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Personal injury law update: proposed reforms

Gerald Swaby reviews the government's plans to remove the right to general damages for minor injuries and increase the small claims limit for personal injury (PI) claims to £5,000.

About the author

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It is probably fair to say that the government's joint Spending Review and Autumn Statement in November 2015 proved to be a sickening blow for those suffering from a road traffic accident personal injury and their legal representatives; however, by comparison, loud cheering was heard coming from the insurance industry.¹ The government made two significant announcements (below), but this article is mainly restricted to paragraph 1.143 of the *Spending Review and Autumn Statement*:

... The government is determined to crack down on the **fraud and claims culture in motor insurance**. Whiplash claims cost the country £2 billion a year, an average of £90 per motor insurance policy, which is out of all proportion to any genuine injury suffered... The government intends to introduce measures to **end the right to cash compensation for minor whiplash injuries and will consult of the details in the New Year**. This will end the cycle in which responsible motorists pay higher premiums to cover false claims by others. It will remove over £1 billion from the cost of providing motor insurance and the government expects the insurance industry to pass an average saving of £40 to £50 per motor insurance policy on to consumers (author's emphasis added).

... Motor insurance – The government will bring forward measures to reduce the excessive costs arising from unnecessary whiplash claims, and expects average savings of £40 to £50 per motor insurance policy to be passed onto customers, including by:

- removing the right to general damages for minor soft tissue injuries ...
- removing legal costs by transferring personal injury claims of up to £5,000 to the small claims court ... (paragraph 3.103).

The 'compensation culture'

These paragraphs generate many questions, and perhaps too many to be discussed here. However, the starting point is whether there is a compensation culture in the UK. The government has quoted from the Association of British Insurers (ABI) website, which has numerous references to the compensation culture it alleges exists within the UK. Indeed, the government has taken most of its facts from one web page on which the ABI is campaigning openly to stop what it claims is an abuse of the system. However, if one looks back to the last coalition government, it could be seen that David Cameron, the prime minister, had bought into the idea of a compensation culture in his foreword of Lord Young's 2010 report about personal claims, where the prime minister states:

... businesses are drowned in ... the fear of being sued for even minor accidents ...

A damaging compensation culture has arisen ... with the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext ...

We simply cannot go on like this ...

We're going to curtail the promotional activities of claims management companies and the compensation culture they helped perpetuate.²

And Lord Young summarised this:

Britain's 'compensation culture' is fuelled by media stories about individuals receiving large compensation payouts for personal injury claims and by constant adverts in the media offering people non-

refundable inducements and the promise of a handsome settlement if they claim (page 19).

However, significant caution is needed before any conclusion can be firmly drawn regarding whether there is a compensation culture. This may have a convenient political undercurrent driven perhaps by the promotion of events such as the ABI's September 2015 conference 'Next steps in tackling the compensation culture'; and by the headline-grabbing populist press and political expediency. The reality is that there was no compensation culture,

as Lord Young states in his report:

The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality. The number of claims for damages due to an accident or disease has increased slowly but nevertheless significantly over recent years (page 19).

Lord Young's report was published in October 2010, when the statistics for road traffic accident PI claims stood, approximately, at between 675,000 and 790,000. The latest figures show that the claims registered in 2014/15 are - at 761,000 - less than the 2010 upper limit (see Table 1 on page 24).

There is probably little doubt that when solicitors were allowed to start buying claims in 2005, the number of claims increased due mainly to claims management companies (CMCs) making claimants aware of their rights to bring a claim if they were injured - and the accident was not their fault - in the previous three years.

A new industry was born. These CMCs employed pro-active (or depending on the reader's viewpoint aggressive) marketing techniques to encourage claimants to come forward, informing them of their rights to pursue a claim at zero risk due mainly to the availability of conditional fee agreements (CFA) and after-the-event (ATE) insurance, which would pay a defendant's costs if the

claimant lost. Such CMCs earned a bad reputation, although this tars them all with the same brush and, undoubtedly, there were some good CMCs.

In 2006, the Labour government attempted to regulate the industry by passing the Compensation Act 2006 and the Compensation (Regulated Claims Management Services) Order 2006 SI No 3319. However, the banning of referral fees payments in PI cases was enacted by Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss56-60. Therefore, a decrease of PI claims by 90,000 can be seen in conjunction with the introduction, in 2013, of qualified one-way costs shifting (QOCS).

QOCS under Civil Procedure Rule (CPR) 44 implemented Lord Justice Jackson's reforms to costs and procedure to make the system more efficient and costs proportional. The new CPRs were effective from 1 April 2013, and the defendant in PI cases now pays the costs of both sides - win or lose - unless the claim is fundamentally dishonest or fraudulent (CPR r44.16). So, no longer do defendants have to pay the claimants ATE insurance or uplift fee under a CFA. The claimant has to pay these costs out of any damages awarded. However, the uplift fee is capped at 25% under the CFA.

The reality is that it was not just CMCs which were promoting frivolous claims before 2013. Claimant-acting solicitors also have to accept some of the blame and responsibility for promoting weak PI claims that had little chance of success. This has now spurred satellite litigation by third-party funders and ATE providers which funded a claimant's CFA agreements.

This can be seen in the Court of Appeal judgment of *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers At Work Ltd) and AIG Europe Insurance Limited UK Ltd (formerly known as Chrtis Insurance UK Ltd)* [2015] EWCA Civ 31.

In this case, Impact made loans available to Barrington (which comprised solicitors) to fund disbursements in PI claims brought under CFAs. Impact alleged that Barrington was professionally negligent in assessing PI claims.

Longmore LJ observed that little attempt had been made to assess the merits of the claims, and that this was a breach of duty. As a result, Barrington owed Impact £581,353.80. Unfortunately, this could not be recovered by Impact as Barrington had entered liquidation. Impact, therefore, sought to recover that amount from the second defendant AIG (which was the professional indemnity insurer for Barrington) under the Third Parties (Rights Against Insurers) Act 1930.

The court was unanimous in holding the defendants liable. It is clear - given the size of the damages for disbursements - that perhaps many hundreds, if not thousands, of claims were negligently promoted and this could be the tip of the iceberg.

What can be seen from the government's own statistics?

The Department for Work and Pensions Compensation Recovery Unit (CRU) shows the number of PI claims registered (Table 1).³

Before 2006, the CRU statistics were calculated differently and based on the number of accident and disease claims notified. Table 2 shows the individual and combined figures that provide an overall approximation of the total number of claims registered in Table 1.⁴

In road traffic accident cases, it can clearly be seen that there has been a near doubling of claims over the past 15 years. It can also be seen that claims have increased generally by 350,000 over the same period, driven mainly by the road traffic accident cases.⁵ However, there may be more than one explanation. In 2013-2015, there was a decrease in claims, perhaps due to the Jackson reforms. This should also be considered against the fact that, according to the Driver and Vehicle Licensing Agency, the total number of vehicles on the road in 1995, when CFAs were introduced, was roughly 25m.⁶ In 2000, this number stood at 29m. In 2005, when CMCs became involved, it was 33m. The latest figures show that there are nearly 37m vehicles on the road; thus, there is a significantly higher potential for road traffic accidents. Therefore, in general, the statistics show that road traffic accidents have increased; however, the assertion that, overall, there is a compensation culture is open for debate.

Fraud

Currently, there are significant measures to tackle fraud. The government is clear that it wants to reduce fraudulent claims. It has already commissioned a Fraud Task Force to make recommendations. However, CPR r44.16 allows a defendant to recover costs if a claim is fundamentally dishonest. This is separate to an outright fraud, which can be pleaded joint and/or separately. Furthermore, the courts are instructed to dismiss a claim, or a related claim that is fundamentally dishonest, under section 57 of the Criminal Justice and Courts Act 2015. So, the

government could perhaps already claim credit for tackling third party insurance fraud. This is in addition to the insurance industry's pre-action protocol in road traffic accident PI cases, which requires a claimant's solicitor to search the askCUE PI service or the Claims and Underwriting Exchange. These databases register all previous claims a person has made. Thus, a practitioner should now be able to filter out those claims that are fraudulent or fundamentally dishonest.

Fraud and exaggeration

A note of caution is required concerning where a claimant is exaggerating so much that it becomes either fraudulent or fundamentally dishonest. Many claimants may exaggerate their injury; however, some exaggeration may be permissible given that any insurer will want to pay the least amount of compensation. This could be seen as nothing more than structural bargaining positions between the parties, as trying to establish an exact figure for a whiplash injury is not an exact science, and, for example, two county court judges given the same circumstances in relation to a PI case will be subjectively objective and reach different figures. The main persuasive precedent that is widely available on the internet is *Gosling v (1) Hailo (2) ScrewFix Direct* (2014) 29 April, Cambridge CC (unreported), which was heard by HHJ Moloney QC. In this case, an initially genuine PI claim was exaggerated by 50%. This was so substantial as to taint the whole claim. The insurer was awarded full costs under CPR r44.16.

Extinguishing the right to damages for soft tissue injuries

This is potentially worrying as greater clarity is required, and to that extent the government indicated that it will consult. However, there is a discrepancy between paragraph 1.143 and paragraph 3.103 of the Spending review and autumn statement in that the latter paragraph clearly indicates that the government will remove all rights to compensation for soft tissue injuries in comparison with the former paragraph, which indicates the end of compensation for minor whiplash claims. These are significant differences.

The government wishes to extinguish the right to compensation for the injury component when someone has suffered soft tissue injury. This would prevent any exaggerated claims for whiplash or fraudulent claims, or for fundamentally dishonest exaggerated claims, but it would also stop genuine claimants. However, the idea that a claimant should not be allowed damages for PI, especially in a road traffic accident case, does have a precedent in one common law country, New Zealand, under the Accident Compensation Act 2001.

Looking forward

This is clearly going to be a very contentious issue. Many genuine

claimants will be without legal redress for their injuries, and many will be scared of going to the small claims court if the limit is lifted to £5,000. The insurers will, however, still be happy to send representatives. So, it will be interesting to see how unrepresented claimants fare. Yet, what maybe a very sobering observation is that many positions within claimant and defendant solicitors' firms may be at risk when a lower number of PI claims come through. This is a clear benefit to the insurance industry, as it will save massive amounts in costs and damages payments, but it may be naïve to suggest that these savings will be passed on in full to customers taking out insurance, when insurers' profits are at stake. One thing which will be clear is that this is a legal issue, and there will be a significant adversarial battle between all the parties.

1 *Spending review and autumn statement 2015*, available at: <http://tinyurl.com/jk9fsy9>

2 *Common sense common safety: a report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*, available at: <http://tinyurl.com/z8wuat6>

3 *Information in tables compiled with data from CRU as of 28 April 2014 and CRU archived data compiled at the National Archives*, available at: <http://tinyurl.com/grmemam>

4 In relation to Table 2, for detailed critical analysis on the statistics concluding that there was no compensation culture in the UK in years leading up

to 2006 see R Lewis, et al, 'Tort personal injury claims statistics: is there a compensation culture in the United Kingdom?', *Journal of Personal Injury Law* [2006] 2, 87-103

5 *There has been a near doubling of clinical liability cases over the past 15 years to around 20,000; however, this is relatively minor within the overall claims. Employer liability has been relatively stable from 2006 to date. Before 2006, it can be seen that the accident component is similar to those post-2006 claims. The disease claims can be omitted on the basis that they represented coal miners' claims and only skewed the statistics temporarily, ending in 2005.*

6 Available at: <http://tinyurl.com/hvsmwbo>

The government intends to ... end the right to cash compensation for ... whiplash injuries and will consult on the details

Table 1

	Clinical	Employer	Motor	Public	Other	Liability unknown	Total
2014/15	18,258	103,401	761,878	100,072	12,972	1,778	998,359
2013/14	18,499	105,291	722,843	103,578	14,467	2,123	1,016,801
2012/13	16,006	91,115	818,331	102,984	17,695	2,175	1,048,309
2011/12	13,517	87,350	828,489	104,863	4,435	2,496	1,041,150
2010/11	13,022	81,470	790,999	94,872	3,855	3,163	987,381
2009/10	10,308	78,744	674,997	91,025	2,806	3,445	861,325
2008/09	9,880	86,975	625,072	86,164	3,415	860	812,348
2007/08	8,876	87,198	551,905	79,472	3,449	1,850	732,750
2006/07	8,575	98,478	518,821	79,841	3,522	1,547	710,784

Table 2

		Clinical	Employer	Motor	Public	Other	Sub Total	Total
2004/05	Accident	7,196	77,765	402,892	86,966	4,463	579,282	755,875
	Disease	9	175,737	32	281	543	176,593	
2003/04	Accident	7,109	79,286	374,740	91,177	4,874	557,186	770,243
	Disease	12	211,924	21	276	824	213,057	
2002/03	Accident	7,973	92,915	398,870	109,441	6,347	615,546	706,697
	Disease	4	90,427	22	341	357	91,151	
2001/02	Accident	9,773	97,004	400,434	100,663	6,252	614,126	688,315
	Disease	6	73,550	11	326	296	74,189	
2000/01	Accident	10,890	97,675	401,740	94,000	7,815	612,120	735,931
	Disease	11	121,508	17	1,883	392	123,811	

