A RESPONSE BY

THE CHARTERED INSTITUTE OF LEGAL EXECUTIVES

"Reducing the number and costs of whiplash claims"

Submission date: 8 March 2013

This response represents the views of the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007.

CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and to the public. 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.

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.

This submission follows consultation with CILEx Council members specialising in personal injuries, who represent both Claimants and Defendants, and has drawn heavily on their day to day professional experience.

Prior to answering the specified questions, CILEx makes the following observations:

1. CILEx is extremely disappointed to note that once again it was not included within the list of organisations to which the consultation was sent for comment.

2. The consultation is extremely one sided, and heavily influenced by the Insurance Industry, which ultimately has a vested interest in paying out less money. The insurance industry works in the

interests of its shareholders, and not of the injured parties. The Consultation focusses 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"[1] the Insurance Fraud Bureau estimates that those detected fraudulent claims, which are based on 'staged accidents' represent 5% of whiplash claims.

3. 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. CILEx is concerned that the current consultation is premature, and should have taken place at a later date, once the fixed costs regime has been finalised and other reforms to this legal sector have been thoroughly and effectively reviewed.

4. 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.

[1] *www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986*

5. 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.

6. 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.

7. Importantly, the proposals in this consultation 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 such

proposals are being made to deal with a perceived problem rather than an actual problem. To date a number of studies have shown that there is no compensation culture; Indeed Lord Young in his 2010 report[2] 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 so 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.

8. CILEx does recognise that there is potential for the current system to be abused, but again makes it clear that it, as well as the vast majority of lawyers and medics want to eradicate fraudulent or unmeritorious claims. Whilst the ultimate objective is to eliminate fraud, genuine Claimants must be protected. The proposals put forward by the Government in this consultation are done so on a perception, mainly provided by the insurance industry, not reality. The Government in its own Impact Assessment says the reason to address this issue is that *"**Concerns** have been raised about the current processes for claiming whiplash injuries...as it **MAY** encourage a large number of unnecessary and less meritorious claims. In turn this **MAY** be pushing up the cost of motor insurance for all drivers"* (our emphasis added). CILEx would be interested to know, outside of the insurance industry, where 'concerns' have been raised.

9. 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

[2] "Common Sense Common Safety" 2010

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, that the number of litigants in person will significantly increase.

10. CILEx calls for cast-iron guarantees to be sought from the insurance industry that premiums will reduce considerably on the back of the reforms already agreed, which benefit that industry, and any future reforms.

11. CILEx does not see that it can be acceptable to introduce proposals which are noted in the Government's Impact Assessment 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.

12. In addition to the above comments, CILEx will address the questions raised in the consultation.

PART TWO – 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?

13. Firstly on this issue, CILEx are concerned by the inaccuracy of the consultation paper as it suggests on a number of occasions that in Personal Injury claims a medical report/diagnosis is often obtained from the Claimant's GP. This simply does not happen in Personal Injury claims. It is specifically stated in the Pre-Action Protocol for

Personal Injury claims that the joint selection of, and access to, experts is encouraged. At 3.15 of the Protocol it states that *"Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct..."* Practitioner input suggests GP reports from the Claimant's own GP are not used as they would clearly not be independent. Furthermore, at Paragraph 31 in the consultation, it is stated that a Claimant would go to *"...any registered medical practitioner and ask them to certify that they have sustained an injury".* There is further reference to a GP 'certifying' an injury at Paragraph 39. CILEx is keen to emphasise that it is not for a medical expert to 'certify' that there has been an injury, but it is about examination of not only the Claimant but his medical records along with making a diagnosis.

14. It is important to remember the relevance of Part 35 of the CPR in relation to medical evidence, and particularly the issue raised at Paragraph 40 of the consultation document. Rule 35.3 provides that experts have an overriding duty to the court. Rule 35.10(1) states that an expert's report must comply with the requirements set out in Practice Direction 35. This Practice Direction specifically states that expert evidence should be the independent product of the expert, and uninfluenced by the pressures of litigation. With each medical report, the medical expert signs a statement confirming this to be the case.

15. CILEx strongly agrees that medical evidence should continue to be independent, and feel that the current situation (joint selection of, and access to experts, and Part 35 CPR) provides for this. Furthermore, doctors are bound by a code of conduct/ethics, and guided by the British Medical Association (BMA), who CILEx would expect to be concerned by such statements.

16. 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 ~~or~~ and a diagnosis can be fraught with difficulty. Furthermore, CILEx is concerned by the idea of the use of a 'standard report form', and considers that 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 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.

Question 2

If not, how would you address the problems listed at paras. 35-39 above?

19. The issue raised in paragraph 35, where the doctor is unlikely to see the patient again, or the next contact might not be for some time, will remain the same whether it is an independent expert, or an expert from a panel of medics. The fact will remain that a medical expert should undertake a thorough examination of the claimant, and consider this, together with a full review of medical records, and make his/her independent assessment. Being independent, and having an overriding duty to the Court (which he/she signs to state is within their knowledge) is enough to ensure that the medical expert would raise any concern over the legitimacy of an injury whilst ensuring the report is fully and competently considered and prepared.

Question 3

Which model should be used for the independent medical panels – Accreditation, national call-off contact or some other variant?

20. CILEx agrees that accreditation is important, but recognises there could be issues with setting up such a system. The real emphasis will be on the need for training in light of difficulties of diagnosing whiplash. If there is to be accreditation, it needs to be ensured that any expert to receive accreditation is a suitably medically qualified practitioner with an expertise in Whiplash injuries.

21. It is also important to note that the options provided leave open a place for existing Medical Legal Reporting Organisations (MLROs) to bid to provide the scheme, albeit under Government control.

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?

22. With any accreditation, it is imperative that it remains totally independent, and CILEx agrees that an element of peer review would assist this. It is extremely important that an expert is able to express any concerns. If any concerns are raised, then there should be a review. CILEx believes it would be appropriate to have a set review of experts, for example, one report in every 100, and in addition to that, a review to be held if there is an issue, for example if a report so reviewed appears to be consistently heavily Claimant biased, or Defendant biased.

23. CILEx does question however, how peer review will be funded, as it does not easily lend itself to the intended reduction of costs. However, it is an extremely important element to ensure that independence is maintained, and seen to be maintained.

24. CILEx would again stipulate that any medic provided with accreditation would need to be a suitably medically qualified practitioner with a specific expertise in whiplash injuries.

Question 5

How should costs be dealt with and apportioned?

25. CILEx has assumed for the purposes of this question that the 'costs' referred to are the costs of the medical report itself, and not the costs of setting up any of the schemes provided as examples. That being the case, CILEx believes that the 'polluter pays' principle is appropriate. A medical report is a disbursement and a Claimant should not be responsible for the costs of such.

PART THREE – 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?

26. There should be no change at all to the Small Claims Track threshold. If the threshold were to be increased, the implications of this are fundamental, and go way beyond addressing the issue of fraudulent and unmeritorious whiplash claims.

27. CILEx believes that if the threshold is raised, genuine Claimants, which are the vast majority of those making a claim, will not have access to legal advice or support when making a claim. Some personal injury claims are more complex, involving substantive legal issues, so require independent legal guidance together with expert evidence. The cost of which may render such advice or evidence prohibitive if the limit is raised. Therefore, Claimants may decide not pursue a claim despite being legitimately entitled to do so. Should this happen it would contradict the long standing principle whereby the purpose of damages, which are assessed to be just and fair, is to place a victim in the position in which they found themselves before an accident.

28. Furthermore, if genuine Claimants do feel able to pursue a claim, without such legal advice or support, then an obvious consequence is a substantial increase in litigants in person in the system. This would of course leave many Claimants at a distinct disadvantage during the life of a claim. A Claimant is unlikely to be aware of the substantive law that may be involved in or applicable to the claim, and will also not be aware of any regulations or statutory duties which may apply. Additionally, issues such as the identification of

the correct Defendant and establishing a breach of duty of care can be difficult for an unrepresented Claimant to understand. Furthermore, there may be difficulties for those Claimants in collecting and collating the necessary evidence.

29. A further important principle which will be eroded is 'equality of arms'. An insurance company can afford legal representation, and a litigant in person may not have the relevant understanding and knowledge of the claims process, other elements of a claim, and the potential value of their claim. Leaving them in a very vulnerable and unequal position.

30. CILEx believes that the Judges and the Courts, particularly at a time when the workload has increased for them due to the closing of a high number of Courts, would not cope with a substantial increase in litigants in person.

31. The above issues could prevent legitimate Claimants from bringing an action. CILEx is further concerned that this may be the case particularly for protected parties, and individuals who, for example, do not have English as their first language. CILEx strongly believes that Access to Justice should not be denied to any genuine potential Claimants.

32. If fewer claims are pursued as a result of any increase to the Small Claims track threshold, then the consequences will also reach further than Claimants and potential Claimants. The public purse will also be affected, as less money will be recovered by the DWP and the NHS for costs of social security payments and the costs of treating injuries. Furthermore, there are likely to be fewer law firms to offer independent legal advice. If this occurs, it is expected that other organisations will appear to bridge that gap, or insurers will attempt to settle matters directly with Claimants (akin to third party capture), which is not an acceptable position.

33. CILEx remarks that the issue of raising the small claims limit to £5,000 was consulted upon in 2008, and was rejected. Rejection was on the grounds that access to justice would be reduced for genuine Claimants. . CILEx contends that the grounds and the conclusions should be the same today. Furthermore, it was a matter further considered at length by Lord Justice Jackson in his review of Civil Litigation Costs, and in his final report[3] he concluded that *"...there should be no change to the PI small claims limit".*

Question 7

Will there be an impact on the RTA Protocol and could this be mitigated?

34. Whilst CILEx does not believe that there should be an increase in the small claims track threshold, for the reasons stated, it believes that if such an increase was to follow, that there would most certainly be an impact upon the RTA Protocol.

35. The Government has not given sufficient consideration to the impact that raising the small claims limit would have on the Portal. To date the Portal has had in excess of 1.7 million claims submitted through it, but raising the small claims threshold would mean, at present, only claims between the value of £5,000 and £10,000 would remain in the portal, there are a large number of 'whiplash' injury claims that will fall below this threshold and which many litigants in person will still wish to pursue.

36. At present, litigants in person do not have access to the portal. If the small claims court threshold is raised, then presumably there will need to be modifications so that they can access it. CILEx would be concerned that the public may struggle with the use of the portal.

[3] "Review of Civil Litigation Costs: Final Report", Part 4: Personal injuries litigation, Chapter 18, Upper limit for personal injury cases on the small claims track, at Page 183

PART FOUR – FURTHER ACTION

Question 8

What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?

37. CILEx believes it is important to reiterate that whilst it also wants to see exaggerated and/or fraudulent claims eradicated, (and it follows that the cost of such will also be eradicated) that the vast majority of claims are genuine.

38. CILEx calls for a more robust enforcement of current rules, and those which are forthcoming. Particularly, the issue of Claimant's details being sold by insurers and other parties, and others who attempt to encourage claims sometimes even encouraging fraudulent ones. Effective action needs to be taken against any party not adhering to the rules.

39. There should be a ban on unsolicited marketing techniques, which include cold calling, 'spam' texting and e-mailing, and other forms of advertising.

40. The issue of 'Third Party Capture' needs to be vigorously tackled. If the insurer of the 'wrong-doer' attempts to settle the matter without the involvement of, or access to, and advice from an independent lawyer, ultimately it means that they will be saving costs. However, such insurers do not owe any duty to the Claimant or indeed to the Court. It owes only a duty to its shareholders. This clearly presents a clear and real risk to the Claimant of under settling a legitimate claim. Access to independent legal advice should always be maintained.

41. Without a doubt, there needs to be more open and prompt sharing of information. Claimant lawyers should have access to the same fraud databases available to insurers. Any information about the possibility of fraud or fraudulent behaviour should also be shared at

the earliest available opportunity. This will help to eliminate fraud, and therefore the costs associated with it for insurers and lawyers alike.

42. CILEx considers that it should not be possible to settle a matter without medical evidence provided by a suitably medically qualified practitioner. This will assist in reducing or eliminating fraud as potential Claimants will be aware from the outset that in order to receive any compensation, they must support their claim with medical evidence.