

## **Motor Accident Solicitors Society (MASS): Written evidence submitted to the House of Commons' Justice Select Committee on its inquiry into 'Government plans to raise the small claims limit'**

1. MASS is a Society of solicitors acting for the victims of road traffic accidents (RTA), including those involving personal injury (PI). MASS comprises 120 solicitor firms that employ over 2,000 lawyers and claims handlers throughout the UK. Collectively member firms conduct the vast majority of RTA PI claims each year.
2. We represent claimant solicitors on the boards of MedCo and Claims Portal, both organisations we helped to establish, and have actively engaged in negotiations with both MoJ and the insurers on many aspects of civil justice, including the establishment of the 'askCUE' PI enquiry service to combat fraud. We are currently one of several stakeholder representatives on the MoJ's Whiplash Reform Steering Group and four sub-groups, one of which is the Guidance and Support Working Group considering the implications of the Government's reforms on all relevant court users, including Litigants in Person (LIPs).

### **General comments**

3. The present £1,000 small claims track limit (SCTL) for PI claims has not been adjusted since 1999, although it is debatable whether the real level of compensation paid has increased dramatically since then. However, the proposed increase is neither reasonable nor fair. It far exceeds a figure that could be justified by any inflation-based calculation, which was the recommendation from Lord Justice Jackson<sup>1</sup>. The proposed SCTL of £5,000 appears to be entirely arbitrary and no detailed analysis has ever been published to justify such a substantive increase to the level proposed.
4. There will be a range of unintended and unwanted consequences resulting from such an increase. We strongly contest the Secretary of State's view<sup>2</sup> that RTA claims are "*not, I suppose, too dissimilar from an insurance claim of some kind*". Whilst RTA claims are clearly not amongst the most complex of legal cases, to untrained LIPs unfamiliar with the process or the workings of the Road Traffic Act, they will still appear bewildering and labyrinthine. The small claims court is not suitable for PI claims as the complexity of handling these claims should not be underestimated.
5. Indeed, an increase may lead to more fraudulent activity and no guarantee that the number of claims will fall. There will certainly be reduced access to justice and equality of arms. It cannot be right that an unqualified and vulnerable individual, with little or no legal experience and without 'professional' legal advice, could be fighting their claim against a defendant lawyer or insurer representative who will have considerable experience in defending claims. Many may simply be put off from proceeding to seek justice, which may be the reforms' base intention.

### **Complexity of cases**

6. Even for lower value claims, the process can be confusing and complex. Even if LIPs understand that they need to submit a claim via the online Claims Portal and are able to find it amongst a myriad of likely listings by Claims Management Companies (CMCs), for their claim to stand any chance of success, they will need to perform a detailed series of steps – customer validation, fraud checks, liability assessment, deployment fault, deployment non-fault, assessment of vehicle damage, uninsured loss and personal injury. How would the LIP obtain the correct TPI information? Would they have access to MIDIS? How would they access AskCuePI and who would pay? Would they know to obtain supporting evidence such as a police accident report? How would they deal with data protection issues?
7. The issue of liability or causation disputes has rarely been mentioned, but these form a significant number of cases. In May 2017, approximately 24% of the 60,664 new CNF's created had issues surrounding liability. Are we really asking LIPs to navigate any case involving a liability dispute, allegation of contributory negligence, dispute over causation, allegation of fraud or fundamental dishonesty? How would they know to approach witnesses and gather evidence? Deal with expert engineering reports or expert intelligence reports?

With many cases falling between the two, with liability not denied but equally not admitted for some time, will the LIP be left in limbo before paid legal representation is permitted or paid for by the Defendant? This is before they would begin the process of obtaining a medical report, presumably through MedCo, calculating losses and expenses, developing a treatment programme and submitting a Stage 2 pack. All whilst they may be recovering from a traumatic incident that may have left them injured and unable to work.

8. Few claimants would be aware of subrogation rights and may settle claims for their own losses without realising that they also have an obligation to recover sick pay advanced by their employers or payments made by their private health insurers. Most will not be aware of the possibility of waiting for a prognosis period to expire before settling their claim. Some will settle their claim only to realise that they have been undercompensated. Claimants will not be aware of the approach to quantification of special damages, for example loss of earnings and care.
9. Originally it was not the intention that PI claims would be included in the online court. It is not yet clear what would happen to PI claims that do not settle and do not go to the online court. There is also the question of what happens to claims that do not settle in the small claims court and what the procedure will be. If PI claims are to be included in the online court, as proposed by the Government's reforms, it would make sense for all the reforms, whatever their final form, to be introduced simultaneously and in a co-ordinated manner, rather than piecemeal.
10. There are a variety of potential financial obstacles to justice that have yet to be resolved. It is not clear yet who will pay for the DVLA fee, GP report, a consultant report, issue fee, application fee, hearing fee, policy report, medical records and the costs associated with accessing the Motor Insurers Database and askCUE PI. LIPs will face clear difficulties in accessing these services and if they are required to fund the associated costs, or even most of them, they will face a severe bar to justice. These various fees are currently funded by claimant law firms on behalf of their clients, and recovered from the third party at the end of the case if successful. Most individuals will not be able to fund these claims. Many legitimate self-representing claimants will simply be put off with pursuing their rightful claim, but probably not until the Court's time and resource have been called upon.
11. Below is a chronology of a typical motor injury claim currently run by a firm of solicitors, thus illustrating the steps and procedures that a LIP would likely have to undertake. We contend that it is unrealistic for the Government to expect LIPs to have the legal knowledge needed to navigate these requirements to successfully handle their claim:
  - **Post-Accident** - Car repairs/valuation/instruct engineer; Vehicle hire; gather evidence eg, photographs, police reports, witness details, receipts, arranging treatment needs.
  - **Funding of case** - Risk assessment; availability of Legal expense policy; Conditional fee agreement (decide on percentage success fee); Contingency Fee agreement; DBA; if child claiming, arrange litigation friend to act.
  - **Identify responsible driver/vehicle/insurer** - DVLA search; Motor Insurers Database search; Police report; witnesses.
  - **Claims notification** – AskCuePI and MedCo Search; complete and submit Claim Notification Form; if uninsured/untraced/foreign driver, apply to Motor Insurers Bureau (MIB).
  - **Liability dispute** - Total denial of liability; contributory negligence, eg seat belt, alcohol, speed; consider and apply case law; consider witness evidence, photographs/plans, police report and CCTV footage.

- **Causation/low speed impact disputes** - Dispute over amount of damage and/or injury caused; consider expert engineering evidence; consider expert medical evidence with a view to obtain orthopaedic report.
- **Financial Losses** - loss of earnings/income/business; insurance policy excess; private health insurers outlay; medication/prescriptions; treatment fees; care; travel to treatments/rehabilitation; future needs/losses.
- **Medical evidence** - Medical report(s) needed; GP/hospital notes needed; ongoing treatment; psychological injuries; valuation of injuries, review case law and JCG.
- **Other matters to be considered** - Request interim payment of losses; Compensation Recovery Unit certificate (deduction of benefits); 3-year limitation date; ongoing rehabilitation/treatment; valuation of claim/negotiation; Part 36 offers – made and received; case may involve a fatality.
- **Issue Court Proceedings** - Draft claim form, particulars of claim and schedule of loss; give Section 152 RTA notice; pay court fee / complete fee remission form; consider mediation; select appropriate court track; service of proceedings (within 4 months); MIB claims, very strict procedural requirements on issuing/notice to MIB.
- **Court Proceedings** - Deal with defence and/or counterclaim; complete directions questionnaire; prepare proposed directions; Costs Budgets; attend CCMC or CMC; comply with case management directions/timetable (witness statements, medical evidence, disclosure of documents, narrow the issues, update schedule of loss); make/defend any applications.
- **Preparation for Trial** – Complete Pre-trial checklist and pay fee; agree time estimate; prepare for trial (liability, quantum or both); subpoena witnesses; prepare trial bundles; prepare case summary and costs estimate; attend trial at Court; present case and evidence; cross examine witnesses/experts; obtain damages; calculate interest on award; entitlement to and assessment of costs; appeals.

#### **Increase in LIPs**

12. We share the concerns expressed by the Civil Executive Team of the Judiciary of England and Wales<sup>iii</sup> that as a result of the proposed reforms, “*there will undoubtedly be a very large increase in the number of LIPs.....This will increase the judicial time needed per case by a factor of at least two (but probably three or four).*” Such an increase in the SCTL would probably lead to increased burdens on the court service and judiciary, equating to longer hearings, delays in justice, longer waiting lists and higher costs.
13. Claimants would not be able to find quality and independent legal support for their case. Advice received by LIPs from Defendant panel law firms is not independent – they will be acting in the best interests of their insurer client. There will be reduced access to justice and equality of arms – many accident victims will be put off by attending court against experienced insurers or representatives for the defence.
14. Greater assistance for LIPs would, of course, be welcome, but no amount of website information or guidance and assistance by Court staff or the Judges is going to sufficiently equip a LIP with the knowledge of how to value their claim and if approached with a low offer how to contest it. The consumer is only likely to find out once it is too late and the settlement has been concluded to their detriment.

#### **Increase in Under-settlement of Claims**

15. One of the main benefits of legal representation is the independence brought by a lawyer and being able to quantify and value cases correctly. Very often, with legal involvement, the true value of a claim can be significantly more than the offer being first put by an insurer. From a random sample of over 3000 cases settled by MASS Members between 2015-2016, 80% of the final settlement figures were higher than the initial offer made by the third-party insurer. Multiple YouGov surveys have indicated that a significant number of consumers were not

confident that an insurer would provide them with the correct amount of compensation if they did not have a lawyer assisting them. MASS are under no illusion that if lawyers are restricted or prevented from the legal process, this will be to the financial detriment of the victim. There would be a strong temptation for insurers to offer lower settlements, exploiting consumer ignorance of the process.

16. It is almost impossible for LIPs to have sufficient knowledge and expertise to be able to adequately 'value' their entire claim. The MoJ's intention of more robust scrutiny will be seriously undermined if a large number of claims are settled prematurely and under settled even before they have been issued. The risk of under settlement will only increase if lawyers are excluded from the process.

#### **Impact on Vulnerable Groups in Society**

17. We fully recognise that it is the MoJ's overall strategy to move many areas of the legal system, both criminal and civil, to online platforms, such as an expanded Portal, and fully recognise that there may be considerable efficiencies from doing so. Indeed, the PI sector has been at the vanguard of early adoption in the legal sector of the benefits of technological advances with the successful operation of the Portal and more recently the ongoing development of MedCo.
18. We do, however, have serious concerns that many vulnerable groups, already susceptible to a variety of inequalities when forced to act as LIPs, would be further disadvantaged by poor or an over-reliance upon digital access.
19. Ofcom's latest 2017<sup>iv</sup> assessment of "non-users of the internet" is telling. Significant proportions of vulnerable groups are still classified as 'non-users' of the internet: 18% of 55-64 year olds, 35% of 65-74 year olds, 56% of 75+ year olds, 16% of C2s, 27% of DEs and 14% across all categories. These people will be extremely unlikely to continue to have access to justice without the assistance of legal representation. If they do proceed to claim, they will be highly vulnerable to CMCs who do not have the legal expertise in which to advise and support. People on lower incomes will likely lose access to justice as they will not be able to fund their own litigation costs and/or will be more adversely affected by losing a proportion of their damages (under a Damage Based Agreement).

#### **Costs to Public Finances**

20. There will be a wide range of costs to public finances, either through lost recoverable monies or a reduction in various tax revenues from the sector. There will be a loss of Compensation Recovery Unit monies (NHS and DWP pick up costs currently paid by insurers on behalf of the at-fault driver); a total of £200 million (£176 million in England and Wales) was reclaimed by the NHS from the 'at fault' driver's insurance company between April 2016 and March 2017. A failure to recover treatment costs will place greater strain on the NHS with physiotherapy charges. In 2015/16 the total amount of money re-paid by insurers to the DWP from motor claims was £31.25 million (recoveries made by CRU), recoverable under the Social Security (Recovery of Benefits) Act 1997. Whilst the vast majority of PI victims who claim compensation for whiplash do not claim DWP benefits which are recoverable, this is a significant further cost to the public purse.
21. There will be: a loss of Insurance Premium Tax on ATE and BTE policies; loss of VAT, income tax, corporation tax (largely SMEs) and PAYE from claimant and defendant solicitors; reduction in court fees (currently subsidises other parts of the court service); loss of jobs in the industry (claimant, defendant and all support industries); impact on private healthcare industry, medical agencies etc; and an impact as consumers have less money awarded (and to spend).

#### **Increase in claim numbers driven by CMCs**

22. MASS is extremely concerned that raising the SCTL to £5,000 could force claimants into the hands of both the regulated and unregulated CMC sector as LIPs are encouraged to process claims with "assistance" for a fee. We believe that this will lead to an accelerated increase in the number of CMCs operating in PI.

23. There are several implications for accident victims and consumers. As more CMCs operate in the PI market there will be a reduction in the quality and independence of advice available to motor accident victims about their rights and what they should claim for, especially if through unauthorised CMCs. CMCs have no legal training, knowledge or experience. There will also be an increase in fraud, as CMCs do not have the same professional obligations to assess the validity of a claim before bringing the case forward. This will add to the payments settled by insurers. Some of these firms will encourage all claims, no matter how spurious. There will also likely be an increase in cold calling and spam text messages, encouraging more claims, as the number of CMCs, and the competition between them, increases. As a result, it is even less likely that there will be any reductions in motor insurance premiums – one of the supposed drivers for the reforms – and the consumer is highly unlikely to have any savings passed on.

#### **Enhanced Role of McKenzie friends**

24. We are concerned that the MoJ is considering a greater role for McKenzie friends to support claimants in the absence of professional, trained legal support, following any raising of the SCTL. MASS would seriously question how an unqualified individual can provide the same standard of advice and support on issues as listed above, without having any legal qualification, professional insurance or significant experience of handling claims.
25. We are also greatly concerned at anecdotal evidence that McKenzie friends are being hired on a self-employed basis by CMCs ahead of the proposed reforms. This worrying development would certainly add to our concerns about what a future claims market might look like if the proposed reforms proceed.

#### **Future uncertainties around BTE-LEI**

26. If the SCTL is increased, then the legal costs will no longer be payable by the at-fault insurer through 'Before the Event' (BTE) Legal Expenses Insurance (LEI). They will instead have to be paid by the legal expenses provider. Either it will likely become uneconomic for insurers to offer an LEI policy, or the policy may become prohibitively expensive and no-one will buy it. Under both scenarios, the consumer loses out.
27. If the reforms are implemented, it is important for the Government not to assume that the BTE market will be able to adapt easily. This is a complex area and it will be very difficult (and could take many years) for BTE insurers to put together a product that works financially; they certainly will not be able to sell any form of BTE insurance at current prices. Consumers will certainly oppose a policy where they can only get their insurance policy excess back if they pursue through the courts themselves.

#### **December 2017**

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<sup>i</sup> Page 183, Review of Civil Litigation Costs: Final Report, December 2009, <https://www.judiciary.gov.uk/wp->

<sup>ii</sup> Q22, Oral Evidence, The Work of the Ministry of Justice, 25 October 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-ministry-of-justice/oral/72183.html>

<sup>iii</sup> Civil Executive Team of the Judiciary of England and Wales submission to MoJ, 'Reforming the soft tissue injury (whiplash) claims process' consultation, January 2017

<sup>iv</sup> Page 165, Ofcom's Adults' media use and attitudes, June 2017, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/102755/adults-media-use-attitudes-2017.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/102755/adults-media-use-attitudes-2017.pdf)