claim. However, there is no evidence of under settlement of self-represented claimants' claims. Research carried out on behalf of the ABI found that there was little difference between the average compensation received by claimants with or without representation, while claims involving legal representation took substantially longer to settle. This is further supported by research[72] from one major car insurer which found that in cases where an injured party approached the insurer directly; the insurer paid at least as much in compensation as they did to claimants who used a solicitor.

65. The ABI believes that any potential concerns about under settlement of a claim would be addressed if Lord Justice Jackson's recommendations on predictable damages were to be implemented alongside an increase in the SCT. There is software available that allows damages to be accurately assessed. A transparent and independently controlled and regulated system of predictable damages should address the problem of self-represented claimants having to assess their own claim for general damages. We have addressed this issue further in part four of our response to the consultation.

66. If a predictable damages framework was introduced then there would be little or no difference between dealing with a personal injury claim and a non-personal injury claim. The small claims track threshold for non-personal injury claims is about to be raised to £10,000 and that will encompass many disputes, such as patents, of a significantly more complex nature than low-value RTA liability disputes. In addition to the concerns raised by the MoJ we are aware of concerns as to the speed of the reforms and a need for the current reforms to the RTA portal process to "bed in" before further reforms are pushed through. The ABI consider that there is no

[70] www.abi.org.uk/Information/Consumers/General/49113.pdf

[71] http://www.abi.org.uk/Information/Codes_and_Guidance_Notes/General_Insurance_Codes_and_Guidance_Notes.aspx

[72] http://www.aviva.com/data/report-library/Road_to_Reform_-_Reducing_motor_premiums_by_reforming_the_personal_injury_claims_process.pdf

need to delay this process. We set out below the reasons why we consider that the portal remains a viable tool and how SCT claims can be handled effectively. There is no need to "wait and see" as we already know how the RTA process is functioning for claims of this value as they have been dealt with under the current process for some time, albeit that minor changes to make it more streamlined are about to be introduced via the amended protocols.

Liability disputes

67. The vast majority of low value RTA personal injury claims, in a system in which the level of damages is predictable, could be resolved efficiently and quickly without the need for either recourse to the court or legal advice. At present the ABI estimates approximately 10% of RTA personal injury claims proceed to litigation due to a liability dispute. Where liability is disputed then the SCT provides a fast and efficient means of resolving such disputes.

68. Mediation is available in the small claims court and can be accessed via telephone. The ABI believes that mediation would in many instances help to resolve liability issues without matters ever coming before the court. Mediation services are also offered by independent third parties who could potentially play a role in settling liability disputes.

69. If mediation does not succeed, then a small claims court hearing is specifically designed to be accessible to self-represented claimants. District Judges are more than able to assist in levelling the playing field for such claimants should there be a need for a judicial determination. Indeed, as the consultation paper highlights, Her Majesty's Courts and Tribunals Services provide advice and support to self-represented litigants throughout the small claims process.

Fraud

70. The average settlement agreed under the RTA protocol process is approximately £2,000. When insurers are faced with a decision on whether to challenge a suspected fraudulent claim, the current cost risks involved and the value of the disputed claim mean the economics of challenging questionable claims is often disproportionate.

71. Raising the SCT threshold to £5,000 would mean that the economic factors that have weighed against challenging individual claims before would be substantially weakened and as such many more challenges of potentially fraudulent or exaggerated claims are likely to be pursued. Additionally, claimants may be less likely to pursue fraudulent and/or exaggerated claims when faced with the costs consequences of doing so, namely the removal of qualified one way costs protection where a claimant's conduct is found to have been fundamentally dishonest.

72. Under the current provisions in CPR Part 26, courts should take into account a number of factors when allocating claims to a track, one of which is the likely complexity of facts, law or evidence. As is the current position, allegations of exaggeration and fraud are likely to be considered to be too complex and trigger a transfer to multi-track. As such, there needs to be careful consideration of case management and how track allocation is approached. If the case is transferred to the multi-track due to challenges presented against the claim, this reduces the economic advantages of raising the SCT. However, a balance needs to be struck to ensure that the claim is allocated to the appropriate track and that the equilibrium is not tipped too far one way as opined by His Honour Judge Hawkesworth QC concerning fraudulent claims:—

> *"The cost to the insurance industry and to other honest policy holders must be very substantial. In addition…the cost in court time in trying such cases is very high, with the added knock-on effect of casting suspicion onto many genuine claims so that claimants are put to proof of their legitimate and genuine claims for compensation when in other circumstance they might not have been called upon to do so"*[73].

73. Challenging fraudulent claims is only one part of the solution. The other part is challenging the perception that it is acceptable to bring a fraudulent or exaggerated claim. This problem has been fuelled to a large degree by the constant unsolicited emails, texts and telephone calls that claims management companies (CMCs) generate in order to capture more claims.

74. If changes are made to the SCT without addressing the issue of claims capture by CMCs there will be no change to the frequency of fraudulent and exaggerated claims. Contingency fee arrangements will mean that CMCs remain incentivised to generate as many claims within the SCT arena as possible. The ABI sets out below a process by which insurers can deal with claims by self-represented claimants directly. This process must be formalised in order to reduce the incentives that drive the frequency of fraudulent claims.

Question 7: *Will there be an impact on the RTA protocol and could this be mitigated?*

75. If the SCT threshold is raised it will have a significant impact on the number of claims being processed through the current RTA Portal process if the protocol remains as it is (ie that SCT cases are excluded).

[73] Shah v Ul-Haq & Ors [2009] EWCA Civ 542

However, there is no practical reason why the simple process that is currently allowed for by the protocol could not be simplified yet further and extended to be used by self-represented claimants.

76. In order to ensure that claimants can access any portal system, further IT work would be required in order to enable portal access via a neutral website, such as the court service website or the government services and information website. The vast majority of claimants have access to internet and this would allow claims to be run quickly and conveniently and would also allow for simple step by step information to be provided at the outset as to the steps to be taken and when in the protocol.

77. The ABI is aware that there are claimants for whom access to the internet is not possible. It would therefore need to be a requirement that a telephone line is established that allows claimants to contact the at-fault insurer, who would themselves put the claim on to the portal and would then post out the Claim Notification Form (CNF) and other documents required together with a clear explanation of the steps that a claimant is required to take and when.

78. Questions have been raised as to how a claimant would trace the at fault driver's insurance details. However, they should be able to obtain such details from their own insurers, or further consideration would need to be given as to how MID data could be more widely accessed.

79. On that basis the ABI considers that the protocols and portal system could remain as important tools in any SCT claim with necessary but minimal adjustments made to the protocols themselves.

80. The ABI considers that there is little, if any need for claimant lawyers in this process. The availability of Damages Based Agreements may however perpetuate the process whereby claimants are actively sought out and offered claims advice by CMCs. Claimants may choose to offer part of their damages in payment to their lawyer, unaware that the claims process is straightforward. The prevalence of CMCs unnecessarily dealing with mis-sold PPI claims has led to a significant number of complaints to the Financial Ombudsman Service. Contingency fee arrangements will also allow for CMCs' continued presence in the market, which will only serve to drive claims frequency.

81. The ABI considers that if there is a simple process and predictable damages are put in place, insurers should be in a position to deal with the vast majority of claims presented quickly and efficiently with no need for a lawyer's involvement in the process. If the insurer is unable to settle the claimant's claim or if liability remains an issue, then the claimant should be provided, by the insurer, with sufficient information to take the claim forward via the small claims court. At that stage, they should be advised by the insurer that they can use a lawyer or other representative should they wish to do so. In addition, although the impact on the various changes to the civil litigation system on motor legal expenses insurance remain uncertain, many motorists now have this product which will cover the legal costs of pursuing a personal injury claim. The FSA will shortly being releasing a study on motor legal expenses insurance.

Part 4—Further Action

Questions 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

82. The proposals set out in the paper may have an impact on the frequency and cost of whiplash claims. However, given that the cost of whiplash currently represents just under a quarter of the average motor premium, the ABI believes that further action could be taken to ensure that the Government policy objective of managing costs and reducing motor premiums for honest motorists is met.

83. We set out at the end of this section some of the issues that we consider require further consideration if the culture of exaggerated or otherwise fraudulent claims is to be confronted. However, the points raised on predictable damages and objective medical reporting should be considered now, alongside the current consultation.

Predictable Damages

84. We have already referred to the need for predictable damages in our response to Part 3 of the consultation. Predictable damages are already used in many counties for valuing personal injury claims (for example Spain, Italy and France—see Lord Justice Jackson's Preliminary Report Ch. 27). This issue is not raised in the consultation paper. The ABI consider that predictable damages are a logical step in facilitating access to justice if the small claims track is to be increased as it adds a layer of transparency and certainty into the claims process. That would allow claimants to proceed with their own claim and negates concerns that claimants are unable to value their own claim for general damages.

85. In the ABI's submission to the Predictable Damages Working Party in June 2011 (*annex B*) we set out in detail our arguments in favour of predictable damages. It is clear from that paper, that certainly in low value claims, claimants are able to value their own claims without legal advice. That is also the evidence from Ireland's PIAB scheme, which seems to work particularly well in low value claims.

86. There is already software in use by many insurers as a valuation tool and around 90% of all claims settle within the range of valuation that the software provides. Significant work has already been carried out by the

Predictable Damages Working Party on this issue. Whilst the Working Party did not reach a final conclusion, the range of damages that they were considering was up to £10,000. Their work should be reconsidered on the basis of damages up to £5,000 as it is likely that greater consensus can be achieved.

87. There is an argument from claimant representatives that these tools lead to under-settlement for claimants. However, this is part of a wider argument that general damages are in any event too low and has been addressed by the increase in general damages following the Court of Appeal's judgment in *Simmons v Castle [2012].*

88. On the strength of that argument claimants have argued that any system of predictable damages should be based on Court awards. These awards represent a tiny fraction of settled cases, and in any event, the only source of these settlements is reported cases, which represent some 0.03% of settled cases annually. These reported cases will tend to be self-selecting as the ones where the damages awards are particularly high. In contrast, the software systems used by insurers builds in all settlements, including Court settlements, into their calculations and therefore represent a far more balanced valuation tool than Court awards alone would. The software is capable of providing infinite gradations based on the medical evidence such that the final valuation is tailored to the individual claimant's precise diagnosis and prognosis.

89. The other source commonly used in valuing claims is the Judicial College Guidelines (previously the JSB Guidelines), however for the reasons outlined in our submission, those guidelines have very little application in the valuation of minor injuries.

Objective medical reporting

90. There is a real issue with the lack of objective evidence in the diagnosis of soft-tissue and psychological injuries, particularly prevalent in whiplash claims, which is one of the core factors behind the rise in the number of minor bodily injury claims insurers have experienced in recent years.

91. There has been a substantial amount of research undertaken into the bio-mechanics of a whiplash injury. The ABI support the Government's stated intention of working to improve diagnosis and is happy to work with Government and other stakeholders on establishing objective criteria against which the severity of a whiplash injury can be measured. We believe this will be critical to tackling the whiplash epidemic effectively in the long term.

92. As detailed above, there are steps that can be taken now to improve what happens in the examination room when a claimant visits a medical professional to undertake a medico-legal examination and to improve a medical experts' ability to comment on the likely severity of the injury actually sustained.

93. Once an injury proceeds beyond the acute phase there needs to be real validation of the responses provided by the claimant and training should be provided in order for the medical expert to do this.

94. The validation can come from two main sources: The first is training around the bio-mechanics of a whiplash injury, and disclosure of documents demonstrating the level of damage to the vehicle. This should enable the expert to understand the extent of the impact and the likelihood of injury (physical or psychological) ensuing from the RTA. The second factor is a focus on open questioning. The expert should use their method of questioning to test the veracity of the responses that the claimant provides. This could be as simple as walking behind the claimant and asking a question to observe how the claimant responds—for example, do they turn their head?

Claims Notification

95. As noted at Part Two of our response above, there is a real issue as to when the best time to obtain medical evidence is. Under the Limitation Act 1980, a claimant can bring a claim up to three years after an accident. Obtaining medical evidence so long after an RTA, when the claimant has usually fully recovered within no more than six months of the accident, means that the medical expert has no option other than to simply record the history and symptoms as given by the claimant. It is unlikely at that late stage that there will be any objective indicators of whether or not any injury was actually sustained.

96. Equally, when medical evidence is obtained too early during the acute stage of a soft tissue injury it is difficult for a medical expert to provide an accurate prognosis. Therefore as part of any consideration around improving the diagnosis of whiplash claims, further research should be conducted as to when the most appropriate time to obtain medical evidence is. Most of the current medical understanding suggests between three and six months post-RTA.

97. Incentives should be introduced to ensure that claims are notified within an appropriate period in order that medical evidence can be obtained at the most appropriate time. If the ABI's proposals on joint instruction of experts are accepted then we trust that defendants will have some control over the obtaining of reports.

98. The ABI considers that it would be appropriate for the Government to put rules in place to the effect that claims should be notified by no later than six months post-accident (assuming that time limit dovetails with the optimum time to obtain the medical report). Given that the Limitation Act allows for a claim to be brought within three years, this step should not impact on the right to bring a claim. However, there should be

sufficient deterrent to late notification introduced such that a claimant is incentivised to bring the claim promptly.

99. The ABI considers that the deterrent should be in the form of a reduction in damages recovered of (potentially) 25%. In effect there would be a two stage process: 1) A claimant should notify the defendant insurer of a claim for personal injury within 6 months of the date of accident; 2) unless there was good reason for not doing so they can still bring the claim at any time up to the three year limitation, but damages will be reduced by 25% if they have not notified the claim within the initial 6 month period.

Tackling Third Party Fraud

100. The costs of tackling fraudulent motor insurance claims are substantial. Detected fraudulent motor claims were £441 million in 2011 and undetected fraud cost an estimated £1 billion.

101. Raising the SCT threshold and improving the standards of medical reporting is a step towards reducing this figure. However, consideration should also be given as to how fraud is perpetrated during the claims process by a number of others involved in the RTA claims system, including but not limited to CMCs, credit hire organisations, motor engineers, and recovery and storage companies. With the proposed increase to the SCT threshold; the process should be modified to allow for greater scrutiny of these individuals/organisations for example enabling greater use of either CPR Part 18 questions or Part 35 questions to the expert and increasing the likelihood of them being called as witnesses at the trial.

102. Third Party fraud or exaggeration has been treated differently from policyholder fraud. A policyholder has a duty of utmost good faith to their insurer. For consumers this will change under the Consumer Insurance Act 2012, which is to be implemented on 1 April 2013. However, the Courts are asked to consider the extent of dishonesty when considering a third party claim and the impact of the dishonesty on the recovery of damages. The ABI consider that this drives behaviours where it is considered acceptable to lie as long as the lie is not too severe. This cannot be acceptable given the effect on costs to honest policyholders.

103. In the Court of Appeal decision in Shah v Ul Haq Lady Justice Smith stated "I have some sympathy with the view that fraudulent exaggerated claims should be struck out in their entirety….But in any event I consider that the law is so well-established that I would not think it right to change it by judicial intervention. In my view, such a change would have to be a matter for Parliament." The ABI is firmly of the view that any finding of fraud or exaggeration should mean that the entirety of the claim is struck out.

104. Third party fraud is endemic. Dealing with such claims places a considerable burden on the insurance industry and creates disproportionate costs. However, given that degrees of fraudulent exaggeration are allowed, there is no incentive on claimants not to exaggerate their claim. The ABI would urge the Government to consider amending the law such that the Courts are better equipped to deal effectively with fraudulent exaggeration.

105. In *Summers v Fairclough Homes* it was held that the court does have the power to strike out a claimant's fraudulent case in full, denying the claimant the genuine part of his claim but this power should only be used in exceptional circumstances. The Supreme Court's decision in *Summers v Fairclough Homes Ltd* [2012] has steered towards the right approach to fraudulent claims, which has filtered down to the lower courts. In *Fari v Homes for Haringey* (2012), the judge found that this was one of the exceptional circumstances envisaged in *Summers* and the claimant's highly exaggerated claim was struck out in its entirety.

106. We welcome the direction of travel by the Court in *Summers,* although we do not consider that it goes far enough. Where there is a finding of fraud or exaggeration, the default position should be that the claim is struck out in its entirety, so the claimant is not entitled to the genuine part of his/her claim for abuse of process, and the exceptional circumstance should be where the court considers that the claimant retains damages for the genuine part of the claim.

Summary of consultation answers

Question 1: *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?*

The ABI would like to see the introduction of standard report formats, standard instruction formats and joint instructions as detailed in paragraph 32–38 above. We consider that this should be implemented for all RTA accidents and that there should be an independent medical panel. We also agree that the report should be available equally to all parties.

Question 2: *If not, how would you address the problems listed at paras. 35–39 above?*

N/A

Question 3: *Which model should be used for the independent medical panels—accreditation, national call-off contract or some other variant?*

The ABI consider that the two models proposed are not mutually exclusive. We favour a system based on a national call-off contract, to which only accredited experts could bid to be listed. Details of such a scheme are detailed at paragraphs 23–25 above.

Question 4: *do you consider that an element of peer review should be built in to every assessment, or only for a sample of assessments for audit purposes?*

The ABI consider that peer review should be part of an audit process, which should be part of a rolling programme of accreditation, as detailed in paragraph 39 above.

Question 5: *How should costs be dealt with and apportioned?*

Any board and panel should be not for profit and self-funding. The costs should be met as part of the medical report fee as set by the board and/or through payments made by experts for accreditation as detailed in paragraphs 45–47 above.

Question 6: *Should the small claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

The ABI strongly favour the raising of the small claims track threshold to £5,000 for all RTA claims as part of a wider, cohesive package of reforms.

If the increase relates to whiplash claims only, then it is probable that there would be a change in what is termed to be "whiplash", so as to bypass the need to bring the claim via the small claims track and we consider that this could well drive the wrong behaviours.

We also consider that it is significantly more straight forward for claimants to determine whether or not to seek legal advice if the small claims track is for use in RTA claims, rather than in whiplash claims only. For example, a claimant with a shoulder strain that they may believe is whiplash would have no clarity of the process by which the claim should be presented.

Question 7: *Will there be an impact on the RTA protocol and could this be mitigated?*

There will undoubtedly be an impact on the RTA Protocol but the ABI consider that these can be mitigated for the reasons given in paragraphs 75–81.

Questions 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

The ABI believes that there are a number of actions the Government should address in order to reduce the cost of exaggerated and/or fraudulent whiplash claims. This includes: introducing predictable damages, focusing developing objective tests for soft tissue neck injuries, tackling third party fraud and looking at the current rules around claims notifications. These issues are discussed in greater depth in Part Four.

Reducing the number and cost of whiplash claims

A CONSULTATION BY THE MINISTRY OF JUSTICE ON ARRANGEMENTS CONCERNING WHIPLASH INJURIES IN ENGLAND AND WALES

A RESPONSE BY AXA INSURANCE

1. Introduction

AXA Insurance is part of the global AXA Group; one of the largest insurers in the world. In the UK it is the 5th largest general insurer and, as such, writes large numbers of motor, EL and PL policies. AXA has a significant interest in the level of damages paid under the civil justice system. In 2011, AXA paid in excess of £250 million in compensation and damages arising out of claims made against our policyholders.

In 2012 we insured some 1,500,000 motor vehicles belonging to private individuals and businesses which produced some 17500 personal injury claims. Our average cost in respect of damages and legal costs for personal injury claims following a road traffic accident (excluding those claims over £100,000) was slightly in excess of £7000. The vast majority of these personal injury claims will have been for so called whiplash injury.

2. Executive Summary

The term "whiplash" is unhelpful and use of it immediately conjures up notions of compensation. Although we use the term in this response, we would advocate calling "whiplash" what it is: neck pain or minor cervical trauma.

Almost unique to Britain, whiplash injury and whiplash claims have now reached epidemic proportions. The UK experience is not mirrored in Europe where, when there were emerging problems, early effective steps were taken to address the issue. While it is right that those who sustain significant genuine injury are compensated, the year on year increase in the number of personal injury claims arising out of road traffic accidents, most of which are for whiplash, has brought the compensation system into disrepute.

AXA Insurance welcomes the Government's attempts to address the whiplash issue, though we are concerned that the proposals outlined in the consultation merely address symptoms of the whiplash issue and not root cause. To effectively address the issue a more radical approach is required and we discuss some options in our response to Q.8.

Whiplash is essentially a self reported condition. There is a need for accepted medical research which leads to objective diagnosis of the condition. It also needs to be understood that although there may be no organic cause for someone's pain, that pain may be nevertheless real. We need to be mindful not to create further problems in respect of conditions which are psychological in origin. An emotional and psychosocial aspect of injury and claims for compensation is a common phenomenon.

A robust approach needs to taken to medical evidence so as to ensure independence of the examining doctor. This should not only break the commercial links between Medical Reporting Organisations and solicitors but should require the examining doctor to adopt a more challenging and forensic approach and to not simply be an historian for the claimant. Even though whiplash is essentially a self reported condition the doctor should systematically look for contra indicators. Additional training and guidance in this regard may be required. Among other things, reporting doctors should be measured and monitored on prognosis periods in order to ensure that they are broadly in line with expected norms, eg recovery within a few weeks or months and not the one to two years that is so frequent now.

Reports should be obtained on a joint basis as soon after the accident as possible.

We would also advocate a review of medical records in many more cases than at present and a move away from the rebuttable presumption that records should not be reviewed as a matter of course.

The Small Claims track must be increased to £5,000 for all road traffic accident claims. Not to increase the limit would perpetuate the issue and to restrict the increase to whiplash claims alone would lead to whiplash being re diagnosed as some other condition. However, we are concerned that if the Small Claimant track limit were increased to £5,000, claimant solicitors would still be able to pursue low value road traffic claims under a Damages Based Agreement and paradoxically may receive more by way of costs under a DBA than they would by fixed recoverable costs. If the Government wishes motor insurance premiums to reduce, we would strongly urge that a radical solution is adopted.

3. The Issue—Opening Comments

AXA Insurance welcomes this consultation and the Government's attempt to reduce the number and cost of whiplash claims for the benefit of motoring consumers. A review of European jurisdictions carried out by AXA suggests that many European states have addressed the issue earlier and more effectively than the UK.[74]This review is appended at Appendix 1. Based on Compensation Recovery Unit figures for 2011–12 some 830,000 motor claimants were recorded. While it is difficult to be certain as to how many of these relate to so called whiplash, we suggest that the majority of them will. There are in excess of 500,000 incidents of so called whiplash in a year; with any other condition or illness this would be flagged up as a significant public health issue.

However, we do have concerns as to whether the proposals will meet the Government's objectives. If the issue is effectively tackled, it is said that it could reduce an average motor insurance premium of £650 by some £90. To address the issue we believe that a coordinated response is required from Government involving not only the Ministry of Justice but also the Department of Transport and the Department of Health.

There is much debate, including eminent medical opinion, as to whether whiplash exists. Those in support of the condition will point to evidence that it is particularly prevalent in low velocity impacts while others will compare the mechanics of a road traffic collision with "dodgems" at a funfair or the "jolt" and deceleration of a plane landing. The absence of agreed medical opinion does not assist in addressing this issue. Medical diagnosis of whiplash depends greatly on the history given by the claimant/patient and this lack of objective assessment does not help in tackling the issue. Even where an objective medical classification tool such as the Quebec scale is used, it is impossible to prove or disprove injury at stages 1 and 2. Whiplash is a self limiting condition and symptoms should reduce after a few weeks and months. NHS Choices[75] say that in only a small number of cases does pain last for 6 months or more. For ease of reference NHS Choices guidance is reproduced at Appendix 2. Even the Association of Personal Injury Lawyers in its "Whiplash Report 2012—Myth or Fact" concede that about one third of sufferers recover within one month. Yet seldom are such short term effects seen in medical reports which frequently talk of a 12 to 24 month prognosis for whiplash following a road traffic collision.

[74] The AXA Whiplash Report 2013

[75] http://www.nhs.uk/Conditions/Whiplash/Pages/Introduction.aspx

Some whiplash suffers will be genuine and need medical attention. Others will visit their G.P or Accident and Emergency Department purely for the purpose of having attendance recorded as evidence of injury in support of a claim for compensation. This ties up resources and wastes valuable NHS time with a corresponding impact on the public purse.

Although we support the thrust of the proposed reforms, our concern is that over the last decade or so whiplash claims and claiming for injury following a road traffic accident, no matter how trivial, has become institutionalised and embedded in British culture. In part this is a consequence of the use of the term whiplash itself. It is a dramatic term that promotes and initiates a sequence of events that invariably leads to a claim for compensation. Although these proposals and the full package of "Jackson reforms" will assist, to fully address the issue we believe that a more radical solution is required. Nevertheless, we attempt to answer the Ministry's questions as constructively as possible as well as offering our thoughts as to what more could be done to address the problem.

4. Part 2—Better Medical Evidence

Question 1. *Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers and (for contested claims) the courts?*

Answer:

Yes.

A growing trend in the personal injury claims arena is that of law firms owning medical reporting agencies. Examples are Thompsons solicitors and MAPS, Winn solicitors and On-Medical, Quindell and Mobile Doctors and Michael Jefferies Solicitors and Lawyers Medical Agency.

The use of medical legal reporting agencies has assisted in speeding up the time taken to obtain and disclose medical reports. They have also greatly increased the use of General Practitioners, as opposed to specialist consultants, in medico legal examinations. However, at the same time it has become an income stream for many law firms operating in the personal injury sector either through receiving commission, referral fee or through direct ownership.

As an expert witness, the doctor reporting on a claimant in a personal injury claim should assist the court on technical matters within their expertise and their duty should be to the court alone. As such they should not be influenced by the person instructing them.

All these commercial relationships must call into doubt the independence of the medical reporting agency. This is reinforced by anecdotal comment of some doctors that they are required to write reports with certain prognosis periods as if they do not they will receive no further instructions. The solicitor commissioning a report from an agency has a vested interest in the prognosis provided in a report dealing with a road traffic accident claim, such as a whiplash claim. A prognosis of a 12 month recovery period, for instance, would guarantee that the value of the claim exceeds the current Small Claims Track of £1,000 so that the solicitor will recover costs and, in addition, the predictive cost regime for such claims pursued outside of the Portal are directly linked to the damages recovered. The same dynamic will apply to any claim funded by a Damages Based Agreement.

Standard report forms are increasingly prevalent and are in use in respect of Portal claims. We have no issues with standard reports provided that the template for the report asks the right questions. However, a balance also needs to be struck between the cost effectiveness of the medico legal report and the robustness of examination. Standardised reporting must have as its primary purpose improving the quality of the examination and report and not reducing cost. We have come across one General Practitioner in Norfolk who prepares 2,000 medical legal reports a year as well as working four days a week as a GP and having other outside business interests. If one allows for six weeks holiday a year, and assumes an eight hour working day for medico legal reports, it means that this particular doctor must examine claimants and write the report within 11 minutes. We do not believe that this type of situation is in any way unique.

However, we do not object to General Practitioners preparing medico legal reports and, where they are acting as expert witness, do not see a conflict with their normal role as patient's advocate as it will not be the claimant's own GP preparing the medico legal report in support of their own claim.

Our contention is that whiplash is generally a self limiting condition and gets better of its own accord. There are some instances where the condition will genuinely last for six months and become chronic, but by and large the condition will recover within a few weeks. Whiplash is essentially a sprain injury and little different to having neck pain after sleeping badly, following sports injury and so forth. Minor, non chronic, examples of whiplash should not be compensatable. However, as the condition is mainly diagnosed through self reporting, and as some claimants are coached before attending medical examination, it is not satisfactory to simply exclude cases where the prognosis is less than six months. Attractive as such an approach would be it would simply reinforce the current trend of a minimum prognosis period of one year and, at present, medico legal reports with a prognosis for full recovery of less than one year, are remarkable. Therefore, a more robust approach is required.

The French legal system requires objective evidence of injury such as MRI scans or X-rays. Although there are established indices or classification of so called whiplash, such as the Modified Quebec Task Force Classification (MQTFC) or Whiplash Associated Disorders scale (WAD), it is impossible to objectively prove or disapprove those conditions falling to stages 1 and 2 of these scales. Most so called whiplash claims in the UK would fall into stages 1 or 2 of these classifications and we would argue that such claims should not give rise to compensation.

As will be appreciated, compensation is awarded for pain, suffering and loss of amenity. This means that medico legal reports and the doctor conducting the examination and taking the patient/claimant history will focus on what the claimant cannot do as opposed to what they can. This difference may appear subtle but could have a profound effect on the approach to medico legal reporting.

We would further argue that doctors preparing medico legal reports for whiplash claims essentially act as an historian by simply reciting what the claimant tells them. There is seemingly little skill required and seldom is a forensic approach evident. Where doctors have tried to adopt a more forensic approach and act as "sleuth" they have been criticised by the courts. The case of *Armstrong v First York (2006)* effectively states that even where the medical evidence establishing the injury is inconclusive (that is, two experts disagree) the general presumption is that an injury has been caused and that the disputing party is likely to have missed something. A similar position was affirmed in the case of *Charnock and others v Rowan and others* (2012) where the defendant's medical expert was criticised by the court for playing sleuth. Thus, it is for the court alone to decide whether a claimant is telling the truth.

However, an approach to medical legal reporting in whiplash claims focusing on what the claimant can do as well as what they cannot do, and adopting a more forensic approach by looking for inconsistencies and contra indicators, such as the claimant being able to do their hair yet are unable to reach up to peg washing on a washing line, might greatly assist the courts in determining whether a claimant is lying or exaggerating for financial gain.

Standardised reporting may assist in this regard and while outside our area of knowledge, an approach similar to that used in the assessment of entitlement for various disability benefits may be a starting point for developing a standardised approach to examination and reporting. However, such an approach would have to be adapted to meet the requirements of the common law of damages and role of the courts and, in doing so, some effectiveness may be lost.

Finally, we would advocate that ALL reports arising out of fast track road traffic claims with a potential below £5000 should be obtained on a joint instruction basis within a prescribed timescale (subject to any limitation issues) from the date of bringing the claim such as three—four months. At present the Civil Procedure Rules say that is it the claimant solicitor who should commission a medical report in a Fast Track case. It should be explained to the claimant before attending examination that symptoms subsisting for more than a few weeks are unusual. The examining doctor should also have details of the damage to both vehicles and photographs, if available, and should have the defendant's version of events as well as that of the claimant. If the report were obtained on a joint instruction basis it would be disclosed to both claimant and defendant at the same time, though the claimant would be still be able to object to the report on the grounds of factual inaccuracy.

Question 2. *If not, how would you address the problems listed at para. 35–39 above?*

Answer

Not relevant in view of our answer above.

Question 3: *Which model should be used for the independent medical panels—Accreditation, national call-off contract, or some other variant?*

Answer

We do not fully understand the concept of national call-off contract. However, we see merit in providers of medico legal reports, whether agencies or individual doctors, contracting with a central body overseen by a cross medical and legal profession, judiciary, insurance and consumer body who are accountable to the Ministry of Justice or Civil Justice Council. Effort will be required in setting up such an arrangement in terms of criteria, contracts and accreditation, but once in place should be resource light. A database could be established so that the post code of the claimant is entered and, on a rota basis, the doctor to be instructed is identified. Such a database could be automated so that instructions are sent automatically and at the same time the defendant notified so that it can submit its repair documents and version of events so that in effect it becomes a joint instruction.

Any doctor appointed to the database or call-off contract, whether directly or via an agency, should be accredited or otherwise evidence their ability to work to prescribed standards including standards in respect of examination, review of medical records, reporting and independence.

A set fee should be charged at a level no more than the current Medical Reporting Organisation (MRO) Agreement fee of £200 (or £250 when a review of medical notes is undertaken), plus any costs associated with

obtaining medical notes. As the MRO rate includes an element of commission or referral fee payable to the claimant solicitor, the current MRO rate should be sufficient to remunerate the doctor, pay the admin fee and profit of any agency involved in the contract and allow for the costs associated with the administration of the contract and database. In other words, the referral fee payable to the solicitor is replaced by the administrative costs of associated with the call-off arrangement. The fee set should also be incorporated by Rule or annex to the Civil Procedure Rules so that variations to the fee are open to challenge through the courts. An enhanced fee within the maximum figure above might be possible for any doctor joining direct. Although this might increase the work required in administering the scheme it may also enhance the quality of examination and reporting.

We have already voiced concerns as to the independence of some medical agencies and the requirements they place on panel doctors to produce reports with a certain prognosis. Therefore, no matter now robust, we would be most reluctant to see an accreditation system in isolation. We believe that it runs the risk of perpetuating much of the mischief prevalent in the current process.

Question 4: *Do you consider that an element of peer review should be built into every assessment, or only for sample assessments for audit process?*

Answer

Although we believe that General Practitioners preparing reports in low value motor claims need guidance and support on how to adopt a more forensic and critical approach, we do not believe that peer review on every case is be warranted. The reports are prepared by qualified medical practitioners and as such peer review in every case should not be required. However, we do agree that an independent audit process with appropriate governance is required and, for any doctor failing an audit, consideration should be given to removal from the call-off contract. Such decisions should be taken by the call-off contract governing body. Reporting doctors also need to more aware that their duty is to the court and that their reports and professional opinion will be open to scrutiny and that poor professional judgment may give rise to sanction and a claim for professional negligence.

Question 5: *How should costs be dealt with and apportioned?*

Answer

In answering this question the increasing costs of medical reports and attempts to control them leading up to *Woolard v Fowler (2006)* need to be appreciated. *Woolard v Fowler* led to the setting up of the MRO Agreement. Although we have already stated that the fees for medico legal reports should be no greater than the MRO Agreement fee, it must be borne in mind that those rates allow for the costs and profit of the agency, referral fee paid to the instructing doctor and the credit cost of delayed payment of medical reports which is quite common. The reporting Doctor receives half, or less, of the fee payable to the agency. Examples of the reporting Doctor receiving £50 or £60 are common.

Obviously, at present, the costs of the report are borne by the paying party whether via early payment through the MRO Agreement or at resolution of legal costs and disbursements following settlement of the claim. We assume that costs will continue to follow the cause. To help contain the cost of medical reporting and to help maintain independence we would suggest that the fee for the report is paid at the time of instruction by the party commissioning report. Where liability is not an issue we advocate joint instruction of experts so that the reporting doctor sees the defendant's version of the accident circumstances as well as that of the claimant. This approach would also help inhibit claimants shopping around for the most favourable report. In these circumstances, the cost of the report could be funded by the defendant.

However, where liability is an issue, the report should be paid for, in advance, by the instructing party, whether claimant or defendant. As such, even where primary liability is an issue, the defendant should be able to obtain medical evidence in order to address causation and quantum issues. Similarly, if a claimant is unrepresented the cost of any medical report should be paid for by the insurer.

5. Part 3—Better Incentives to Challenge Fraudulent or Exaggerated Claims

Question 6: *Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?*

Answer

The Small Claims track should be increased to £5,000 for ALL road traffic accident claims. Although we have reservations that, in isolation, the proposals discussed in this consultation will solve the whiplash problem; to do other than implement an increase applied to all RTA claims will create future problems.

It is generally accepted that the majority of motor claims, particularly those with a value below £5,000 are whiplash. Were the increase to apply only to whiplash claims, there is a concern that the "whiplash issue" will start to manifest itself in other areas such as PTSD or shoulder bruising. In other words, the problem will simply manifest itself elsewhere.

If the Government is serious about addressing the continuing rise of personal injury claims following a road traffic accident then an across the board increase in the Small Claims track limit is required.

It is anticipated that the claimant lobby will strongly argue that any increase in the Small Claims track will greatly inhibit access to justice as personal injury claimants will not be able to represent themselves. We do not accept this view. Low value RTA claims will constitute the bulk of work in many solicitors' personal injury practices. We would argue that what is being complained of is not so much a restriction of access to justice but rather a loss of income stream that will impact on the individual firm's business model and profitability.

As a society we have become better able to assert our rights as consumers. Indeed, for many years legal fees have not been recoverable in employment matters. Similarly, those pursuing a claim against the Criminal Injuries Compensation authority do so, in the main, without the benefit of a solicitor. We would suggest that these matters are as important, if not more important, than minor injury following a road traffic accident.

If the Small Claims track were to increase to £5,000 for all motor claims, claimants would still be able to obtain legal advice, albeit at their own cost or by damages based agreement.

Although it is likely that an increase in the Small Claims track limit will mean more unrepresented claimants, the ABI already have in place a code of practice for the conduct of insurers dealing with unrepresented personal injury claimants. Further, there are possible reputational issues that help guard against the under settlement of claimants. From AXA's own experience it is more likely that an unrepresented claimant will receive enhanced compensation as there are no legal costs to pay as well as concerns over adverse publicity if a claimant were to be knowingly undercompensated.

Question 7: *Will there be an impact on the RTA Protocol and could this be mitigated?*

Answer

An increase in the Small Claims track may mean less claims being submitted by claimant solicitors via the Portal, though it is still possible that solicitors will bring low value claims with the support of a damages based agreement. However, with minimal changes to the RTA Protocol it could be adapted to enable the claims of unrepresented claimants to be managed via the Portal & and RTA Protocol.

Unrepresented claimants should be accommodated so as to be able to submit claims via the Portal or, where the insurer is known already, by telephone direct to the insurer with the insurer entering details onto the Portal and sending to the claimant a copy Claim Notification Form for them to sign and return. The insurer would then manage the claims process in respect of obtaining medical evidence, liaising with the claimant over proof of loss of earnings and other special damages and making an offer.

6. Part 4—Further Action

Question 8: *What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?*

Answer

As mentioned at the outset, our concern is that the proposals discussed in the consultation paper will not fully address the Government's concerns and meet their objectives. Although the proposals discussed in the consultation paper have to be viewed in conjunction with other civil justice reforms, there remains too much money in the compensation system and many law firms and service providers have modeled their entire businesses on the low value motor personal injury sector.

Although we support the aims of Government and proposals raised in the consultation paper, our concern is that the root cause of the "whiplash issue" will not wholly be addressed.

Other ideas as to how the compensation process in respect of whiplash and other low value road traffic accident claims could be improved so as to reduce the number of such claims are:

1. Development of a "phone based (recorded) triage process to be carried out as soon as possible after the accident. It is likely that this will give the most accurate view of existence of injury. To be effective, this would have to be done a first party basis. To be effective such an arrangement would have to compulsory.
2. Access to medical records—reporting doctors should see medical records as a matter of course as neck pain might be age related or have some other cause.
3. Adoption of an approach similar to that of the French so that unless there is objective clinical evidence of injury, damages following so called whiplash injury are not recoverable.
4. Remove low value RTA claims from the civil justice system and replace with a Tribunal similar to the Employment Tribunal or Criminal Injuries Compensation Authority. This would still enable victims to be compensated but the number and cost of whiplash claims could be better controlled by the introduction of a tariff for such injuries. Linked with this approach, those cases classified as either MQTFC or WADS I and II would either have to be excluded, so that they did not give rise to

an entitlement of compensation, or the tariff or level of damages awarded for such injuries must be set at a much lower level than at present.

5. Ban DBAs for low value RTA cases. It is anticipated that if the Small Claims track were to be increased as proposed, low value road traffic cases will attract DBAs.
6. Even with an effective referral fee, CMCs and others will still see the RTA sector as being lucrative and alternative business structures will mean that insurers and CMCs will still see RTA as an income source—this needs to be addressed. Both could set up own claims handling arrangements and take fee from claimant or out of damages recovered.
7. Move to a first party system so that Insurers pay compensation to the occupants of vehicles they insure, irrespective of liability & subject to tariff, up to value of claim to be determined. This will require primary legislation.
8. Legislate to change the common law approach to damages in low value RTA cases to a disablement approach. Doctors would be more pivotal and the disability bar following a road traffic accident could be set quite high. It would enable doctors to express an opinion and require them to play sleuth so as to support the court or tribunal.
9. Restrict Alternative Business Structures as they will simply perpetuate the issue by chasing claims following an accident. Insurers are already looking at joint ventures with law firms as a means of replacing referral fee income lost from referring their own customers' injury claims. Now, they will look to take a share of any profit, but will still have a direct vested interest in producing whiplash claims following accidents involving their policyholders.
10. More research and development into the objective testing and diagnosis of whiplash.

As will be appreciated, these are simply thoughts and ideas and more work would be required to develop them further.

7. Part 5- Impact Assessments

Question 9: *Do you agree with the accompanying equality screening? If not, please explain why*

Answer

Yes

Question 10: *Can you identify ways in which the procedure under the current arrangements impacts on people with protected characteristics? If so please provide evidence of impact*

Answer

There will be minors and other protected parties such as those who lack capacity to conduct their own litigation where court approval for any damages ward or settlement will be required. If, notwithstanding any increase in the Small Claims track limit, it is considered that legal costs of protected parties should be recovered, this should only be on a nominal fixed costs basis.

Question 11: *Do you consider that the introduction of independent medical panels to assess whiplash injuries will affect people with protected equality characteristics? If so, please give detail*

Answer

They will be affected no more than any other claimant.

Question 12: *Do you consider that an increase in the small claims limit for Whiplash/RTA personal injury claims from £1,000 to £5,000 will affect people with protected characteristics? If so, please give details.*

Answer

They will be affected no more than any other claimant.

APPENDICES

1. The AXA Whiplash report 2013.

2. Extract from *NHS Choices* website on whiplash

Whiplash is a term used to describe a neck injury caused by a sudden movement of the head forwards, backwards or sideways

It often occurs after a sudden impact such as a road traffic accident. The vigorous movement of the head damages the ligaments and tendons in the neck.

Tendons are tough, fibrous bands that connect muscles to bone. Ligaments are fibrous connective tissues that link two bones together at a joint.

Common symptoms of whiplash include:

— *neck pain* and stiffness;
— tenderness over the neck muscles;
— reduced and painful neck movements; and
— *headaches*.

After an accident, the symptoms of whiplash often take a while (6–12 hours) to develop.

The neck pain and stiffness is often worse on the day after the injury and may get worse for several days afterwards.

Read more about the *symptoms of whiplash*.

Causes of Whiplash

Road accidents are the main cause of whiplash but it can also occur following:

— a sudden blow to the head—for example, during contact sports such as boxing or rugby;
— a slip or fall where the head is suddenly and violently jolted backwards; and
— being struck on the head by a heavy or solid object.

Read more about the *causes of whiplash*.

Diagnosing Whiplash

Whiplash can usually be diagnosed from a description of your symptoms. Tests and scans are not usually required.

Visit your GP if you have recently had a road accident or a sudden impact to your head and are experiencing pain and stiffness in your neck.

Your GP will ask about your symptoms and details of how the injury happened. They may also examine your neck for signs of muscle spasms, tenderness and assess the range of movement in your neck.

X-rays and scans, such as, *computerised tomography* (CT) or *magnetic resonance imaging* (MRI), will usually only be recommended if a fracture or other problem is suspected.

Treating Whiplash

Whiplash is often a self-limiting condition, which means it eventually gets better on its own or after some basic treatment.

If you have whiplash, it is better to move your neck rather than keep it still using a neck brace or collar. Your neck may be painful, but keeping it mobile from an early stage will improve its functionality and speed up your recovery.

Painkillers, such as *paracetamol* and *non-steroidal anti-inflammatory drugs* (NSAIDs), such as *ibuprofen*, can be used to help relieve the pain.

Whiplash that lasts for six months or more is sometimes known as chronic whiplash or late whiplash syndrome.

Your treatment plan should be based on your symptoms. If you have severe pain, your GP can prescribe a stronger painkiller, such as codeine or recommend *physiotherapy.*

Read more about *how whiplash is treated*.

Complications

In many cases, whiplash will eventually get better without any lasting damage. However, in a small number of cases, the pain can last for six months or longer (chronic whiplash).

If you experience prolonged pain, you may find it difficult to carry out daily activities and enjoy your leisure time. It may also cause problems at work and could lead to *anxiety* and *depression*.

Visit your GP if you have chronic neck pain that is causing problems with work and carrying out normal, everyday activities.

The AXA Whiplash Report 2013

Foreword

Roads and cars in the UK have never been safer, yet the number of compensation claims for personal injuries, notably whiplash, continues to rise pushing up the cost of insurance for motorists. A contributory factor has been the growth in claims management companies and an underlying culture that encourages people to seek compensation whenever they can.

It is not for insurance companies to decide whether it is right for individuals to receive compensation and at what level; that is a matter for government, regulators and policymakers alike. Someone who suffers real injury through the negligent act of another deserves to be put back into the position they were originally in through an appropriate mix of rehabilitation and compensation. But without more fundamental reform to our compensation system in the UK, compensation awards will continue unabated and will go on representing something akin to a minor lottery win for too many people, and our motor insurance premiums will remain the highest of all countries analysed in this report.

Before policymakers consider solutions that might improve the situation for the UK's motorists, they would do well to review how other countries have tackled the situation. AXA's unique position as a significant European motor insurer leaves us well placed to offer solutions of our own. That some countries have been able to find answers should send a positive signal that it is possible to find a way forward that balances the needs of the wrongdoer and the wronged.

I hope you enjoy reading this unique analysis of whiplash which includes some fascinating trends across a range of different countries.

Chris Voller, AXA Claims Director, February 2013

Introduction

The roads of the UK, and much of the developed world, have never been safer. However, whilst accident rates are falling, the cost of motor insurance is rising. One of the major culprits is the increasing cost of claims for bodily injury, very often involving only minor whiplash injuries.

Whiplash is one of the most common causes of neck injury, occurring when the head suddenly and unexpectedly moves forwards, backwards or sideways, damaging the neck's ligaments and tendons. That whiplash can cause a real injury we recognise, but the problem is that doctors find it difficult to effectively diagnose whiplash due to vague symptoms such as pain and stiffness, and diagnoses are often reliant on patient descriptions—which can be inaccurate and easily falsified. There has also been evidence emerging in recent months about a small number of GPs who do not even see their patients (rather diagnosis is based on a telephone conversation). And in one or two instances, GPs have been engaged in actively promoting fraudulent claims. On many fronts, the current system is clearly open to abuse.

The first major cross-border study into whiplash was conducted by the CEA (the Comité Europeen des Assurances, a pan-European trade body, now Insurance Europe) in 2004. This report constructed a comparative analysis across European countries of differences between levels of claims for bodily injury, and in particular the costs of these claims.

This study by the CEA is still cited today, and is long overdue for updating. However, the data collection requirements for such work are onerous, and difficult to collate across countries without direct contact and co-ordination with individual trade bodies, which collect data from their insurance company members. For this report we have used existing facts available from Insurance Europe and other sources such as industry trade associations and public organisations.

As well as aiming to collate all available data in relation to whiplash, this report also seeks to analyse the factors causing differentials in these places, especially in the legal and medical system. Although legal systems are notoriously difficult to compare, some conclusions can be drawn from policy decisions in individual countries. Drawing upon this analysis, we have defined a series of policy recommendations for the UK which we believe will help bring the cost of whiplash claims down, and with them motor insurance premiums.

Key Facts

- Despite there being a significant reduction in traffic volume and road fatalities since 2000, there has been a 100% increase in the number of motor insurance injury claims over the same period. As a result, in 2011 UK motor insurers made an underwriting loss of £425 million;
- One self-insuring company looked at in this study now has personal injury claims which account for 40% of all outstanding claims. This has increased by 13% in recent years. Another claimed to have average bodily injury claim costs of around £2,000, which is dwarfed by the potential £15,000–20,000 in legal costs that might be incurred in defending the claim;

— Individual policies are getting more expensive. The cost of an annual comprehensive motor insurance policy rose by 102% between 1994 and 2011 impacted in no small part by the impact of whiplash claims, which now add approximately £90, or 20%, to each policy. This trend has been particularly damaging for young people, where 96% of young drivers now think they are being priced off of the road;

— We can see in England and Wales how there has been a strong correlation between the number of claims management companies (CMC) and the number of bodily injury claims by region, a key driver in pushing up insurance premiums. The UK CMC industry grew significantly in 2010, with turnover increasing by 50% to £377 million;

— A small element of the medical profession is also helping to drive up the level of personal injury claims. Again, this is particularly true in England and Wales where the diagnosis of whiplash is often reliant upon patient descriptions which can be inaccurate and easily falsified;

— Whiplash now accounts for 75% of all personal injury claims in the UK which contrasts with just 3% in France where the diagnosis of whiplash requires objective proof based on more rigorous medical testing. No compensation can be awarded in France without an independent medical assessment by a professional who is an expert in dealing with bodily injuries;

— Evidence gathered from the French insurance market shows how this outcome benefits consumers with a comparatively low cost of motor insurance compared to the UK, approximately 40% lower.

1. Context and Overview

This chapter seeks to provide a context and overview to the rise of whiplash as an important issue affecting the UK. It explores the state of the motor insurance market, the rise in bodily injury claims, claims management companies (CMCs) and the impact on the driver with the rising cost of motor insurance premiums.

1.1 UK Motor Insurance

The £13.4 billion UK motor insurance market is characterised by fierce competition and low growth. [1] Price is increasingly becoming the defining issue in buying motor insurance, driven by factors such as the emergence of price comparison websites, which have further cut into the margins of UK motor insurers. The latest annual statistics in 2011 paint a gloomy picture of the private and commercial motor insurance market: [2]

— 2011 recorded underwriting loss for the UK motor insurance market of £425 million;

— For every £1 premium received, insurance companies paid out £1.03 in claims and expenses;

— There has been no recorded underwriting profit for the UK motor market since 1994.

Despite an increase in gross written premiums from motor insurance from £9.2 billion in 2000 to £13.3 billion in 2011, there has been a reduction in traffic volume in Great Britain, down 2% to £208.1 billion vehicle miles in 2010, £5.1 billion fewer than in 2009. This figure stayed relatively stable at £303.8 billion in 2011. [3] [4] A higher overall premium level without a corresponding increase in traffic suggests that individual policies are getting more expensive, and indeed the cost of an annual comprehensive motor insurance policy rose 102% between 2004 and 2011. [5]

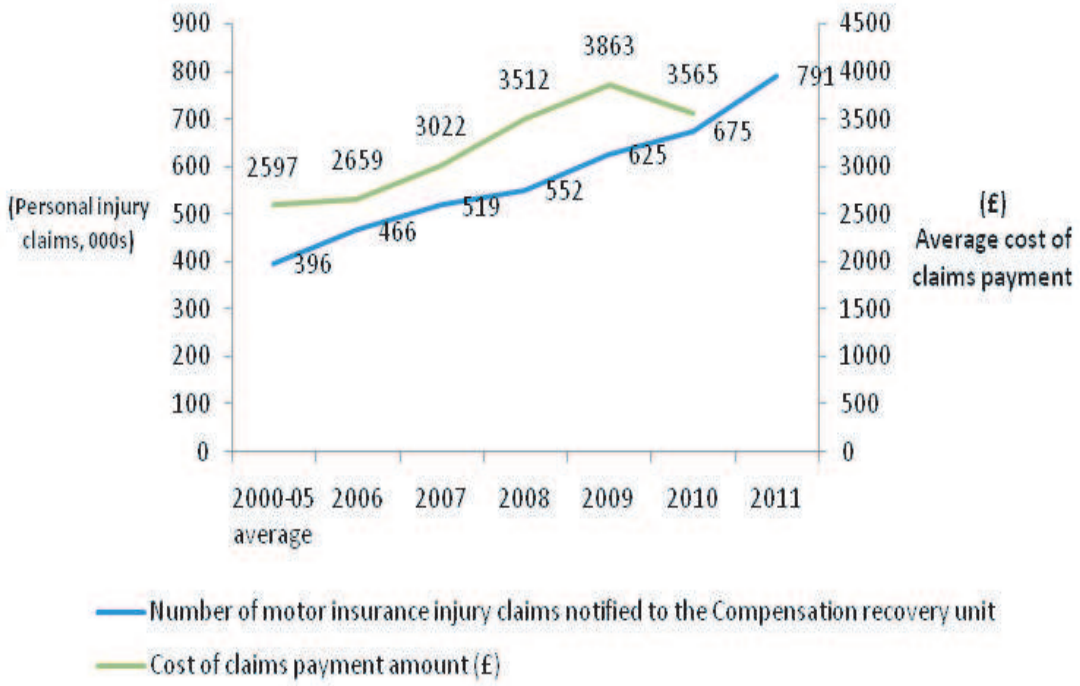
Figure 1

ANNUAL AVERAGE COST OF COMPREHENSIVE MOTOR INSURANCE POLICY—ALL DRIVERS[6]

Concurrently, the number of personal injury claims arising from road traffic accidents has risen sharply, whilst the number of casualties from these accidents has fallen every year, from approximately 40,000 in 2002 to 25,000 in 2011. [7] In addition to the rising number of claims, the payout of the average personal injury claim has risen to £3,565 in 2010, up from £2,556 in 2001.

Figure 2

INCREASE IN PERSONAL INJURY CLAIMS RISING WITH THE AVERAGE COST OF BODILY INJURY CLAIMS[8]



- The Compensation Recovery Unit is a part of the Department for Work and Pensions which is informed when a claim for compensation is made

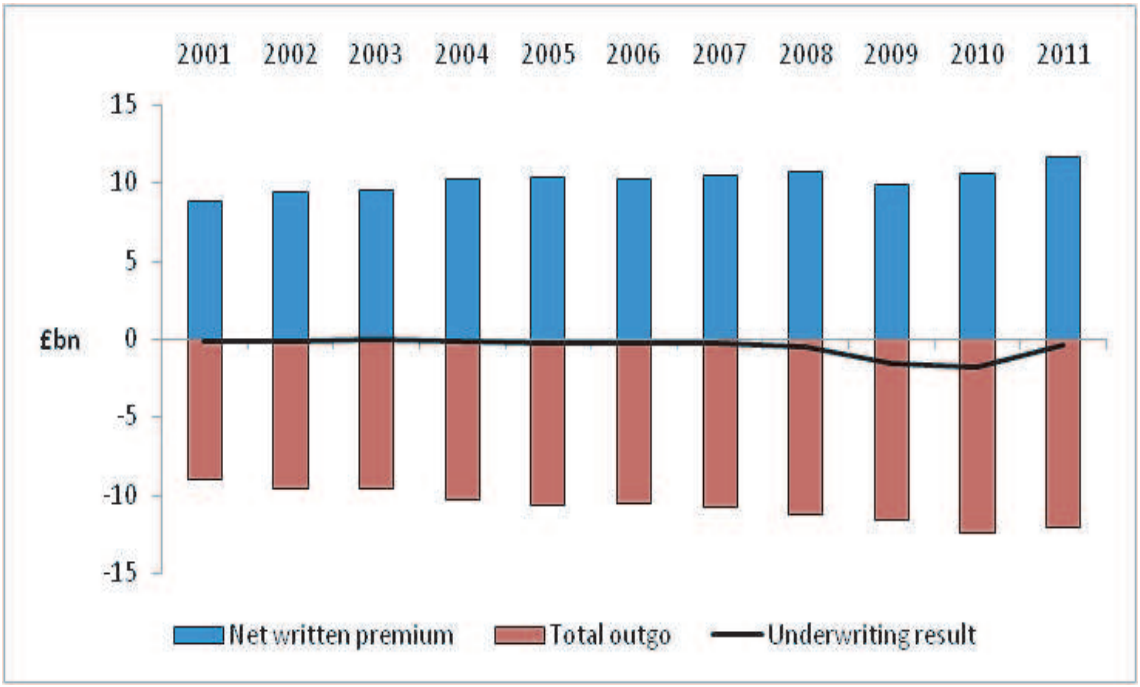
According to the Financial Services Authority (FSA), insurers lost over 1.03p for every £1 premium sold in 2011. [9] Figure 3 shows the impact of these trends on the motor insurance industry. The "net claims incurred" have outweighed the "net written premiums" since 1994, resulting in an underwriting loss. In response to this increase in the number of claims and cost of claims, insurers have been forced to increase insurance premiums for consumers. This is particularly damaging for young people, where 96% of young drivers now think they are being priced off of the road. [10]

Alison Seabeck MP—"Clearly there is an impact on people's cost of living because motor insurance is a significant chunk out of a lot of family's budgets. Looking at this could benefit the majority of drivers"

Why do insurers accept these underwriting losses? Personal motor insurance is still the single largest class of insurance business, with UK insurers generating £18.6 billion of worldwide in 2011. [11] Therefore, for any insurer with a desire to be a major player on the insurance landscape, with a large pool of funds to invest, motor insurance remains a crucial market to operate in. The scale of competition to access this revenue pool is high, leading to increasingly tight margins. The consistent loss on motor insurance underwriting has increased the reliance on a reducing stream of investment income, as well as sales of ancillary products and the provision of referral fees in order for firms to maximise revenue.

Figure 3

UNDERWRITING MOTOR INSURANCE IS NOT PROFITABLE IN THE UK[12]



Costs of increasing whiplash claims have additional impacts on UK plc. We undertook interviews with two UK businesses that are directly exposed to the recent trend in whiplash claims. Given the nature of the market place, many companies self-insure parts of the liability risks arising from road traffic accidents. Unlike motor insurance premiums which are relatively easy to track, the "hidden costs" faced by businesses and public authorities often go unnoticed but run into potentially hundreds of millions of pounds. Firms which operate large commercial fleets are clearly heavy road-users and are at the sharp end in efforts to cap the growing claims culture driven by whiplash. Below we include two examples of UK firms which have felt the impact on their costs.

Case Study: FirstGroup plc

With its roots in Aberdeen, FirstGroup has grown rapidly to become the world's leading ground transport operator. As a major British success story, its 125,000 employees help to transport some 2.5 billion passengers a year, generating revenues of over £6 billion. [13] Within the UK, it is now the largest bus operator running more than one-in-five of all local bus services. The company has a fleet of some 8,000 buses, carrying 2.6 million passengers a day in more than 40 major towns and cities. [14] The company has based its growth on an absolute commitment to safety and a strong foundation of sound risk management. Detailed data analysis is carried out in order to assess where all the risks arise within the business—risks can be assessed for individual drivers, vehicles and each route operated. In addition, the company's Injury Prevention scheme encourages a Safety First culture throughout the company. As a result of the company's efforts to improve the safety of its operations through thought leadership, commitment to best practice and employee training, it now has one of the best safety records of any major bus operator in the UK. Yet the company has still experienced a dramatic increase in personal injury claims, which now account for 40% of all outstanding claims; up by 13% in recent years. Since the introduction of the MOJ portal (30 April 2010), the impact of personal injury claims continues to grow and claim costs are now 31% higher since the new reforms were initiated. During the last year alone, the company has experienced an 11% increase in personal injury claim notifications and a 25% increase in passenger injury claims. In contrast, vehicle damage claim notifications have reduced by 21% during the same period. The company is having fewer collisions or accidents each year but seeing more injury claims made. Given that the company is effectively self-insured for the majority of these claims, most of which are for alleged whiplash or soft tissue injuries, additional costs are being incurred which the company has to fund.

Case Study: Sheffield Insulations Group (SIG)

As a major UK fleet operator SIG has 2,200 vehicles across the UK supporting its £1.2 billion annual turnover of insulation, exterior and interior products distribution businesses. Ensuring all risks facing the business are properly assessed is critical. SIG has its own Accident Review Panel (ARP) which meets monthly to look at accident and incident data across all of its UK businesses. The ARP has access to data which enables it to assess risks on both individual drivers and vehicles. Risks are managed through appropriate training and where necessary, disciplinary action. Despite all of SIG's best efforts and whilst the UK's roads are themselves

safer than ever, combined with the continued improvement in car safety design, the cost of personal injury (PI) claims continues to increase perpetuated by the current claims culture and fuelled by the advertising and prominence of claims management companies. SIG like many companies carries a significant level of self-insurance and the ever increasing cost of PI claims is a significant additional cost for commercial fleets, on top of fuel price increases. In the case of SIG nearly 50% of third party claims by cost now come from PI claims. The increasing number of such claims the company receives, many of which based on the circumstances of the incidents appear to be at the least spurious and in some cases fraudulent, significantly add to fleet running costs. Unfortunately the current claims settlement system is stacked up against defendants, with claims companies making the most of what they regard as being easy pickings. Anecdotal evidence and reports from employees have confirmed the ease with which sympathetic supporting medical evidence can be obtained. As a result of this both commercial fleet operators and insurers alike are in many cases forced to settle spurious or fraudulent claims given the basic economics: typically the damages will be worth no more than £2,000–3,000, which is dwarfed by the potential £15,000–20,000 in legal costs which might be incurred in defending the claim. SIG have also experienced issues with what are perceive to be "claimant-friendly" courts in some parts of England, where judges no longer expect claimants to even attend disposal hearings reviewing their cases, combined with there being no penalties for bad practice among claimant lawyers in not following due legal process.

Both of our case studies recognised that no one factor can be singled out in explaining the trends outlined above: for example, whiplash on its own is not the issue; nor can it be blamed on the medical profession. Rather, it is the wider environment in which all of the various legal, economic and social factors come together which is contributing to the fundamental problem of high legal costs and the impact of exaggerated or spurious claims. Whilst the introduction of the RTA portal has been a welcome initiative, the full potential impact has been limited due to the reduced burden of proof requirement (no proof of injury) at Stage 1 when the initial cost (£400) is payable. Weighting the staged payouts under the RTA portal towards the end of the process when the evidence has been gathered and the claim has been settled would be a helpful development. Fleet operators would also benefit if the Portal adopted a more tailored approach which reflect the unique challenges in gathering evidence and determining liability in those cases which involve multiple claimants.

1.2 *Defining and Diagnosing Whiplash*

Sir Peter Bottomley MP "If there is a test where people don't have to show something has happened that's not a test. A test has to potentially disprove something. You have got to have a test which shows something is disprovable. If not it is not science."

Whiplash is a non-medical term describing a range of injuries to the neck caused by or related to a sudden distortion of the neck associated with extension. [15] "Cervical acceleration/deceleration" (CAD) describes the mechanism of the injury and "Minor Cervical Trauma" (MCT) is the most common injury resulting from whiplash. [16] The Modified Quebec Task Force Classification system for diagnosis of whiplash is classified into four grades in increasing order of severity. In the UK, over 92–95% of all whiplash cases are attributed to grades 1 and 2 whiplash associated disorder (WAD), which includes neck pain and possibly decreased range of motion in the neck. Only 5–8% of WAD incidence is attributed to grades 3 and 4, which includes symptoms of neurologic damage and spinal cord injury. [17] The problem is that grades 1 and 2 are virtually impossible to diagnose because they cannot be visualised by MRI scans or X-rays and therefore no objective evidence can be produced.

Over the last three years (2008–11), the number of people claiming whiplash has jumped by 32% to 570,000 a year, even though the number of accidents reported has fallen by 16% to less than 210,000. [18] There is no doubt that some of these claims are genuine, but it is apparent that many people visit their G.P. or Accident and Emergency Department for the sole purpose of attaining a medical record to file a compensation claim.

An excess of 500,000 recorded incidents of "whiplash" annually in the UK; with any other health condition, this magnitude of incidence would be flagged as a major public health issue. Controversy arises regarding MCT because around 70% of motor insurance personal injury claims are attributed to whiplash injuries, at a cost of £2 billion per year. [19] This is estimated to add £90 to the average UK motor insurance premium. [20]

The Road Traffic Act of 1988 states that the first non-hospital physician that provides emergency treatment to a road accident victim is entitled to charge a fee of £21.30 and a mileage rate of £0.41 for anything over 2 miles directly to the patient. Sometimes treatment for whiplash is not sought immediately after the accident and the BMA's advice for the GP's surgery is to treat these cases as "emergency treatment" and therefore charge the fee under the Road Traffic Act. [21] Most physicians, however are either not aware of the fee or do not think it is fair to impose such a fee if it may deter genuine whiplash cases from being examined. The fee is meant to create a hurdle for fraudulent whiplash claims.

Dr. Stephen Davies, a spokesperson for the Royal College of General Practitioners (RCGP), verifies that both the NHS and the RCPG support this fee, although the vast majority of surgeries still diagnose whiplash associated disorder with no charge. [22]

The Transport Select Committee's report of January 2012 recommended that the bar be raised on the proof required before whiplash injury can be compensated. The committee concluded: "Where someone can demonstrate that they have suffered an injury, including whiplash, as a result of a road traffic accident for

which they were not fully liable they should be able to claim and receive compensation. However, in relation to whiplash, we are not convinced that a diagnosis unsupported by any further evidence of injury or personal inconvenience arising from the injury should be sufficient for a claim to be settled". [23]

Premex, a provider of independent medical reports for personal injury claimants, and its competitors in the UK, presently provide 50% of all personal injury claims with medical reports through their panel of medical professionals. They provide specific training material to their medical panel on whiplash diagnosis, which is the first step to an independent objective medical diagnosis akin to the system in France. These organizations have set fees under the Medical Reporting Organisation Agreement of £200 for a medical report with no review and £250 with a review plus any other fees that are associated with obtaining medical notes. These types of agencies have decreased the time it takes to obtain medical reports and have increased the use of GP's rather than specialists for reporting whiplash, however they have also become a strong income stream for PI lawyers through commission, referral fees or through direct ownership. They are also the first step towards standardised reporting and examination similar to what is currently used in assessing the entitlement for various disability benefits. Standard reporting is beneficial in identifying the appropriate compensation for damages in a fair manner but a balance must be found between the cost effectiveness of the medico legal report and the robustness of the examination.

The problem still remains, though, that the BMA needs to develop proper guidance to diagnose whiplash and Lord Hunt requested that either medical profession must take action or Parliament needs to better define the evidence needed for whiplash diagnosis. [24] The question of how doctors can provide concrete evidence to the courts confirming the presence of whiplash remains to be answered. At present, England and Wales does not have a robust and scientific way of judging the location and severity of the pain, with doctors relying on the judgment of the patient. Fixing this issue will involve some upfront costs for the NHS and insurers. However, as we have seen with efforts to promote welfare to work reforms, the government has been prepared to fund upfront costs in the knowledge that it will generate greater benefits in the long-term. The potential costs and benefits of such reforms are considered below when we look at the example of market practice in France which already has in place such a more comprehensive medical approach to assessing whiplash.

Alison Seabeck MP—"It is enormously difficult [to judge] without putting a huge additional burden on criminal investigation teams and on the Health Service who would have to do potentially more detailed testing rather than sitting in your GP's surgery and doing some basic tests and the GP saying—Yes—I think you've got a whiplash problem"

In addition to diagnosis, the treatment of whiplash is a highly debated area that is supported by very little evidence for or against intensive care. A recent study published by the Lancet shows that intensive, specialised and longer treatment for mild to moderate whiplash provides no benefits for the victim's recovery. The study looked at the results of 2,704 whiplash victims and assessed their Neck Disability Index (NDI) after receiving intensive care and standard care as well as a physiotherapy treatment compared to general advice and worksheets on exercise. The results of this study displayed that both receiving intensive care and lengthy physiotherapy did not offer a significant benefit to the whiplash victim. This indicates that an adjustment should be implemented by the NHS on the guidelines for the treatment that a person can receive for whiplash. If this data can be confirmed and reproduced, consequently decreasing the extent of whiplash treatment provides immense cost benefits immediately and in the long term. [25]

1.3 Claims management companies

"The claims management companies can only ride on a system which works in their favour. If not they'll evaporate." Sir Peter Bottomley

Figure 4

HEAT MAP OF CLAIMS MANAGEMENT COMPANIES[26]

Region	*% of private motor insurance claims involving bodily injury*
North West England	42.8%
North East England	40.3%
Yorkshire	37.4%
Central	30.5%
London and South East England (excl. Kent and Essex)	29.5%
Great Britain average	29.4%
Wales	28.3%
East Anglia	25.8%
West and South-West England	22.4%
Kent and Essex	21.8%
Scotland	20.4%
North-East Scotland	13.0%

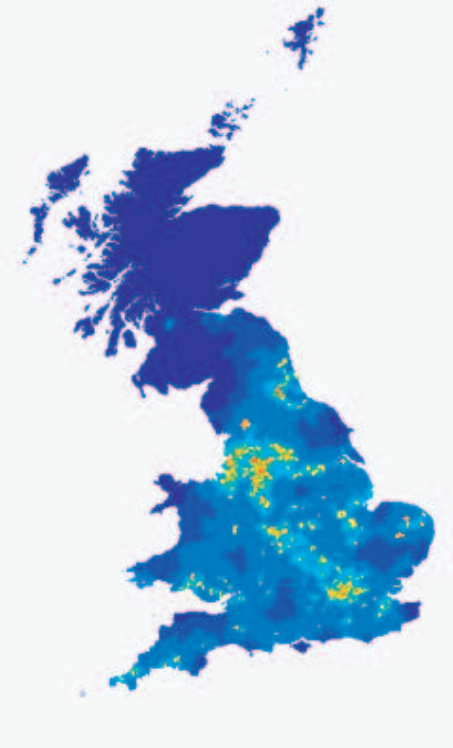


Figure 4 shows the relationship between the number of claims management companies (CMCs) and the proportion of private motor insurance claims that involve bodily injury to third parties. As whiplash in the UK makes up a significant proportion of personal injury claims we can say that there is a relationship between whiplash prevalence and CMC's geographic location.

A positive correlation exists between the number of CMCs in a region and the proportion of private motor insurance claims that involve injury to third parties. Generally, more CMCs mean more motor insurance claims involving bodily injury. Prices of motor insurance are also linked to location of claims management companies. The North West of England has the highest average annual comprehensive premiums, at £1,615, as well as a very high concentration of claims management companies.

"It doesn't seem like a crime—just getting some money back that should not have been paid in the first place… [we have] good people doing bad things." David Ward MP

CMCs are a growth industry, with national turnover increasing 50% to £377 million in 2010. The strongest growth in CMCs has been in North West England, North East England and West London, which are all areas with high levels of motor insurance claims involving bodily injury. [27]

1.4 *The Advancement of Anti-Whiplash Technology*

Several recent studies have identified the seat and headrest design to be the most important factors in whiplash safety. [28] The Volvo WHIPS system is the most well known and one of the most effective anti-whiplash technologies on the market. The WHIPS seat has improved spinal support and has been designed to keep the headrest closer to the drivers head. It also is constructed with a novel hinge mount and springs that move the seat back in the event of a rear collision in order to absorb some of the impact from the collision. This system of improved seat and headrest design helps to limit the impact of whiplash. The implementation of the WHIPS system in 1999 resulted in 49% less injury claims in the Volvo vehicles.

Saab's active head restraint (SAHR) is another effective whiplash protection system. It involves a padded headrest that is linked to a pressure plate inside the back of the seat. During a rear collision, the passenger's torso makes impact with the seatback, which presses on the pressure plate and sends the headrest up and forward in order to catch the passengers' head before their head can whip back, causing whiplash. The Saab seat itself also is designed to absorb to impact of the crash by cradling the passenger's body. [29]

There are autonomous vehicle braking technologies emerging such as Volvo's City Safety. A recent paper uses the Volvo City Safety to generate predictions for the effect of this system on whiplash cases. Their predictions display that 263,250 crashes could be prevented, 87,750 could be better mitigated and 151,848 injuries could be avoided. This equates to £2 billion in auto repair costs and whiplash compensation in the UK. [30]

In 2008, the European New Car Assessment Programme (Euro NCAP) implemented a whiplash test as part of its new car assessment to reduce the incidence of whiplash associated disorder, to promote car manufacturers to produce best in practice seat designs and increase consumer awareness of whiplash safety. The Euro NCAP

ranks new cars by the quality of their whiplash safety by a set of statistical and experimental safety data and publishes an annual report. [31]

2. Lessons from Overseas

In this section we examine some of the experiences from other countries which have dealt with whiplash claims in a number of ways. We have chosen to review European countries including France, Sweden, Germany, Italy and Switzerland since they represent territories with a similar economic disposition to the UK. To provide a global dimension we also analysed the compensation system in Canada—a country with an established road infrastructure but without the complexity of multiple states, each with its own rule book, like the USA. It is notable that of all the examples we looked at it is the French model—in which the approach taken by the medical profession in dealing with the diagnosis of whiplash is markedly different to that in England and Wales—where we potentially see the greatest learning points. Sweden too, has applied the use of a strict de minimis time limit imposed on new claims and both countries have seen very different trends emerge.

2.1 *Overview—Whiplash across Europe*

To reinforce the points made in the previous chapter, we can see that the same story exists when looking across Europe. Although bodily injury claims are not linked to the number of fatalities on the road, they are a key cause of the rising cost of motor insurance. The data points on the chart below represent the European countries, with data taken from Insurance Europe's 2010 motor insurance report. As we know from the 2004 CEA report into whiplash, a significant proportion of personal injury claims are whiplash related. Therefore, as there is a relationship between personal injury claims and insurance premiums, we can infer that whiplash claims have a direct correlation to insurance premiums.

Figure 5

THE COST OF MOTOR INSURANCE RISES WITH LEVELS OF PERSONAL INJURY CLAIMS[32]

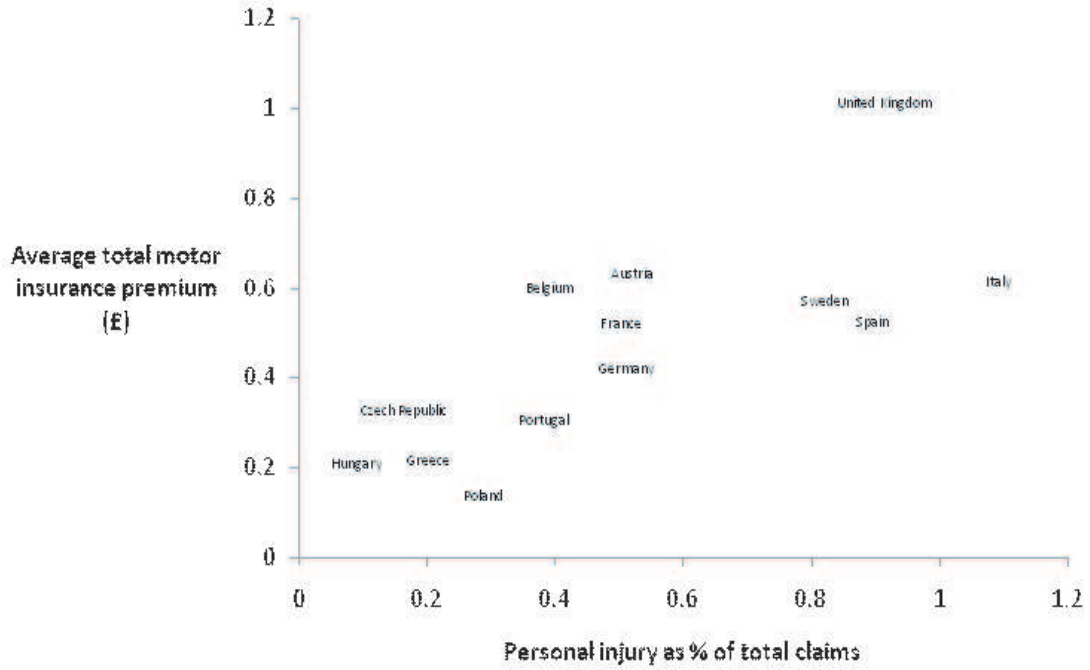
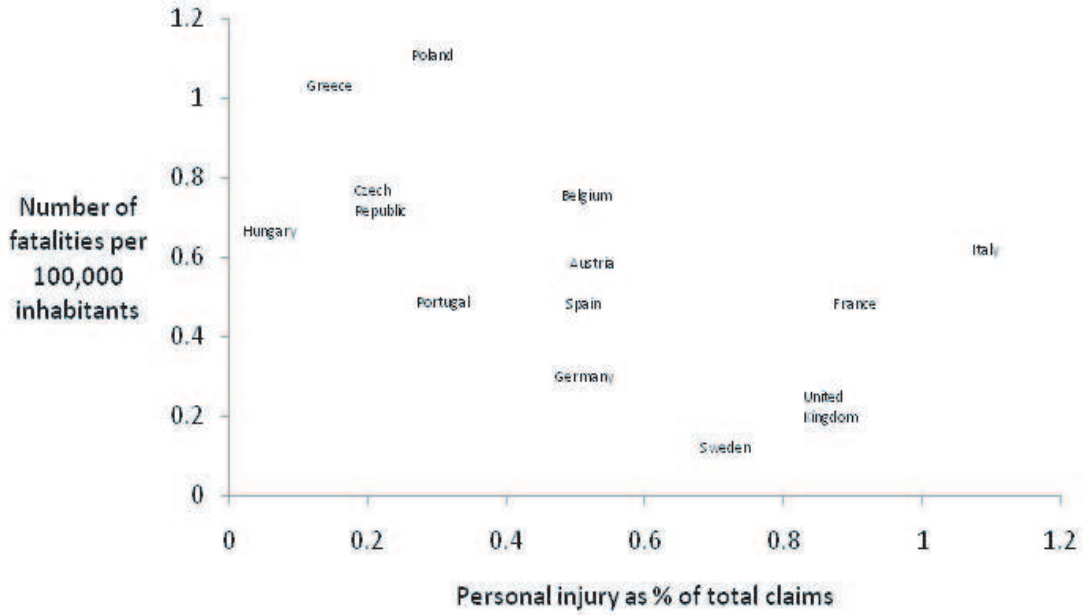


Figure 5 shows a strong correlation between the average motor insurance premium and personal injury claims as a percentage of total claims. The relationship is clear, with the number of personal injury claims being to some extent responsible for driving the level of motor insurance premiums. This implies that if countries are able to bring their levels of personal injury claims down then reductions in premiums should follow.

Figure 6

THERE IS NO RELATIONSHIP BETWEEN FATALITIES AND LEVELS OF PERSONAL INJURY



However, there is no relationship between the level of fatalities on the road and the number of personal injury claims. This implies that the number of personal injury claims is in fact unrelated to the number of road accidents. Therefore to explain the reasons behind the high levels of personal injury claims we need to look at wider social and legal trends in individual countries to evaluate what drives the level of claims. The heat map below shows the average total motor insurance premium (adjusted for PPP*) across Europe. Switzerland and the United Kingdom have by far the highest costs of motor insurance, while Greek and Polish motorists have the cheapest motor insurance out of the countries selected.

Figure 7

AVERAGE TOTAL MOTOR INSURANCE PREMIUMS ACROSS EUROPE

Country	*Average Total Motor insurance premium (€ PPP*)*
Greece	283
Poland	300
Hungary	358
Portugal	359
Germany	363
Sweden	369
France	410
Czech Republic	422
Norway	442
Belgium	448
Austria	462
Italy	485
Spain	486
Switzerland	614
United Kingdom	681

** PPP stands for Purchasing Power Parity, which is an economic theory and technique which compares the amount of money needed to buy the same goods or services in different countries*

The influence of the whiplash victim's cultural setting is examined by the CEA by looking at the German, French and Italian speaking parts of Switzerland. The German speaking regions exhibit much higher amounts of claims and costs compared to the French and Italian regions and the CEA suggests that this is related to the heavy amount of lobbying from whiplash victim associations and therefore public awareness of the availability of personal injury compensation. [33]

2.2 *France*

Overview

In the CEA's 2004 study, France had the lowest level of insurance claims linked to whiplash (0.5%) out of all ten countries surveyed. It also had one of the lowest levels of cost per claim at €3837. Whiplash claims are estimated to be only 3% of all bodily injury claims and the country is often used as a comparison point by other countries pointing out their own high costs. Due to whiplash being a minor issue in France minimal data has been published since the 2004 CEA report. As shown by figure 7, the French enjoy relatively low levels of car insurance, at just €410, and this is in part due to the low levels of bodily injury claims incurred on the industry.

Medical framework

In France, strict regulation and a strong medical element to personal injury claims seem to have played a role in keeping the cost of car insurance down in recent years.

Diagnosing bodily injury

To diagnose bodily injury in France there is a firm emphasis on objective proof. With regards to whiplash this means that injury is not recognised unless the medical professional is able to see evidence of injury, such as on an MRI scan or X-Ray.

Medical qualifications

There are strict rules in France around the qualifications needed to be able to diagnose bodily injury when an insurance claim is involved. Legislation specifies a certain level of training required in order to assess bodily injury, requiring a diploma in bodily injury assessment. No compensation can be awarded without this *legal and independent* assessment, and many argue that this is the key element to the containment of whiplash claims.

There is an extensive process for diagnosing whiplash, including the requirement for a neurological examination and one of several diplomas are needed to assess Bodily Injury from a medical perspective. The CAPEDOC (see below) is one of these although other University qualifications can be used to award diplomas in Legal Medical Assessment.

The assessment is performed by a doctor trained and who has graduated in legal medical assessment.

Two kinds of diplomas are relevant:

- Diploma from University in Legal medical assessment—Réparation du Préjudice Corporel (RJDC).
- Diploma named CAPEDOC delivered by the French Insurers association required by the insurance companies to assess Direct settlement claims which are compensated via an agreement between Motor Insurance Companies.

The medical assessment given by professionals with these qualification aims to:

- Give a medical and independent opinion on the victim's physical and psychological state related to the accident;
- Estimate the current and future consequences of the accident; and
- Allow the claims handler or the Court to estimate the extent of the damage and propose a fair compensation.

Medical-Legal Assessment

The medical assessment legal framework is based on two pillars; the type of damage such as disability or pain or suffering is defined by the law. This is in addition to a medical scale in which each damage is rated by the medical expert on a medical scale. Compensation of bodily injury claims is based on a legal medical scale and the assessment is performed by a doctor with knowledge of legal medical assessment. The type of calculation used to measure the scale of bodily injury in France is the "calcul au point" or the AIPP scale. The courts usually ask the experts to specify a percentage of incapacity, though only in an indicative way. Frequently, medical experts use unofficial scales, but usually rely on their professional experience. The most commonly used scale in the courts is the "bareme fonctionnel indicative des incapacites en droit commun" published in Le Concours medical in 1982. [34] The Code of Civil Procedure from the French Assemblee Nationale mandates that the forensic medical expert, individual or corporation is prohibited in engaging in an activity that is incompatible with the independence necessary to carry out its mission in the statutory provisions in Articles 2 and 3. This means that the medical professional who is evaluating the whiplash claims must be independent of any external organisations that may influence their medical assessment.

An example of the level of compensation based on age and disability is shown in the table below. [35] [36] The principle behind this table is that the older the individual is, the less time they will have to live with this permanent or semi-permanent injury and therefore as age increases, the compensation decreases.

AIPP, Age	*0–10*	*11–20*	*21–30*	*31–40*	*41–50*
1–5%	€1,200	€1,100	€1,000	€950	€900
6–10%	€1,400	€1,290	€1,180	€1,120	€1,050
11–15%	€1,600	€1,480	€1,360	€1,290	€1,200

AIPP Scale Example Injuries:

AIPP (%)	*Example of Injury*
0–5%	Loss/paralysis of toe or finger, loss of smell or voice
5–10%	Loss of hearing in one ear, knee replacement
10–15%	Loss of all toes or teeth, loss of teeth
15–20%	Facial paralysis, loss of non-dominant thumb
20–25%	Loss of dominant thumb, loss of vision in one eye
25–30%	Loss of foot or leg (replaced by prosthetic)
30–40%	Loss of non-dominant hand
40–50%	Loss of dominant hand, loss of non-dominant arm
50–60%	Loss of dominant arm, loss of leg, sight or hearing
60–100%	Paraplegia, tetraplegia, cranial trauma

Legal process

If the claimant wishes to dispute the decision taken by the medical expert then they are able to go to court. Once taken to court, if the claim is unsuccessful, the cost of legal fees falls on the claimant. However, if the claimant is successful in front of a tribunal, then compensation for pain and suffering and reimbursement for legal fees will be awarded. There are no scales for compensation and no fixed amount but a guideline related to average cost per head of damages is used by courts to compensate personal injury claims.

2.3 Sweden

Overview

Between the 1990's and early 2000's, Sweden saw a rapid increase in the number of whiplash related injuries, resulting in increased cost to drivers. Whiplash injuries in Sweden were depicted as "very common" in the media. A "Whiplash Commission" was an initiative financed and undertaken in 2002 by the insurance industry with the former Prime Minister Ingvar Carlsson as chairman. Their work was finalised in 2006 in two reports, with some key implications outlined below. The Commission noted that in 2002, more than 30,000 people in road accidents reported neck problems to Swedish insurance companies, representing more than half of all injuries reported. At present, whiplash claims do still occur but have reduced significantly. Although there are no reliable statistics to show levels of whiplash claims at present, in 2011 the total number of personal injuries was 27,000. The view from Insurance Sweden is that the incidence of whiplash injury is now less than 50% of personal injury, compared to approximately 60–70% in the 1990's.

De minimis threshold

In Sweden, a time limit system for the onset of symptoms is used, and cases where symptoms appear more than 72 hours after the incident are generally rejected by insurers. This is more a rule of thumb, as opposed to a strict rule, and is used as an approximation of "close proximity" to the accident in question.

This De Minimis threshold was reinforced by the Whiplash Commission's medical group in that symptoms must be discovered within three—four days after the accident otherwise it is not a whiplash injury.

Other attempts to control whiplash

The main report written by the commission was on how to prevent fraudulent whiplash claims while the second study was a medical report on assessment, treatment and rehabilitation. These were rolled out across all emergency hospitals in Sweden and to other stakeholders. During 2007 Insurance Sweden also produced a leaflet with consumer information on "How to act when having a whiplash injury" that was sent to all pharmacies and medical day care centers. The trade association also produced a small information guide for doctors when assessing a whiplash injury. The Commission's medical report was published in European Spine Journal in October 2008 (Volume 17 Supplement 3).

Insurance Sweden had also been sponsoring—through the Whiplash Commission—the work of The Bone and Joint Decade 2000—10 task force on neck pain and its associated disorders, which was published in "Spine" on 15 February 2008. [37] In 2009, there was a joint conference held by two medical groups in Stockholm on how to detect, treat and rehabilitate whiplash injuries. Doctors from the Nordic countries attended.

Insurance Sweden says it is now able to see the positive effect of their work;

— Most motor manufacturers now make their cars with specific emphasis on protecting drivers and passengers from whiplash injuries.

— There is a more common understanding in Sweden of whiplash injuries including how to detect, treat and rehabilitate them, yet it is not easy to spread the information to all doctors in the country. Whiplash patients are not something they see every day, compared with people with high blood pressure etc.

— The courts have accepted how the injury works. (You cannot now claim that you have a neck pain from an accident eight years ago if you haveńt had any pain the first four days.)

— There are fewer people seeking treatment at hospitals claiming that they have a whiplash injury. Earlier people involved in a car accident wanted to be x-rayed even if they didńt have any symptoms.

2.4 *Germany*

Overview

German insurers have faced similar problems in that they are seeing a decline in gross written premiums in parallel with an increase in the cost of claims. Despite this, Germans are able to enjoy relatively low premiums compared to those in other European countries, especially the UK which has average premiums roughly double that of Germany. In part this has been brought about by fixed claimant legal costs which average €300 in Germany compared with £1,200 in the UK. Due to regulations imposed by the German government there is also a smaller incidence of whiplash claims reported.

Collision speed limit on claims

In Germany a system involving the consideration of biomechanical evidence was used pre-2003, where claims involving a collision speed of less than 10km/hr were generally not considered by courts. This was, however, repealed; the BGH (Bundesgerichtshof, Federal Court of Justice of Germany) required that a case-by-case analysis of claims should be adopted as of 2003. The claimant is still required to provide full proof of the incident, and these requirements can be quite high.

Further methods to control whiplash

In Germany, there are three levels of whiplash related injury, measured as first, second and third degree in increasing levels of severity. Second and third degree injuries are diagnosable using clear, objective criteria; problems arise when attempting to demonstrate the existence of first degree injuries. Where these cases are disputed the evidence of a physician is often reinforced with that of an "interdisciplinary expert opinion". This takes into account the type and speed of impact, and the degree to which injuries could be the result of pre-existing conditions. Lower speed collisions require higher levels of proof that the injury is genuine.

Claimants in Germany will require two medical opinions to prove that they have suffered a whiplash injury and classification of injury severity is measured on the "abbreviated injury scale".

Claiming for whiplash in Germany

German legal costs relating to personal injury claims are amongst the lowest in the world, averaging at 14.4% of the claim value. It is a country considered by the UK as a good example of legal costs kept under control by efficient regulation. The Jackson report[38] commits a whole section to the German legal cost structure. The key points are outlined below: [39]

— The German rules of civil procedure contemplate cost shifting, albeit according to well-defined scales for recovery. The effect may be that a successful litigant is entitled to recover a smaller proportion of its actual fees than would be recoverable in England and Wales. [40]

— The German system permits the use of contingency fees only in limited circumstances, namely where a claimant does not have the means to retain lawyers for his case. Legal aid is available in certain civil cases. [41]

— In Germany, civil litigation is managed by the court so that it controls the proceedings and the evidence that is brought before it. One method by which the court does this is to appoint experts to assist the court on relevant factual issues, rather than leaving it to the parties to adduce their own expert evidence. [42]

2.5 *Canada*

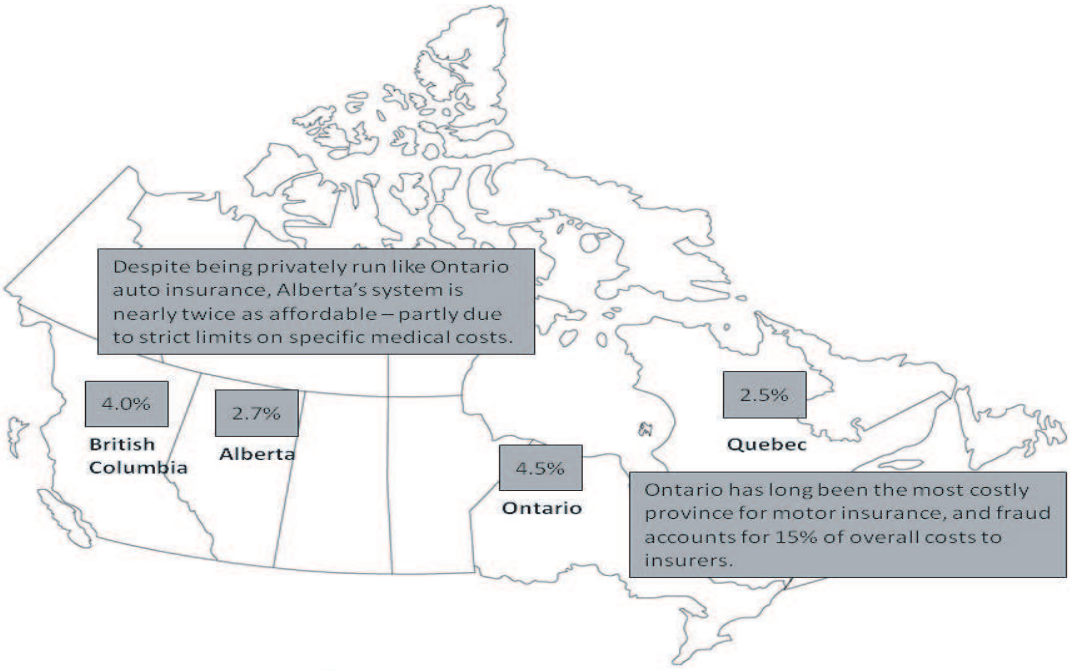
Overview

Motor insurance in Canada is regulated by province and legal systems and insurance premiums vary widely. Some states such as British Columbia have government-owned motor insurance corporations with a monopoly, aimed at keeping costs down. The average cost of motor insurance varies from a low of $CAD642 a year for the Quebecois to a high of $CAD1,282 for Ontarians. Comparative studies have shown that those states with a private but well regulated market for auto insurance, such as Alberta, generally have the most affordable premiums for motor insurance.

Compensation cap

Figure 14

MOTOR INSURANCE PREMIUMS AS A % OF DISPOSABLE INCOME IN LARGEST CANADIAN MARKETS[43]



Legal Framework

In Canada, there are prescribed compensation caps for whiplash associated personal injury claims, however these vary between provinces. In Nova Scotia the general damages cap for minor injuries (including "whiplash-associated disorders" is currently set at $CAD7,665 (approx. €5,500) and is linked to inflation. The state of Alberta also has a similar general damages cap, but at the lower value of $CAD 4,559 (€3,270), also inflation adjusted. This latter price cap was disputed in 2008, however it was ruled as "constitutional" in 2009. As a side effect of this, Alberta's Automobile Insurance Rate Board (AIRB) required insurers to reduce their premiums by 5%.

Many states have a "no-fault" rule in place in order to try and limit personal injury claims, and it can be argued that this is one of the factors keeping premiums low in Quebec in particular. While in Ontario the cost of motor insurance increased significantly up to the 2010 reforms, yet in other states costs have been under control or have even fallen (as in Nova Scotia).

The Fraser Institute, a think tank, believes that Ontario's legal framework is a direct contributor to its high insurance costs. They claim that "regulatory severity" has failed to prevent insurance fraud, and has instead encouraged it and led to runaway costs.

Bringing whiplash under control: the Ontario case study

Ontario has a tightly regulated but extremely generous motor insurance sector, where the regulator controls premium levels but has approved consistently high increases in premiums. This has been driven by what Ontario's Auditor General believes are "unnecessarily high payouts" and a lack of measures in place to combat fraud. [44]

Insurance Canada believes that the Minor Injury Guideline, introduced in Ontario in 2010, has had an important impact on levels of claims. It limits the payment for injuries such as sprains, strains and whiplash to $CAD3,500, [45] in an attempt to combat runaway payouts to Ontarians which were averaging $CAD56,000. [46]

Has it worked?

More than 18 months since its introduction, there is not enough data to truly say that the reforms are working, according to RBC Insurance chief for property & casualty Anne-Marie Vanier. [47] In 2012, she told the third annual Canadian Insurance Financial Forum in Toronto: "The best complete data we have for analysis is up to June 2011." "But there are some signs that the reforms are at least partially doing the job intended". The cost of assessments is now 10 to 18% less than pre-reform. Accident benefits claims are developing better than expected. Frequency on those is down 10 to 20% and a lot of "suspect" medical clinics have closed. But

there are still a large number of claims in mediation. On third party liability and bodily injury claims, frequency has increased 15 to 40% depending on the insurer.

2.6 *Spain*

Overview

Spain has problems with a growing "claims culture", though the UK and other countries may be able to learn from the aggressive fraud prevention policies pursued by both insurance companies and the government.

In Spain, an injury under the personal claims system is known as a "sequels". The most recent estimates suggest that 60% of all "sequels" in Spain are whiplash related. This high prevalence is compounded by worries over the level of fraudulent claims.

The claims procedure in Spain is similar to that of the UK, in that lawyers are involved throughout the process. Once a case makes it to court and liability has been established, a doctor's certificate is required to verify the claim. The actual level of damages is controlled by the "Baremo" personal injury system (which uses actuarially derived tables to calculate the payout a claimant would receive). The severity of an injury is measured on a range of one to 100; an injury level of 100 would typically be associated with cases such as total quadriplegia, whereas whiplash related injuries are typically limited to three. This results in a typical payout of around €3,000, with lawyers fees taken as a percentage of this, usually around 10% (or approximately €300) as a conditional fee (no win—no fee) arrangement.

Measures to control whiplash

In Spain, the main challenges for the future of whiplash claims concern fraud, and more specifically the prevalence of organised fraud. There is a growing "claims culture" of lawyers pursuing a large volume of cases, and there is an increasing worry over the potential involvement of health professionals in producing/enabling fraudulent and exaggerated claims.

The Baremo legal system for the assessment of personal damage caused by road accidents was introduced by Law 30 in 1995. The assessment system is a legal and rating system that seeks to value all types of damages, both pecuniary and non-pecuniary. The Spanish government intends to promote a reform of Baremo to adapt it to new social realities and to mitigate its main defects. At present, the full scope of this project is not known, but a comprehensive review is also being carried out internally by UNESPA, the insurance business association.

Fraud prevention policies are very common in private insurance companies and in the government. The focus is on awards for the detection of fraud, and there are commissions that work on fraud prevention, such as the one at UNESPA, and a significant increase in police checks. There is also close collaboration between the security services, Zaragoza Centre and UNESPA, to stamp out illicit trade in vehicles and to improve the recovery of stolen cars.

2.7 *Italy*

Overview

Italy has the highest density of cars in Europe and the second highest motor insurance claim frequency. Motor insurers have experienced heavy losses on the increasing costs of motor insurance claims, with a combined claims ratio of 109% in 2009. In 2012 Italy introduced legislation in an attempt to reduce the levels of unjustified bodily injury claims.

One in five claims in Italy is a personal injury claim. The provinces of the south have a higher experience than the national average, for instance: 44% of claims in Crotone are for personal injury; Brindisi, 41%; Taranto, 40%; Foggia, 37%. Very mild injuries account for 13.3% of claims and more than 70% of non-severe injuries. Italian insurers indemnify these claims with about 1.7bn Euros a year, or more than 11% of total motor liability compensation.

Direct indemnification

The introduction of CARD (Convenzione tra Assicuratori per Risarcimento Diretto) "Direct Indemnification" system aims to decrease claims costs by reducing conflict between the injured party and insurers through reduction of legal involvement. [48] In addition, databases have been created by authorities to record injury data (eg Social Security records all injuries to workers; the Italian regulator created databases with all insurance industry claims data) to counter or limit potential fraud.

Other whiplash reducing initiatives

Insurers have also tried to reduce the number of whiplash injuries by:

- Challenging medical results when there is not a clear medical opinion to prove symptoms;
- Investing in expert analysis of acceleration-deceleration forces according to vehicle deformation;
- Accepting only original medical documentation; ans

— Investigating any precedent to avoid having to pay the same damage twice (or more).

The cost of these actions is sometimes higher than the damage itself but there is a consensus that it is worth proceeding in order to deter fraudulent behaviour.

In Italy, personal injury claims are made using the "Book of Quantum" principles, where an injury is assigned a specific level of severity by a court, and damages are assigned based on this level. The level of severity for personal injury is based on a scale from 1 to 100% of permanent disability, with whiplash claims typically receiving 2 to 3% on this scale. This remains a point of contention for Italian insurers, who argue (through ANIA, the Italian trade organisation) that whiplash does not generally cause a permanent disability, and therefore should not be classified as such. Lawyers are also involved throughout the process, and fees vary from 10 to 20% of the payout. Typical payouts are in the region of €3,000, and therefore fees range from €300 to €600. The "claims culture" itself is however markedly different to the UK, in that when individuals make a claim they usually go to the broker from which they purchased the policy (an estimated 90% of policies are sold through brokers). This broker proceeds to nominate a lawyer to handle the case. While the broker is not meant to receive a fee for this, this is not believed to reflect reality.

In recent years, Italian policymakers have been studying levels of compensation for personal injury. Conclusions were to fix medical criteria and the compensation value degree for permanent and temporary disability.

On 26 March 2012, a new law entered into force which sets out new guidelines for accurate medical diagnosis. The insurance sector lobbied for the law because of the ease at which the court was able to award whiplash injuries without objective medical evidence certifying the disability. Although it is too soon to measure the impact of these efforts, future industry data should show its effect.

2.8 *Switzerland*

Overview

In Switzerland, the average cost of bodily injury motor insurance claims has been reported as significantly higher than in other countries. The 2004 CEA report into whiplash claimed the average cost at €35,000. The Insurance Europe 2010 report into motor insurance puts the average cost of a personal injury claim in Switzerland at €42,000. These levels of claims have been particularly high in Switzerland due to the legal system allowing claimants to claim for long periods off of work.

2010 Court ruling[49]

A 2010 court case involving whiplash has had a profound impact on the Swiss motor insurance industry, and may well lead to lower levels of motor insurance premiums and personal injury payouts in the future.

The case concerned a woman who suffered two car accidents, one in 1997 and in 2000. She applied for payments under her disability insurance, but these were refused by her insurance company for lack of evidence that her injuries caused her inability to work. The lower court however ordered the insurance company to pay. The company then appealed to the Swiss Federal court (the Bundesgericht) which had previously ruled in 2004 that patients with pain disorders without a physically detectable cause were not covered by disability insurance.

In the case at hand (a ruling from August 2010) the Court extended this practice to injuries related to whiplash. The Court held that whiplash injuries cannot be classified as a disability, as the symptoms manifested could have multiple causes and are not recognised as a diagnosis by any authoritative medical classification system.

3. UK Policy Landscape

3.1 *Policy actions—what have UK policymakers been doing to address concerns around whiplash?*

"The wind has changed. The Transport Select Committee has got the bit between the teeth—they are determined not just to write a report and then leave it." David Ward MP

In examining the background to our civil compensation system that underpins claims for whiplash and other personal injury claims, it is necessary to review the associated legal costs that form an integral part. The principle of proportionality of legal costs has long been a feature of European law. [50] In the UK, the principle became a key issue during the Woolf Inquiry into Access to Justice between 1994 and 1996. One of Woolf's key eight principles for the civil justice system was that "procedures and cost should be proportionate to the nature of the issue involved." [51] However, the costs system as it currently operates assesses the charge for work on the basis of the market rates charged by professionals rather than attempting the no doubt difficult task of placing an objective value on the work. Lord Justice Jackson commented in his 2010 report that since Lord Justice Woolf reported, a decade earlier, nothing seems to have changed. [52] The impact of conditional fee arrangements ("no win, no fee") has had a major impact on the cost of litigation which in turn is helping to push up the costs on insurers. In giving evidence to the Jackson Review in 2009, data from one insurer suggested that costs related to personal injury cases amounted to an average of 77% of damages. [53]

The issue of whiplash arose onto the Parliamentary agenda in the latter half of 2011, particularly in relation to the wider issue of the rising costs of insurance premiums. At governmental level, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act of 2012 legislates for a ban on referral fees (effective from April 2013) and reform of "no win, no fee" arrangements by removing recoverability of success fees and ATE premiums, all of which the government believes to be key drivers of the large volume of whiplash claims in the UK. The UK government has also committed to extending the current Road Traffic Accident (RTA) Personal Injury scheme by April 2013. The expansion will be vertically, to include claims up to £25,000 (previously £10,000) and horizontally, to incorporate Employers Liability (EL) and Public Liability (PL) claims. [54] The present RTA fixed cost will also be reduced from £1,200 to £500. Banning referral fees and removing recoverability of success fees and After the Event Premiums form an important element in creating a more proportionate cost system for civil litigation and one where the claimant will have a personal interest in the level of legal costs incurred in his name.

A recently published consultation on "Reducing the Number and Cost of Whiplash Claims" considers two vital factors for reducing large volume whiplash claims. The first is the introduction of independent medical panels to provide better medical evaluations for whiplash claims. The second establishes whether the small claims threshold for road accident claims that are attributed to road traffic accidents should be increased from £1,000 to £5,000. These proposals mimic the successful system of personal injury whiplash claim compensation seen in France where strict regulation and price control keep claims to a minimum. In Scotland, a consultation published in December 2012 set out to reform the damages of psychiatric injury by reducing the liability that may be incurred for these cases as well as decreasing the limit on the time period where an individual can take civil action for personal injury. These proposed changes seek to modernise and simplify the law and future claims that are incurred for personal injury, establishing standardised procedures for previously vague areas of the law.

Although increasing the small claims track will benefit the speed at which claims can be processed, there is concern as to whether a similar instance will manifest itself in other areas such as PTSD and shoulder bruising. It is therefore important to increase the threshold across carefully all RTA rather than whiplash alone. The claimant lobby, on the other hand, asserts that increasing the small claims track will hinder the access to justice of personal injury claimants who need to represent themselves. It is a likely case that an increase in the small claims track will cause there to be more unrepresented claimants, they will be more likely to receive enhanced compensation because there are no legal costs for them to pay.

David Ward MP, interviewed for this report, says that the timeline for implementation of reform proposals should be "now now, now, yesterday, the day before" Not surprisingly, UK Parliamentarians have been highly vocal in informing this debate. The Motor Insurance Regulation Bill was introduced by Jack Straw MP to reform the regulation and operation of the market in motor insurance, with specific regard to banning referral fees, establishing new standards related to the evidence required in whiplash claims, reforming the Pre-Action Protocol for personal injury claims in road traffic accidents, and setting requirements in respect of risk pricing for personal injury claims. [55] The section of the Bill pertaining to whiplash contained the following provisions:

- The onus shall be on the claimant to satisfy the court that there is independent, objective evidence that the claimant has suffered harm, and for them to justify the extent of that harm; [56]
- No damages shall be recoverable if the only evidence is the subjective description of symptoms by, or on behalf of, the claimant; [57]
- There shall be a rebuttable presumption that no harm or injury to the claimant has been suffered where:
  - The collision giving rise to the accident took place at a relative speed of 15mph or less; or
  - There are no musculoskeletal signs of any injury, including fracture and dislocation. [58]

In March 2011, the House of Commons Transport Select Committee reported that around 70% of motor insurance personal injury claims arise from whiplash injuries. [59] Among the reasons highlighted for the rise were the earlier introduction of conditional fee arrangements ("no win, no fee") and the practices of claims management firms in generating personal injury claims, for instance through "aggressive" marketing techniques. [60]

"There is clearly fraud going on in a number of different places. It is becoming an issue for general conversation. It is moving up everybody's agenda—with friends, constituents—do you know anyone who has claimed?" Alison Seabeck MP

The Transport Select Committee's additional report in January 2012 recommended that the bar be raised on the proof required for whiplash. [61] They felt that greater use of technology could help to provide a partial solution and that countries which revealed the lower incidences of whiplash also tend to undergo radiographic examinations of patients such as x-rays, NMR, EMG, MRI and CT scans. In the UK there is only a requirement for a simple clinical examination. The Committee suggested that if the number of whiplash claims does not fall significantly as a result, they believe there would be a "strong case" to consider enacting primary legislation to require objective evidence of a whiplash injury, or of the injury having a significant effect on the claimant's life, before compensation was paid. [62]

The Committee further recommended that the government should take action to investigate the role played by legal and regulatory rules in generating the continuing increase in personal injury claims relating to motor accidents, and assisting the police and the insurance industry in tackling fraud more effectively. [63] While the report welcomed provisions to increase access to justice, it stated that this should not provide people with an opportunity to make fraudulent claims for non-existent or pre-existing aches and pains. The Committee's report also recommended that the Department for Transport sponsor a research project on international experience in restraining the number of personal injury claims relating to motor insurance, with the aim of publishing a discussion paper on this issue during 2012 outlining possible options for change.[64]

"We are part of a dysfunctional system that is spiralling out of control. I could have an accident and a garage which without my knowledge or permission could pass on my details without me knowing" David Ward MP

At a meeting of the All Party Parliamentary Group on Insurance and Financial Services in February 2012, it was revealed there is evidence that in one or two instances GPs are diagnosing whiplash over the phone, without undertaking any face-to-face clinical examination. There was also evidence of fraudulent medical assessments, sometimes with the complicity of medical practitioners.[65] For this reason it is vital to separate the medical doctors from the claims management companies.

During 2012 the Prime Minster has committed the government to take action to tackle the compensation culture, reduce legal costs and cut health and safety red tape.[66] The Government and industry also committed to work together to identify effective ways to reduce the number and cost of whiplash claims. Options include improved medical evidence, technological breakthroughs, the threshold for claims and the speed of accidents. [67]

Furthermore, at a high-level summit hosted by the Prime Minister David Cameron at 10 Downing Street, he committed the Government to work with the insurance industry to identify effective ways to reduce the number and cost of whiplash claims. These actions illustrate that the government recognises that the very high number of whiplash claims in the United Kingdom is a significant concern, and one which needs to be addressed.

4. Summary

The key challenge for policymakers is to be able to create a system in which injured persons are rehabilitated and compensated and put back into the position they were in while at the same time providing little incentive for fraudulent claims to be submitted. Other countries have been more effective at balancing this than the UK. France has had a very low prevalence of whiplash claims; in 2004, just 3% of total bodily injury claims were whiplash related, and the proportion has stayed low ever since. Evidence from our comparative analysis shows that countries which have stricter diagnosis procedures, for example requiring claimants to have an assessment undertaken by a medical professional with specific training in diagnosing neck injuries, are likely to have a lower frequency of expensive whiplash claims.

Objective proof, in addition to extensive training for medical professionals, enables an accurate diagnosis to be made and for fraudulent claims to be rejected without fuss. Other countries have been following suit. Italy, Sweden and Switzerland have also been (or are currently) challenging medical claims they believe to be unjustified. We can see this in the case of Sweden in the work of the Whiplash Commission, which the Trade Association, Insurance Sweden, now claims is having a material impact on claims. In addition to the medical requirements, Sweden's de minimis threshold has also helped to keep the number of unjustified claims to a minimum, after concluding that injuries warranting compensation should be notified within three—four days of the incident. We can therefore see by looking at other jurisdictions that there are a number of tools that governments can use to reduce the prevalence of unjustified claims, bring costs to insurers under control and ultimately provide fair and affordable motor insurance premiums for customers.

Acknowledgements

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Cicero is an international consultancy specialising in corporate communications, digital strategy, government affairs and thought leadership generation for policy, business and consumer audiences. Cicero was established in 2001, and now operates from offices in London, Brussels, Washington and Singapore. As a market leader in policy research, Cicero authored this report, as well as collating and analysing the data used within it.

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Parliamentarians

Sir Peter Bottomley MP is a British Conservative Member of Parliament for Worthing West. He became the minister for roads and traffic in 1986. He is currently the co-Chairman of PACTS the Parliamentary Advisory Council on Transport Safety.

David Ward MP is a British Liberal Democrat Member of Parliament for Bradford East. Since coming to Parliament in 2010 he has taken an active interest in insurance due to the high cost of motor insurance in his constituency. He has a survey and a petition on motor insurance on his website.

Alison Seabeck MP is an English Labour Party politician for Plymouth Moor View. She is a member of the All Party Parliamentary Group on Insurance and Financial Services.

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