Reforming the Soft Tissue Injury (whiplash) Claims Process

Consultation response by Kent Law Society

Kent Law Society

Founded in 1818, Kent Law Society is one of if not the oldest law society in England and Wales. The society has over 600 members who are practising solicitors living or working within the county. Our members work both in the public and private sector. Their practices range from sole practitioners to multi-partner practices or companies working in all disciplines of law.

The county has a population of over 1,500,000 and it is approximately 1,440 square miles.

Our members serve to represent the interests of the local communities which they seek to serve.

We have a large number of members representing both claimants and defendants in the whole range of personal injury actions.

We also have close links with the judiciary sitting at all levels in the courts and tribunals throughout Kent.

We are closely involved with the law departments at both Kent's universities including the work that they undertake in accessing justice through the Kent Law clinic and the CLOCK initiative.

The Society's review of and response to the proposals in overview

The consultation document is drafted on the assumption that these far-reaching proposals are to go ahead, with the specific questions offered for consultation largely seeking responses based on that premise.

Whilst recognising that any consultative paper needs to have a structure to it, the society feels it is important to begin this response by setting out, in overview, its views on the proposals as a whole before answering the questions raised.

The society opposes the changes to the substantive, evidential and procedural law in personal injury claims that these proposals envisage on the following overarching grounds:-

1. We regret the bringing together of 3 distinct groups of people, namely those:- (1) who have suffered "minor injuries", (2) who bring exaggerated claims and (3) who bring fraudulent claims into one whole as presenting a common problem with generic solutions .This obviously flawed approach underpins much of the unfairness and many of the failings found within the proposals.

2. There may well be a need to "crack down", "tackle" and "disincentivise" (2) and (3). Compare and contrast (1) - people who, through no fault of their own, have suffered significant injuries due to the avoidable negligence of a third party. The minority fraudulent cases are being used as justification for removing, wholesale, the genuine claims brought by the vast majority of legitimate victims.

3. The sole, or main, justification for these changes is represented as reducing motor insurance premiums. In terms of ensuring that this happens, however, the approach and language becomes vague. We are told that "leading insurers" have already "undertaken" to pass on savings to consumers. No mechanism is offered, however, to guarantee this beyond the vague promise to "consider taking further action" if future premiums do not reflect the reduction in costs. Is the government considering some form of an audited guarantee that the obvious savings claimed are indeed passed on by insurers? The Insurance industry have attempted to persuade the government to reduce their outlay in many different "reforms" over the years but the Insurers have not passed these savings onto the consumer.

4. It seems that the government has listened intently to insurers and been keen to consider their research and anecdotal evidence. The evidence relied on in the consultation appears selective and obviously flawed in a number of respects.

5. It is stating the obvious but necessary to stress that insurers are commercial organisations whose purpose is to pay out as little as possible in claims or to avoid them altogether however legitimate. The government must we suggest have a wider concern than serving the insurers' narrow objectives – namely to provide access to an efficient and cost proportionate system of justice for genuine accident victims with significant injuries.

6. It is supremely ironic that at the time of the Autumn Statement in 2015 that the chancellor at the time should allow automatic compensation to be paid by railway companies for a late train but at the same time should initially then propose these proposals for changes to curtail the ability to compensate victims of accidents that were not their fault. There is no need to prove you were on that exact same train that was more than 30 minutes late and this will only lead to multiple fraudulent claims. Indeed there are websites and apps that allow you to check which trains might have been more 30 minutes late thus encouraging fraudulent claims.

7. The insurance industry does not just pay compensation to injured victims. It is also required to pay back any recoverable state benefits paid by the state to those people who have been put out of work as a consequence of injuries sustained in an accident. In addition in an RTA claim if an ambulance has been called to the scene and then the injured victim has been taken to hospital and treated in A&E or even admitted then the insurer pays a set rate for each of these stage. The NHS and the DWP with these reforms will then be denied these refunds by the insurance industry as a consequence thus denying them millions of pounds in what is already a very cash-strapped situation for the NHS.

8. We fear that the proposals will deprive injured persons of the right to a fair trial.

9. They offend against the principle of 'equality of arms' found within the overriding objective in the CPR and, indeed, natural justice. Undoubtedly the insurance industry, local councils, hospital trusts / the NHSLA, governmental departments and employers will continue to use their specialist in - house legal departments and external lawyers to protect and forward their interests at every stage in the litigation process.

10. In contrast ordinary members of the public will be left as litigants in person and massively prejudiced by these proposals. Any genuine assertion to the contrary is simply naïve and would not be supported by any honest participator in the litigation process. We urge the government to take heed of the views of the judiciary in this regard in particular.

11. The changes are likely have a negative disproportionate impact on: (1) minority racial groups, (particularly those who do not have English as their first language), (2) the disabled, (particularly those with learning difficulties) and (3) the elderly, (particularly those with hearing, sight or communication difficulties) many of whom may find it extremely difficult to access information, investigate a case, secure the necessary evidence, access the Court and pursue their claims as litigants in person.

12. We feel that many LIPs will not feel able to start the process or will give up before its conclusion.

13. Local courts, particularly district judges, are already besieged with work to absolute breaking point. The idea that this whole new category of small claim can be foisted upon them and dealt with fairly is wholly unrealistic.

14. Many of the mischiefs that these proposals purport to address are either "myths" (the compensation culture) or are already being dealt with through existing reforms or could easily be managed through very different but simple changes. e.g enforcement of the pre-action protocol, rehabilitation protocol or defendants insurers behaviours.

15. Years ago, before the Access to Justice Act 1999, when legal aid was still available for personal injury actions and costs were not dis-proportionate, the unfounded persistent refrain from the insurance industry was that they had to settle claims without merit because they could not recover their costs from a legally aided claimant even if they were successful.

16. The advent of Conditional Fee Agreements under the 1999 Act meant that insurers could fight unmeritorious claims safe in the knowledge that, in so doing, they would recover their costs from the After The Event Insurance. Few additional claims were in fact fought, because in fact there was not a problem with unmeritorious claims being brought by Claimants and their lawyers by reason of the availability of legal aid to do so. The insurance industry frequently posture such Myths.

17. When the Jackson reforms came in April 2013 the Qualified One-way Cost Shifting was very much supported by the insurance industry.

18. Another Myth is the level of unmeritorious claims these it has been shown are far fewer in number than the insurance industry and media would have the public believe. On any view they are in a tiny minority.

19. The Jackson reforms have reduced costs, as envisaged, which the paper recognises, (para 8). The CPR, including its protocols, contains ample mechanisms by which defendants can defend unmeritorious or inflated claims. The strategy and reasoning behind the changes seems to be one of the insurance industry saying and the Government accepting that (a) there are lots of claims (b) some are fraudulent (c) insurers chose not to fight claims (d) there is then a cost (e) the solution is to target all these claims:- (i) to be hugely under compensated and / or (ii) make them so difficult to bring for LIPs that they are not brought or pursued.

20. The Jackson reforms simply haven't been given long enough to evaluate their long-term impact. They are and will achieve proportionate costs recovery.

21. Similarly the measures introduced to address fraudulent claims have only been with us since April last year (para 9). Insurers and defence solicitors have been vocal in advertising their high levels of success in securing judgements in large numbers of cases pursuant to the new regulations in that short time. Similarly the portal changes have only been with us that same short time.

22. In light of all the above is wrong to take such problems as there may have been with the system as justifying these wholesale changes without allowing the previous raft of changes to have a chance to take full effect. It is as if the government is wedded to the idea of reform for reform's sake and is just going to continue on regardless.

23. The paper tracks those changes as having been very recent and successful, then says (para 10) that "Despite" them over the last 3 years RTA claims levels have remained "static". Comparison is then made with levels from 10 years ago. It is obvious that these comparisons are not temporally sound. Even if, at the very least, the changes have arrested an historic long term increase in claims then that is noteworthy of itself and does not justify pressing ahead with such radical further changes so soon. Further, the reforms are targeted at reducing costs not necessarily the number of claims.

24. Further (para 10) the proposed reforms deal with minor injuries from RTAs yet evidence of a reduction of injuries reported to the police is relied on. These are likely to reflect serious injuries and this is therefore not a 'like for like' comparison. Similarly para 11 addresses safety in terms of serious injuries and fatalities. Similarly at para 12 France is a much bigger country geographically!. Our roads are hugely overpopulated with cars and this is likely to be reflected in the level of low impact RTAs giving rise to lesser but still significant injuries.

25. The safety advances described (paras 13 and 14) should further drive down the number of injuries arising at all in RTAs and the severity of those that still do.

26. The overall objective of all must be safer roads, pavements, workplaces, premises and hospitals. These proposals threaten to create environments in which wholly avoidable accidents can occur without consequences for the tortfeasor or their insurers. All our experience tells us that this will encourage dangerous practices and more accidents of all severity.

27. Paragraph 15 to this paper is key and contains a sequence of assertions, assumptions and opinions that are flawed and / or difficult to understand by those familiar with the claims process. None are supported by evidence. The opinions are those of the insurance industry. Genuine victims and their interests do not feature as important. Our response to these:-

    (a) "The number of soft tissue injury claims..... remains too high. There are a number of reasons for this.."

        Any avoidable accident causing injury is regrettable.

        An obvious remedy (not mentioned) is to make our roads and cars safer.

        Those accidents that are not due to fault will not give raise to a claim and the insurance industry is actually very well placed to root these out, through compulsory accounts of claims through claims forms, police accident reports, CCTV, the damage to cars resulting from accidents etc .

        There are now the mechanisms that the insurance industry asked for, has got and are using to weed out fraudulent claims. Huge resources are available and being used there.

    (b) "...the difficulty in identifying and assessing soft tissue injury claims."

        This is one of 3 reasons given for the numbers of claims.

        Whiplash injuries arsing from sudden impact RTAs are a well recognised, clinically based condition. They can be and are assessed objectively

        Usually with RTAS there will be evidence of the speed of impact and the surrounding circumstances of the accident

        The injured party will either seek medical treatment or not if genuinely injured and there will be the existence (or not) of the records, the description of the injury, the treatment given and response to it – all recorded, (much of it in the immediate aftermath of the accident) and all available for analysis.

        The injured party and their records (including historic) will be available to an independent medical examination by a medical specialist who will also be able to examine them for genuine presentations both as to the existence and severity of an injury.

        The above actually comprises a formidable array of resources available to not only root out fraudulent and exaggerated claims but also to speedily process and compensate the overwhelming legitimate claims cost effectively for all.

        This observation seems at odds with many of the key reform proposal particularly the key role envisaged for medical assessments of these injuries.

    (c) "This asymmetry of information"

        This seems to be proffered as a second reason why the claims level remains "too high"

What is thought and said here is difficult for the initiated to followed

The Claimant will know more about whether there is an injury and its severity than the defendant will by dint of the fact that they have suffered it. They have to prove the injury and the defendant has the mechanism to test and assess same as explained above.

(d) "The availability of compensation at levels many claimants clearly regard as significant means there are substantial financial incentives for claimants to bring cases…"

This is the third reason why claims are "too high"

This analysis can only be intended for the PSLA / general damages elements of award, (as the reforms claim to leave financial losses unaffected)

Contrary to popular belief these damages in the UK are not generous

No – one in our experience would rather have received these sums than avoided having the accident and injury in the first place.

As an example an 18 year old left paraplegic by a drunk driver but with full cognitive functioning would receive around £300,000 for general damages / their PSLA

Why should genuine victims of soft tissue injuries alone have their damages levels for the injury reduced in the savage manner proposed?

(e) The underlying analysis whereby because there is an outlay you take away a genuine entitlement is flawed

You would not say that because pensions or types of illness are increasing you do away with payments or treatment altogether

(f) Far better you process genuine claims as quickly and cost efficiently as possible while rooting out both the exaggerated and fraudulent claims.

28. We support the curbs on and outlawing of cold call enquiries for personal injury claims. What are the Government going to do about this major issue that has been going on with increasing levels for over a decade? It is the insurance industry that not only make increasing profits year on year but also money from selling the names of their policy holders to third parties to cold call.

Question 1

We think that the definition referred to appears in para 23 not 17

We do not object to the definition per se as opposed to the proposed use to which it is to be put

Question 2

We think that the definition referred to appears in para 23 not 17

We oppose this change because:-

(a) Both the actual and anecdotal evidence cited does not show a need for it

(b) Psychiatric injuries are as genuine as physical and equally amenable to rigorous assessment by medical professionals. If anything they are more complicated and "hidden" than physical injuries. They often need specialist treatment to resolve. £25 "added on" is an insult to an injured party and wholly inadequate.

(c) This discriminates against those with mental health difficulties who are far less able to stand up to large corporate insurers.

(d) There is a cynicism underlying these proposals that everyone is or will be 'on the make' – to the point where such people are being invented here to support changes that no –one thinks are needed.

Question 3

We note that this division of claims will be based on fine assessments of the injury whereas earlier in the paper the supposed impossibility of such assessment was cited as justifying the changes.

We would say 6 months is better than 9 months

Question 4

See our answer to Question 3 above

Question 5

Absolutely not

Yes this proposal is "radical" (para 38)

It is unprecedented to focus on one area of injury and just cancel out compensation for it

The Government's view as para 35 is simply without foundation

The JC Guidelines are objective and empirically based on actual cases and awards and there is no justification for moving away from them

The Government should conscientiously reflect on and endeavour to understand the full nature and affect on an injured party of a genuine whiplash injury lasting up to 6 months

The JC approach of categorising the lowest level of injury at 3 months would be a sounder approach

Question 6

No this is totally unjust.

Fixed sums in principle either under or over compensate

Question 7

These sums are arbitrary and wholly unjust

The paper recognises (para 30) that injuries lasting up to 6 months are currently compensated at an average of £1,800, those lasting up to 9 months at £2,100.

JC guidelines brackets are a few hundred pounds - £2050 for 3 months; increasing to a maximum of £3630 for a year

£400 and £425 respectively are ridiculously low sums

The JC guidelines bracket for generic minor injuries resolving within 3 months is £1060 to £2050.

Why should whiplash victims be treated differently?

Question 8

We think that this, ironically, is perhaps the most precise proposal one could put forward for encouraging exaggerated claims – ie telling the injured person to go to an assessment at 6 months knowing full well that if they still have symptoms they will be compensated but if not they will get nothing.

So, bad idea

Question 9

The prognostic approach would have better levels of clinical and forensic integrity

Question 10

Potentially this approach could lessen the number of cases brought closer to the limitation problem although we do not recognise or agree this is a problem

It could also encourage early and effective rehabilitation

Question 11

Absolutely not

How could we as the Government has offered no objective justification for them?

Tables 1 and 2 very fairly set out details of average payments and JC guidelines both of which are objective and even provides a weighted median. These sums are then juxta positioning with the proposed tariff amounts which involve such unjustified reductions.

The tariff to weighted median percentage as one ascend the bands are:- 23%, 29%, 37%, 51%, 66%, 80%.

Question 12

We view this as a paltry uplift that would be litigiously burdensome, hard to apply, bring uncertainty and is no substitute for retaining the common law principle of compensation reflecting the actual level of injury.

Question 13

We view this as the most insidious of the 4 proposals and note that it does not require primary legislation.

No –one should be under any illusion as to the far reaching consequences of this massive hike in the small claims limit.

It will effectively debar victims from bringing claims. That is our submission.

We are afraid that we see a pattern here of the Government wanting to block people's access to justice rather than taking away rights which would be much more controversial.

Thus the wholesale removal of legal aid, the huge hike in Court and Tribunal fees and now effectively removing legal representation from victims altogether.

It must be recognised that rights that are inaccessible are totally worthless.

Unlike the continent we have an adversarial process.

Defendants will be represented

Claimants effectively will not be

All personal injury claims are to be affected

Our response is that:-

(a) This level of increase should not be brought in for RTAs or any PI case

There are good reasons why PI cases have been dealt with differently over the years which are being ignored.

Few soft tissue injuries would attract PSLA damages of £5,000 as the papers' earlier analysis shows

(b) So far as other injuries caused but RTAs are concerned (eg a broken leg) why should a victim have their entitlement to compensation removed just because of the way their accident occurred?

(c) Accident victims are not able to bring these claims as LIP (see below)

(d) A victim of a serious injury attracting less than £5,000 HAS to prove that through a medical report. How are they to commission this? It might cost £2,000. How are they going to fund this? (as well as the Court fee). Why should that come out of their compensation?

(e) The position is even worse with wider claims.

(f) For example in a clinical negligence case a Claimant MUST have a liability and causation report too, with additional complexities and costs so that disbursements alone will eat up all the damages.

(g) A victim of an accident at work may need an engineer's report on liability additionally

(h) If the government want to remove the right to compensation for people at whatever level then they ought to have the honesty and integrity to say so and argue the case – not adopt this 'back door' approach which is thoroughly disingenuous.

Question 14

Not at all – see above

An increase in line with inflation would be more reasonable as has been suggested.

Question 15

You can't increase the limit and say that people can apply to go to another track on grounds of complexity as that is simply a recipe for multiple applications. The Court rules (CPR 26.8) leave a lot to discretion of individual judges. Proper rules are needed focussing on appropriate principles but value must be a key factor

Perhaps our major criticism of all these reforms is the idea that people can deal with cases as LIP against represented defendants in our adversarial system.

It is financially prohibited as explained above

Experts will not be truly accessible

Beyond this it is not a viable proposition forensically and we have no hesitation in saying this

For example:-

A medical negligence victim up against the Trusts' legal department and the NHSLA or a doctor's defence union solicitor trying to bring a case against a hospital and / or doctor when they have all the specialist resources and knowledge.

Someone who has tripped on a paving facing the inspection reports that local authorities routinely produce arguing a recent inspection which anyone working in the area knows are often bogus.

An employee injured at work having to try to source equipment records.

The undeniable fact is that insurers and all defendants often ignore or defend cases, early on especially, on totally bogus grounds, in the hope that the opponent will get disheartened and simply give up.

Lawyers are needed here. If they were not then defendants and insurance companies would not use them.

Question 16

No

The scope for exploitation and inappropriate unethical conduct of claims in a largely unregulated industry is enormous and the Court's recent experience of Mckenzie friends is not a happy one.

Question 17

This seems to be another area where a reform is being foisted on the industry that is not wanted by either side.

We oppose it.

There are cases where there can be a minor injury which can be settled without medical evidence as such – eg through an A&E record and GP records

The ban is not needed

It should not be introduced for RTA or any PI case

Question 18

There should not be a ban – see above

Question 19

There should not be a ban – see above

Question 20

This idea is unlikely to work as those hiding fraud with abuse the "simple" proposal

Question 21

No- there are many reasons why a Claimant may withdraw proceedings. Would the insurers agree to such measures when on the day of trial they abandon their "ill- founded" defences.

Question 22 - 24

We feel that this is an issue that should be dealt with between the commercial lawyers representing the credit hire industry and insurance industry and kept out of these reforms.

Question 25

No- there is no need to interfere with the pre-action protocol. Insurers and Claimants should be bound by it.

Question 26

No- injuries are different as humans react differently to accidents, their circumstances and their injuries. There are many injuries which are not apparent immediately or the Claimant does not think are an issue until they do not go away.

Question 27

Other- Claimants should be entitled to independent rehabilitation that is tailored for them. The NHS do not have the resources to deal with community rehabilitation and the Insurers have proved that they are not willing to offer "independent" therapists. Insurance employees do not make good therapists.

Question 28

Ban the insurance industry from selling innocent injured parties details. Fine them heavily and freeze their shareholders dividends if they are found to do so at £40 per case. Enforce the pre-action protocol and rehabilitation code.

Question 29

Disagree-this will be yet another reason for innocent parties to go under-compensated as medics on fixed fees will do a minimal job.

Question 30

If introduced this would undermine innocent victim's ability to claim the right level of compensation. For what gain? The insurance shareholders' profits. That is the only advantage.

Question 31

There are well established principles upon which PI claims are brought. Insurers have been shown to "exaggerate" the problem of costs and their conduct is normally the reason costs rise and become disproportionate. Until the insurance industry is stopped from making huge profits at the expense of the consumer the "myths" will remain.

Where is the justification or "justice" in equating minor soft tissue injuries with exaggerated and fraudulent claims? Even reference to the compensation culture is flawed as the government is aware its own report shows this to be a media fallacy.

Kent Law Society 23 December 2016