

# The MoJ's proposals on whiplash injuries

## The Small Claims Limit

- The MoJ is proposing to **increase the Small Claims Limit for RTA personal injury claims from the current £1,000 to £5,000**. This is part of a wider set of proposals to cut the legal costs incurred by insurers, who, it is claimed, will return these savings to consumers by reducing motor insurance premiums.
- MASS fully recognises the need to tackle fraud and reform in a number of areas is needed, but this should **not be at the expense of legitimate claims for justice**. We have serious concerns that **widespread injustices** will follow from these reforms as currently proposed, with legitimate claimants unable to get the justice that they deserve and a variety of **adverse impacts upon all RTA claimants, regardless of whether they are absolutely legitimate**.
- The other elements of the plans are: the introduction of a **fixed tariff system of damages** to be granted to accident victims and a ban on settlement offers being made without first obtaining medical evidence about injuries sustained (**a pre-medical ban**) – both being legislated upon in the **Civil Liability Bill** – and the development of a new online Portal designed for Litigants-in-Person (LIPs, self-representing claimants) to process low value road traffic accident personal injury claims. The Government recently announced that the implementation of all of these measures has been put back from April 2019 to April 2020.
- This measure will be introduced under Civil Procedure Rules (via a Statutory Instruments under the negative procedure), meaning that there will be very **limited parliamentary scrutiny or debate** on such a wide ranging measure.
- Under the current proposal, most accident victims will **lose independent legal representation** and will have to either represent themselves as **Litigants in Person (LIPs)** or lose part of their damages in costs, probably to a resurgent **Claims Management Company (CMCs) sector**. This will particularly **adversely impact vulnerable groups** – people on lower incomes, the disabled, the young, the elderly and those with poor or no digital access (still 13% of population according to Ofcom). There is **little or no evidence** that such a drastic 500% increase in the Small Claims Limit would either reduce fraud or result in insurers' cutting motor insurance premiums.
- In May 2018, the Justice Select Committee recommended that the **SCL for RTA claims should not be raised above the inflationary figure of £1500** and concluded that the reforms would represent **“an unacceptable barrier to access to justice”**.
- The MoJ's **last round of reforms** and action by the sector are working, with **claims falling to their lowest levels since 2009** (according to the Govt's Compensation Recovery Unit), significantly contributing already to the falling price of motor premiums in some areas (eg. new customers).
- We believe that an increase in the Small Claims Limit should be **fair and reasonable** – **we propose that the limit should be increased to £2,000**, higher than the recent recommendation of the Justice Select Committee or by Lord Justice Jackson, allowing for an historical inflation uplift and some future proofing, showing our commitment to ensuring the reforms are fair and appropriate without severely affecting the rights of genuine accident victims.

### How you can help

- We would welcome your support in **making representations to MoJ Ministers**, urging that the reforms, including the proposed increase in the Small Claims Limit, are implemented in a more reasonable and fair manner that protects genuine claimants that are seeking justice following a motor accident. There should be safeguards for particularly vulnerable groups, fair amounts of compensation for accident victims and mechanisms to ensure that any savings from the reforms are genuinely passed back to the consumer.

# The consequences of an increase to £5k

## The background

Civil cases, such as personal injury claims, are subject to different forms of procedure, depending on their size and complexity. Personal injury claims for general damages over £1,000 (but less than £25,000) are currently dealt with using the "fast track" procedure. With the vast majority of road traffic accident (RTA) claims falling below £5,000, this would mean that most would switch from the fast track to the "small claims track" if the Government's proposal is implemented in some form. Switching most RTA claims from the fast track to the small claims track would mean that the recovery of costs is strictly limited and no costs can be claimed for legal representation.

<p><b>Increase in the number of Litigants in Persons (LiPs)</b> – the senior judiciary has warned that “<i>there will undoubtedly be a very large increase in the number of LiPs</i>”; the Association of District Judges’ warned that “<i>it could lead to very significant problems and difficulties in the operation of the court system that could become unworkable</i>”</p>	<p><b>Reduced access to justice and equality of arms</b> – many accident victims will be put off from claiming, or if their case does go to court, without legal representation they will face experienced legal defendants representing the insurance company</p>
<p><b>Complexity of the claims process for LiPs</b> – even low value RTA claims can be complicated with numerous steps and information needed from multiple sources; even with a “LIP friendly” Portal, most claimants will find making a claim confusing and complex</p>	<p><b>Rise in under-settlement</b> - the proposed new process would provide a strong temptation for insurers to offer lower settlements, exploiting consumer vulnerability and ignorance of the process</p>
<p><b>Adversely impact vulnerable groups</b> – will particularly impact people on lower incomes, the disabled, the young, the elderly and those with poor or no digital access (still 13% of population are non-internet users according to Ofcom, 48% of over 65s, 20% of C2s and 22% of DEs); the Justice Committee noted: “we remain concerned about the potential deterrent effect on particular population groups of introducing online-only applications, with the risk of introducing a discriminatory element into the pattern of claims.”</p>	<p><b>Substantial costs to public finances:</b> unable to reclaim legal costs, there would be a loss of up to £162m to the NHS and £31m to DWP, currently claimed from insurers; loss of IPT on ATE and BTE policies; loss of VAT, corporation tax and PAYE from job losses in the sector; reduction in court income; impact on healthcare sector; impact on consumers of having less money awarded</p>
<p><b>Burden on the court system</b> – an increase in LiPs would mean longer hearings, delays in justice, longer waiting lists and higher costs, all concerns expressed by the judiciary</p>	<p><b>Increased number of claims driven by CMCs</b> – the new process will actively encourage CMCs, with lower operating costs, to enter the market and be able to directly process claims, on behalf of claimants, for the first time; claimant fees will be deducted from the damages and there is the potential for an increase in fraudulent claims</p>
<p><b>Unsuitability of the small claims court</b> – may lead to more fraudulent activity and no guarantee that the number of claims will fall</p>	<p><b>Enhanced role for McKenzie friends</b> – whether paid or unpaid, unqualified, unregulated and uninsured, McKenzie friends assisting CMCs, are not an adequate alternative to professional legal advice</p>

## No justification for the increase

- We would challenge many of the common assumptions associated with whiplash injuries:
  - Whiplash is a genuine injury that can cause significant pain and loss of amenity and the effects of whiplash can last in excess of 2 years
  - There are fewer UK deaths on the roads, but a large number of more minor accidents at lower speeds, on the most congested roads in Europe (data company Inrix), on roads with record traffic levels (up 1.2% on 2015) and in more crowded cars
  - The headline that the UK is the whiplash capital of the world is highly questionable – as the Insurance Fraud Taskforce (IFT) noted, international comparisons should be approached with caution given cultural variations, differences in legal systems, definitions of fraud and the availability of insurance and fraud detection capabilities; international insurer figures have been cherry-picked and are based on unreliable data according to an academic study from Bristol University)
  - Technological advancements in sturdier vehicle bodies and breaking systems have changed accidents: *“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.”* (ABI).
- The number of personal injury motor insurance claims has **fallen to the lowest level since 2009** according to the number of claims recorded with the Department of Work and Pensions (DWP) Compensation Recovery Unit (CRU) with a **fall of 20% in the last year**. The number of motor insurance claims passing through the Road Traffic Accident (RTA) Portal for low value Personal Injury Claims has fallen for the past two years, **falling by more than 18% over the last two years**, from 857,416 in 2015/2016 to 699,167 in 2017/2018.
- The Government focuses on the undisputed fact that the number of serious motor accidents has dramatically fallen since 2006, whilst pointing at the significantly higher number of road traffic accident (RTA) claims. Department for Transport estimates that between 2012 and 2016, an average of **around 426,000 “slight” injuries per year and around 57,000 serious injuries from RTAs went unreported to the police**. DfT’s central estimate of reported and unreported total road casualties is **670,000 per annum**, of which only around 187,000 are reported. This is conveniently ignored.
- According to ABI data **claims costs have fallen 29% since 2010 with the amount paid annually by motor insurers falling from £8.3 billion in 2010 to £5.89 billion in 2014 – a decrease of £2.41 billion**. Between 1991 and 2010, the value of claims rose 116% but, after allowing for inflation, the ‘real’ increase was only 29%. **Since 2010, the total value of motor claims has fallen**. (Access to Justice/Capital Economics). **Legal costs have been falling for over ten years**, having been fixed for RTA cases in 2003, reviewed (and negotiated with insurers) in 2010 and the LASPO cost reforms introduced in April 2013 further reduced legal costs by up to 60%.
- The **CMC sector** is already planning to **dramatically increase its presence** in the claims market, replacing lost revenue as PPI finishes with representing vulnerable LIPs, pushing up excessive hire charges and exploiting loopholes in the areas of rehabilitation and repair.
- The insurance sector has a **poor history of passing cost savings to consumers**. Whilst **claims and costs have fallen, motor insurance premiums have risen** despite any recent modest decreases. The insurance industry **does not maintain promised cost savings** to consumers and when insurance companies claim that the cost of motor insurance has reduced, they are usually **only referring to new business only**, ignoring the automatic premium increases applied on renewals (which can account for around 70% of premium policies).
- Fraud is a significant problem that needs concerted action, but **the majority should not suffer** because of the actions of a minority. On the ABI’s own figures, **the incidence of proven fraud dropped to 0.25% of all motor claims**. Both claimant and defendant solicitors report fraud is 1-3% of claims.

# Justice Committee report in the Small Claims Limit for PI Claims

- On 17 May 2018, the Justice Committee published a highly critical report following its inquiry into the Small Claims Limit. In their concluding remarks, the Committee said: "*reform should not proceed unless the Government can explain how it will make sure that access to justice is not affected*".
- Amongst the considerable number of issues and concerns raised by the Committee were:
  - Recommended that the **SCL for RTA claims should not be raised above the inflationary figure of £1500**
  - Said that having "*received compelling evidence*" from witnesses, the reforms would represent "**an unacceptable barrier to access to justice**" and that "**more convincing justification is needed for the Government's policy of reducing a large proportion of claims**"
  - Concluded that "*it was illogical for the Govt to propose further reforms to the PI claims process before its review of Part 2 of the LASPO Act*"
  - Considered that MoJ "**should take a more realistic approach to the technical challenges that may be faced in developing a fully functional electronic platform that has been properly tested with a wide range of users**" and that "**we remain to be convinced that the electronic platform will be capable of overcoming the underlying inequality of arms between professionally represented insurers and self-represented claimants**"
  - Concluded that "*the Government has under-estimated both the role of BTE insurance in securing legal representation for PI claimants, and the impact of raising the small claims limit on BTE providers' current business model, with potentially adverse consequences for access to justice*"
  - Concluded that "*the Government's current package of reforms creates a risk of increasing cold calling by, or on behalf of, CMCs*" and that "*an outright ban should be introduced*" (rather than the restrictions in the Financial Claims and Guidance Act 2018).
- In responding to the Report, the Government rejected the central recommendation that the increase in the small claims limit should be limited to £1,500. The Ministry of Justice also failed to "*explain how it will make sure that access to justice is not affected*". It is our view that the MoJ will be unable to provide sufficient assurances that access to justice and the rights of individual claimants will be safeguarded under the current proposal.
- The Justice Committee has subsequently questioned:
  - Why there shouldn't be an exemption from the higher small claims limit for vulnerable road users;
  - Why the Government believes that an increase should be calculated from 1991, rather than from 1999 when the limit was adjusted to exclude special damages and the date used by Lord Justice Jackson in the context of his review of civil litigation costs
  - The lack of evidence and explanation for believing that the increase to £5,000 is "proportionate".



MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 110 solicitor firm Members, representing approximately 2,000 lawyers and claims handlers throughout the UK. Collectively member firms conduct the vast majority of RTA PI claims each year. We represent claimant solicitors on the boards of MedCo and Claims Portal, both organisations we helped to establish, served on the Personal Injury sub-group of the Insurance Fraud Taskforce and are currently one of the stakeholder representatives on the MoJ's Whiplash Reform Steering Group and its four sub-groups. Please do contact us at the details below for further information.