

Personal Injury: whiplash and the small claims limits inquiry

**A submission by
The Chartered Institute of Legal Executives**

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1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes approximately 3,700 members of all grades who work in personal injury.
- 1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.
- 1.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 1.4. CILEx's members includes practitioners work in the field of personal injury for both claimants and defendants. To respond to the Ministry of Justice's consultation on the issue CILEx liaised with members of the CILEx Personal Injury Specialist Reference Group, and conducted a survey of members.

2. General points

- 2.1. The overall impact of these proposals will be to remove innocent injured persons of their right to fair compensation, and to deprive them of the independent legal advice they need to be able to enforce their legal rights. It will exacerbate the inequality of arms we already see between claimants and defendants, and it sets a dangerous precedent for future reforms.
- 2.2. We are concerned that there has not been a fuller exploration of alternatives to the measures on offer that would have the potential to achieve the desired policy outcomes without punishing genuine victims.
- 2.3. We would like to refer the committee to the submission CILEx made to the initial consultation issued by the Ministry of Justice. It contains a fuller exploration of the issues that the committee is considering.
 - 2.3.1. This was published in January 2017, and is available at http://www.cilex.org.uk/about_cilex/consultations/consultation-responses/whiplash_reform

3. The definition of whiplash and the prevalence of RTA-related whiplash claims.

- 3.1. The definition used in the Bill is a welcome alternative to the one used in the original consultation. Specificity is important so as to reduce disputes over whether a claim falls within the definition or not.
- 3.2. Ensuring the definition is limited, and does not unintentionally capture non-whiplash injuries, is also important given the significant limitations that are

being proposed on cases that do fall within the definition. Therefore a strict and limited definition is welcome.

- 3.3. The Bill gives the Lord Chancellor power to describe whiplash injuries in regulations. We would invite the Committee to consider whether the Bill should require the Lord Chancellor to take particular steps in making these definitions, including potentially consultation with practitioners and the public, or consider medical definitions. Should there be a statutory provision requiring the LC to consult, and take account of medical definitions?

3.3.1. In our submission to the initial consultation, we recommended considering a medical definition, such as the Clinical Knowledge Summary definitions published by the National Institute for Health and Care Excellence (NICE).

- 3.4. We encourage the committee to resist calls to extend the definition, given the significant restrictions that will be placed on genuinely injured persons, and also resist conflating the definition of whiplash with tackling fraudulent or exaggerated claims.

3.4.1. The argument heard by the Public Bill Committee that to not include 'back injuries' would leave the door open to fraudsters is misleading. Fraudsters by definition are fabricating or exaggerating claims, and they will do so regardless of where the defining line falls. Other measures are needed to reduce fraudulent or exaggerated claims.

- 3.5. CILEx does not original data to provide with regard to the prevalence of RTA-related whiplash claims, however we were concerned with the veracity of the evidence used to inform the initial consultation.

3.5.1. One of the main premises of the proposed reform was to reduce the number of soft tissue related claims which the Government say is too high. Yet OECD figures say that the number of claims has plateaued.¹

3.5.2. The consultation itself acknowledged that figures have been at a 'steady state' for a number of years, but says they are still higher than 10 years ago (para 6). Yet (as identified by the Department for Transport²) miles travelled by road in Britain over the last 5 years has increased and, as the consultation's Impact Assessment acknowledged (para 1.9), there are 79% more cars per kilometre on Britain's roads than in other EU countries. Against the backdrop of those statistics, the premise looks less certain, and the proposals represent a blunter instrument to crack a more nuanced problem.

4. Whether or not fraudulent whiplash claims represent a significant problem and, if so, whether the proposed reforms would tackle this effectively

¹ http://www.oecd-ilibrary.org/transport/road-safety-annual-report-2016_irtad-2016-en

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567098/prov-road-traffic-estimates-oct-2015-to-sep-2016.pdf

- 4.1. Genuine claimants, not fraudsters, will be most penalised through these proposals. Whilst CILEx does not have original data to provide regarding fraudulent whiplash claims, with indicators showing the level of actual whiplash claims falling then the proposals would not be the best way to tackle fraud.
- 4.2. The recommendations of the Insurance Fraud Taskforce represent a more targeted way of tackling fraudulent or exaggerated claims.
 - 4.2.1. They include; improving data sharing, clamping down on cold-calling, and discouraging pre-med offers.
- 4.3. It is important to note the Bill is being pursued whilst we await part 2 of the consultation outcome from the Ministry of Justice, which relate to a number of issues including the Taskforce's recommendations.

5. The provisions in Part 5 of the Bill introducing a tariff to regulate damages for RTA-related whiplash claims, with an uplift in exceptional circumstances; and banning the settlement of claims without medical evidence.

- 5.1. The Government asserts that the proposals will lead to an average £40 a year reduction in insurance premiums for motorists. We find this unlikely given that there is no mechanism to require insurers to pass on any savings, and imposing any possible requirement risks being largely unenforceable.
 - 5.1.1. We are also concerned that by raising the small claims limit, rather than decreasing the cost of insurance premiums, the extra time insurers will spend in court because of not dealing with legal professionals like CILEx members risk increasing their costs. These will be passed on to consumers.
- 5.2. A fixed tariff for compensating pain, suffering and loss of amenity should not be introduced. Awarding damages on a tariff system risks overcompensating some, or exaggerating others to move into a higher tariff band, rather than awarding damages based on the facts of the case.
 - 5.2.1. The complexity of personal injury cases appears to have not been given due regard. The current 'limits' systems allows for judges to make a balanced assessment within a widely understood framework.
- 5.3. The proposed tariff figures are too low to be considered at all fair.
 - 5.3.1. Duration of injury alone is not a sufficient measure for compensation. The severity of injury (or exacerbation of existing conditions) should also be considered, and there is no provision as yet for inflationary increases to the tariff.
- 5.4. Leaving the interpretation of exceptional circumstances to judges is very welcome, although a 20% maximum uplift is arbitrary and will likely not account for the most exceptional cases.
 - 5.4.1. We would also recommend amending s63(2)(a) to replace 'and' with 'or'. This would allow for greater judicial discretion, and would not inappropriately restrict judges in exercising their duties.

5.5. CILEx fully supports a ban on settling claims without medical evidence.

6. The impact of raising the small claims limit to £5,000 for RTA-related whiplash claims, and of raising the small claims limit to £2,000 for personal injury claims more generally, taking account of the planned move towards online court procedures.

6.1. The small claims limit for personal injury claims of any sort should not be raised. It will harm access to justice, worsen inequalities of arms, encourage exaggerated claims, and lead to potential turmoil in an already over-stretched court system.

6.1.1. The small claims track is for faulty goods or unpaid invoices, not road traffic injuries.

6.1.2. The small claims track exists to offer a route to settle cases that are so straight forward as to mean that neither party would normally require legal representation.

6.1.3. This assumes an equality of arms between the sides, that on the most part the facts are not disputed, and that relatively small amounts of money are being claimed for – it is in these specific circumstances that legal costs are not normally afforded.

6.1.4. Ordinary people should not be deprived access to legal advice, particularly in cases that have such potential complexity as those subject to these reforms.

6.2. We support the development of an Online Court, and the efforts to modernise our courts and tribunals system.

6.2.1. However the OC is simply the facility through which cases can be brought and settled, but is not a guarantor of fair outcomes.

6.2.2. Injuries are complex and a person requires support so that they can be fairly heard. A claimant who is injured through no fault of their own should have access to legal advice, and be able to recoup those costs if their claim is approved.

7. The role of claims management companies in respect of these matters.

7.1. We are concerned about cold calling practices, and we concur with others who have called for a ban on cold-calling, as Chartered Legal Executives (along with solicitors and barristers) are currently bound by.

For further details

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