Association of British Insurers

TRANSPORT SELECT COMMITTEE INQUIRY
COST OF MOTOR INSURANCE: WHIPLASH

Evidence from the Association of British Insurers

The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute over 90 per cent of the insurance market in the UK and 20 per cent across the EU. Employing more than 300,000 people in the UK alone, it is an important contributor to the UK economy and manages investments of £1.8 trillion, over 26% of the UK's total net worth.

Summary

1. Whiplash claims cost insurers over £2 billion per year and add over £90 to the average car insurance premium of honest motorists. In the context of strained household budgets and the challenges facing consumers in terms of the overall cost of living, paying for fraudulent and exaggerated whiplash claims is a cost consumers can do without.

2. The industry has delivered on the public commitment it made to reduce car insurance premiums at the Prime Ministerial insurance summit. Following the reforms to the civil litigation system, premiums have come down substantially in the past 12 months. There is a question about the extent to which these premium reductions are sustainable over the medium term without the Government delivering further substantive reform of the civil litigation system. We are pleased to see that the Government is committed to improving the medico-legal framework for low value RTA claims and look forward to working with other stakeholders to develop models that will deliver meaningful change. Although we recognise the potential challenges to access to justice of increasing the Small Claims Track (SCT) limit to £5000, it is disappointing that the Government has not taken the opportunity to seek to overcome these challenges.

The industry is delivering on its commitment to pass on savings to customers

3. The industry has been delivering on its commitment to pass on savings to consumers following the reforms to the civil litigation system. The AA's British Insurance Premium index showed that the average quoted premium reduced by 5.4% in Q3 this year and 12% over the past year. The latest Confused.com/Towers Watson Car Insurance Price Index show that the average premiums for comprehensive cover fell by 3.9% in the second quarter of 2013 and 13.9% over the last 12 months.

4. This comes against a backdrop where general damages have increased by around 20% in the past year due to the 10% uplift introduced as part of the Lord Justice Jackson's recommended reforms to the civil litigation system and implemented via the *Simmons v Castle* ruling as well as the 10% uplift introduced by the Judicial College Guidelines.

There is significant cross-sector agreement on the reforms needed to the medico-legal reporting system but action is now required

5. The ABI supports the Government's proposed reforms to the medico-legal reporting system. For far too long, too many medical reports for low value personal injury claims have not been fit for purpose. The ABI supports introducing much greater independence and transparency into the system, removing the perverse financial incentives that are in place to produce a clinical diagnosis of whiplash and ensuring that a proper accreditation framework for medical professionals producing medical reports is introduced.

6. While there still remains no objective test for whiplash, all stakeholders need to come together to work through the detail of how these reforms might work in reality. The ABI has worked proactively with the Motor Accident Solicitors Society, the Association of Medical Reporting Organisations (AMRO) and the Forum of Insurance Lawyers (FOIL) to develop a consensus in relation to the required reforms and what the key elements in any new system would be.

7. The ABI believes that in any package of reform, the following elements are vital:
   - True financial independence between the instructing party and the party carrying out the medico-legal examination;
   - A structured and compulsory accreditation process;
   - Improved training for medico-legal experts;
   - Standardised medical reports;
   - Standardised instructions; and
   - An element of peer review.

8. Furthermore, we support the Transport Select Committee's view that further action is required to strengthen the requirements for producing a claim. The Committee suggested that the claimant should provide proof that they saw a medical practitioner shortly after the accident or provide evidence of the impact of their injury on everyday life. The ABI agrees there should be a presumption against accepting claims where such information is not provided.

9. It is vital that the Government take forward and implement their proposals in a timely manner to support the efforts of the insurance industry and other stakeholders in continuing the battle to combat exaggerated and frivolous whiplash claims.

Insurers are reporting an increase in non-standard medical reports for low value personal injury claims, leading to unnecessary costs and pressure on premiums

10. While the industry fully supports reforms to the medico-legal process for low value claims, it must be noted that the use of non-standard medical reports is becoming more widespread. Since the implementation of fixed recoverable costs in the Claims Portal in April, insurers are reporting a steep rise in the number of psychologist and/or rehabilitation reports being commissioned in support of low value RTA claims.

11. These reports will often add little value to the claim, as the claimant will often have only suffered a minor soft tissue injury. Furthermore, they can add up to £1600 in additional costs, which puts increased pressure on premiums and are often obtained from a medical agency within a claimant lawyer's business structure or where they receive a significant referral fee. There is also a concern that, at times, these very early medical interventions appear contrary to NICE guidelines and to the detriment of the claimant. Despite increased interventions/treatment, there are no signs of any reduction in prognosis times or improved outcomes for consumers.

Government can quickly help to reduce pressure on claims costs and premiums by setting medical reporting fees in the Civil Procedure Rules

12. There is currently a voluntary agreement between some insurers and a number of Medical Reporting Organisations (MROs) which caps the recoverable fees for a medical report[1]. This has been in place since 2007. The agreement helps to bring cost certainty to insurers and helps MROs secure timely payment of their fees.

[1] [1] The agreement allows for two rates of payment: Rate B is the standard rate; and Rate A is a discounted rate that factors in early payment (within 90 days). It is estimated by Medical Reporting Organisations (MROs) that around 75% of all medical

13. Unfortunately the rates in the agreement are not uniformly upheld by the Courts and, as a result, there has been an increase in the number of MROs operating outside the agreement by charging significantly higher fees than those set out in the agreement. Furthermore, the agreement's fees were set before the ban of referral fees for personal injury claims was introduced and, as such, are artificially high (this has been accepted by MROs).

14. It is important that MRO fees are incorporated into the Civil Procedure Rules (CPR) and at a rate which reflects the fact that the Government has banned referral fees. Reducing the fee, without incorporating it into the CPR, would likely leave MRO signatories to the agreement at a competitive disadvantage. This could lead to a number of MROs leaving the agreement, rendering it unsustainable.

15. The ABI believes that the fee should be set in the CPR and then reviewed and altered, if required, to reflect any new medico-legal reporting system developed by the Government as a result of the forthcoming reforms.

Raising the Small Claims Track limit is vital in helping to combat fraudulent personal injury claims and helping to reduce premiums further

16. The Ministry of Justice (MoJ) consulted on increasing the SCT and decided that now is not the right time to do so. The need for an increase is overwhelming: when the SCT's £1,000 limit was set in 1991, 50% of personal injury claims fell within its jurisdiction. Now only 9% do.

17. The ABI recognises that it would not be right to have a system in which access to justice for genuinely injured claimants is undermined. We believe that it is important to introduce safeguards for claimants, so in conjunction with an increase in the SCT to £5,000, we would like to see:
    - Improved education and awareness so that claimants know how to file a claim for compensation in a reformed system.
    - The mandatory use by claimant and defendant representatives of software based damages calibration tools (incorporating all settled claims not simply those that are settled in court) to assess general damages awards. This would ensure that claimants are always provided with fair and reasonable compensation.
    - Support for those without access to the internet which could impact on their ability to access an online Claims Portal.

18. In order for this to be delivered, legislation is not required – it can all be achieved through amendments to the CPR. The fact that the Government has deferred a decision to increase the SCT is a missed opportunity to improve the efficiency and effectiveness of the civil litigation system and further reduce car insurance premiums for customers.

Predictable damages can support an increase in the Small Claims Track limit

19. One of the concerns of increasing the SCT limit is that self-represented claimants would not be in a position to value the personal injury element of their claim. The then Financial Services Authority[2] examined this issue and did not find evidence of customer

reports prepared in RTA and EL/PL cases valued at up to £15,000 are obtained via MROs who are signatories to the Agreement.

[2] http://www.fsa.gov.uk/pubs/other/third_party_capture.pdf

determent. However, the ABI believes that any potential concerns about under settlement of a claim could be addressed if Lord Justice Jackson's recommendations on predictable damages were to be implemented in conjunction with an increase in the SCT.

20. Predictable damages are already used in many EU counties for valuing personal injury claims (for example Spain, Italy and France)[3]. The ABI considers that predictable damages are a logical step in facilitating access to justice if the SCT is to be increased as they add a layer of transparency and certainty into the claims process. This would allow claimants to proceed with their own claim and negates concerns that claimants are unable to value their own claim for general damages.

21. There is already software in use by many insurers as a valuation tool and around 90% of all claims settle within the range of valuation that the software provides. Significant work has already been carried out by the Predictable Damages Working Party on this issue. Their work should be reconsidered on the basis of damages up to £5,000 (rather than the £10,000 limit previously considered) as it is likely that greater consensus can be achieved.

Under the current system, the medico-legal report will often provide little value assistance in determining the claim

22. Some insurers pay low value personal injury claims without the claimant undergoing a medico-legal examination. They do so because the current medico-legal reporting system does not produce the quality of reports that are required consistently. Given that there is no objective test for whiplash, combined with the perverse financial incentives operating in the system, there is little likelihood that the medical report will result in a clinical finding other than for whiplash. Furthermore, a number of claimants who have suffered a minor injury which has resolved in a matter of weeks want compensation to be provided quickly but they want neither to undergo a medical examination nor to consult a solicitor.

23. If the claim is notified in a timely manner and the medical professional is able to examine the claimant while they are still injured or recovering, then at least there is the potential to produce a robust clinical finding. However, the current limitation period for personal injury claims is three years post-accident. As such, in a number of cases the medical examination will take place years after the accident and at a point when the claimant has fully recovered from any injury they may have sustained. Therefore, the medico-legal report will provide absolutely no value the medical professional will simply be able to report the subjective view of the claimant that they were injured following an RTA.

24. The industry could consider ending the practice of offering to settle claims before a medical report has been produced. We recognise that for some claimants and claimant solicitors the current practice can potentially lead to a temptation to submit a frivolous or exaggerated claim. Stronger safeguards are required.

25. Before insurers could consider ending pre-medical offers, they would need to have confidence that a medical report is worthwhile and is produced in an environment where the reforms to the medico-legal system have been introduced and implemented effectively, including the elements laid out in para 7 above. Furthermore, to ensure the cost of the reports is appropriate, the fees should be set out in the CPR at a rate that fairly reflects both the cost of producing the report and the fact that referral fees for personal injury claims are now banned.

[3] See Lord Justice Jackson's Preliminary Report Ch. 27

26. As outlined in paragraph 23 above, even with a reformed medico-legal system in place, there will still be a number of claims where a medical report will provide no value in determining the claim. For example, a medico-legal examination would provide no benefit when the RTA has occurred months if not years before and the claimant's injury has resolved. Furthermore, if the injury is relatively minor the costs, in terms of requiring a medical report and the potential incremental costs from delayed settlement, mean that many minor injuries risk becoming materially more expensive.

27. Any move to prevent the ability of offer to settle claims before a medical report has been obtained and before the proposed reforms to the medico-legal reporting system are implemented will only serve to increase insurers' claims costs which will ultimately put increasing pressure on car insurance premiums.

Cash inducements must be banned for all stakeholders to help combat frivolous and exaggerated claims

28. At the moment, Claim Management Companies (CMCs) are banned from offering cash inducements to a claimant. The industry supports extending this ban to apply to solicitors, given the important role they have in helping to reduce the number of frivolous and exaggerated whiplash claims entering the system. So far, the Solicitors Regulation Authority has resisted this move, but if all stakeholders are to play their part, then the ban on inducements should apply to solicitors as well as CMCs.

The ABI is working with the claimant community to help provide access to fraud data

29. The insurance industry understands the benefits of sharing data with claimant lawyers, and has now agreed, in principle, to do so. The ABI is working with insurers, the MIB, MASS, APIL and the Law Society to define how the data will be shared in practice. We have an agreement in principle in place with MASS and we are currently focusing on how we can deliver that in a timely and cost effective way.

The current law on third party personal injury fraud inhibits insurers' ability to combat exaggerated claims

30. The industry has significant concerns over the current law which inhibits the ability of insurers to effectively combat exaggerated third party personal injury claims. Under current case law, where a third party is found to have fraudulently exaggerated a genuine claim, it was held in *Summers v Fairclough Homes* [2012] that the court can strike out the claim under CPR 3.4(2) or its inherent jurisdiction at any stage in proceedings, but only in 'very exceptional circumstances' at the end of a trial. For situations falling outside what the court deems to be 'very exceptional circumstances', damages are still recoverable for the part of the claim that is genuine.

31. The Law Commission has recently consulted on their 12th programme of law reform where they considered this issue. The ABI believes that the law should be amended making the strike out of claims the general position upon a finding of fraudulent exaggeration. Legislation in the Republic of Ireland provides an effective example of how this can work in practice. It is now important that the Government gives approval to the Law Commission to take forward further work on this issue.

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