Response to Consultation Paper CP17/2012
"Reducing the number and costs of whiplash claims"

1 March 2013

Executive Summary

1. It is a good idea to train and certify medical experts who are reporting in whiplash claims. PIBA supports this.

2. There are many research papers and precedents for making the medico-legal filter better (for instance the Quebec Task Force in the mid 1990s).

3. PIBA members have sharp end experience of defeating and weeding out fraudulent claims. The current system is effective for weeding them out. It is the Portal introduced in 2010 which has made it easier for fraudulent claimants to pollute the system.

4. The evidence on which the MOJ rely to suggests that there has been an increase in fraudulent claims in England and Wales is deeply faulted and lacks credibility. There may be other evidence, we have not been shown it.

5. The MOJ's proposal to increase the Small Claims Limit to deal with fraudulent claims is:

- **[1] discriminatory against the poor, the elderly and the mentally disadvantaged and the uneducated,**
- **[2] unworkable,**
- **[3] based on a fundamental misunderstanding of the Small Claims process,**
- **[4] will create a barrier to access to justice for injured people.**

6. PIBA propose better deterrence of fraudulent claimants by the following methods:

- **[1] The Government should publicise the likely consequences of being found fraudulent by a court.**
- **[2] The police should be encouraged to follow up cases in which a claim has been dismissed on the basis that it was dishonest and the judge has referred the case to the DPP.**
- **[3] The procedure for committal for contempt should be made quicker and cheaper.**
- **[4] The Supreme Court decision in *Summers v Fairclough Homes Ltd* [2012] UKSC 26 should be publicised.**
- **[5] Medical Records should be disclosed in all whiplash cases.**

RESPONSE TO PART 1 OF THE CONSULTATION: THE ISSUE

MOJ proposition [1]: the increase in RTA PI claims is caused by an increase in fraud and exaggeration

1. PIBA have analysed the evidence put forward by the MOJ on which the MOJ have made the assumption that the increase in whiplash claims is due to an increase in fraudulent and exaggerated RTA PI claims.

2. The authors of both the Consultation Paper and the Impact Assessment recognise that there is insufficient evidence to support the assertion that there has been an increase in fraudulent and exaggerated claims.

3. It is illogical that the MOJ has chosen to consult on methods to reduce the number of fraudulent/exaggerated whiplash claims before gathering and reciting sufficiently credible evidence to be satisfied on the balance of probabilities that the number of fraudulent/exaggerated whiplash claims is increasing.

4. The Consultation is based fundamentally upon the asserted fact that there is an increase in the number of RTA injury claims and there is a decrease in the number of reported RTAs. The reason which is put forwards by the MOJ for this anomaly is a growth in fraudulent/exaggerated whiplash claims.

5. The MOJ then assert as a fact that this growth is not mirrored in other jurisdictions and raise this as further support for the "fraud" explanation.

6. PIBA have analysed the evidence put forwards by the MoJ in support of these assertions and warn that it does not stand up to any proper scrutiny.

The fall in the number of reported accidents

7. The MoJ points to a 20% fall in the number of reported road traffic accidents over the 4 years between 2006/2010. They then note that there has been an increase in whiplash claims during that period and conclude that the increase must be due to fraud.

8. However, the "reported RTAs" information published by the Department of Transport comes from the STATS19. This is data which the Department of Transport itself has concluded is **unreliable** because it is tainted by massive under-reporting when compared with hospital A&E data. This is confirmed in the Department of Transport's Road Safety Research Data Report No 69 2006 which states:

> "… there is general recognition and acceptance that the STATS19 record is an underestimation of the actual number of road traffic accident casualties. This has been acknowledged for some time and studies have been undertaken which provide estimates of this shortfall, but the issue is how constant over time are the levels of under-recording, misclassification and under-reporting, especially of serious accidents, to the police. And, if they are not constant, by how much have they changed so that the implications can be assessed to inform road safety policy and practice to the end of this target period."

9. The authors of the MOJ Impact Assessment acknowledge that there is no evidence of trends in relation to unreported accidents. Non reporting of accidents is prevalent in all countries (see page 25 of the International Transport Forum Report IRTAD Road Safety 2010). Even the best performing countries recognise a shortfall in crash reporting, including

even fatal crashes. In its 2010 Report, "Safety on roads: What's the vision?", the Organisation for Economic Co-operation and Development recognised that there are serious data deficiencies in relation to non-fatal (and non injury) collisions.

10. For minor RTAs, where no fatality or serious injury has been caused, most are not reported to the police. Even if a telephone report is made the police often do not attend the scene so the "reported figures" relate to more serious RTAs, are grossly unreliable and potentially irrelevant.

11. *The Road Safety Research Report No. 69 2006* recognised that there had been changes in healthcare practice with a reducing tendency to admit casualties if their injuries can be dealt with by an outpatient department. This would lead to a reduction in the number of reported crashes at hospitals.

The 60% increase in the number of RTA PI claims from 2006 to 2010

12. The DWP data shows that the number of PI claims registered with the CRU were as follows:

	Clinical Negligence	Employer	Motor	Other	Public	Liability not known	Total
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	1,041,150
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	987,381
2009/10	10,308	78,744	674,997	2,806	91,025	3,445	861,325
2008/09	9,880	86,957	625,072	3,415	86,164	860	812,348
2007/08	8,876	87,198	551,905	3,449	79,472	1,850	732,750
2006/07	8,575	98,478	518,821	3,522	79,841	1,547	710,784

13. This data proves that RTA claims registered through the CRU rose by 60% but it also proves that clinical negligence claims rose by 58% (and employers' liability claim dropped by 11%).

14. The MOJ has not concluded that the rise in clinical negligence claims is due to an increase in fraud yet it has done so for RTA claims.

15. Further, if the MoJ believe there has been a rise in fraudulent claims generally, this does not explain the decrease in employers' liability claims.

16. PIBA submits that these figures alone do nothing to support the MOJ's conclusion that there has been a growth in fraudulent RTA claims or fraudulent claims generally.

The MOJ rely on the asserted fact that in the UK: 2.7 claims for whiplash are made for every reported RTA. This is higher than the figures in Germany, Spain and France.

17. The source for this assertion is a report by *an Association of Swiss Insurance Companies*. The report was presented in 2002 and compared whiplash claims across Europe. It contained the following conclusions which the MoJ has ignored:

i) "**With the exception of Norway which did not reply …all countries in which there are victims associations indicate that they benefit from the assistance of doctors and lawyers**." (page 21)

ii) Countries should concentrate on improving medical evaluation of Whiplash cases.
iii) Italy had the highest number of claims (4.7 million); then Germany (3. 960 million). The UK was third with a significantly lower 2.9 million claims.
iv) The average cost per whiplash claims in the UK was the in **the lowest group** out of all the countries: 2,878 euros. It compared very favourably with the 2,500 in Germany and 2,625 in France and 16,500 in Netherland and 35,000 in Switzerland.
v) UK did have the highest % rate of MCT (Minor Cervical Trauma) claims (76% of injuries).

The high % of MCT claims in the UK needs some examination. It is the MOJ's responsibility to do so in advance of making changes in law or procedure which may deprive victims of their rights to compensation against tortfeasors.

However, the *Association of Swiss Insurance Companies* conclusions did not take into consideration the large number of cars on this small island. In 2002, when the questionnaires for this report were completed, the UK had 30,403,000 vehicles with a total roads length of 245,000 miles (see the Department for Transport's Road Length Statistics, *Statistical Release*, June 2011) or 398,350 km. France had roughly the same number of vehicles 35,396,000 but 3 times the length of roads at 1,000,960 km. In the UK there were 2.9 million RTAs in 2002 and there were only 2.5 million in France. The vast majority of the latter were serious (with only 3% whiplash). These figures only serve to show that most of the crashes in the congested roads in the UK were low speed and most of those in France were more serious. They do not prove fraud.

Submissions: The MOJ's conclusions are not supported by the evidence presented.
18. PIBA members deal with many fraudulent and exaggerated claims each year and have great experience in doing so. PIBA accept from this personal experience that RTA claims involving whiplash are made and some are fraudulent. The current Fast Track and Multi Track system, if used properly, leads to such claims being struck out or defeated and to costs orders being recovered from the fraudulent claimant because ATE insurance is in place and because two way costs shifting exists.

19. In 2009 PIBA raised written and very real concerns when the Portal was proposed on the basis that the Portal would encourage fraudulent claims. This is because the Portal is a cheap, quick system which does not allow the Defendants to gather their own medical evidence and does not encourage the medical experts who are reporting for the Claimant to do a proper, professional job, to obtain the Claimant's pre-accident medical notes and to weed out fraudsters and exaggerators. The MOJ pressed ahead and implemented the Portal and has wholly ignored the effect of the portal on RTA whiplash claim figures. Note the massive increase in RTA claims between 2009-2010: **674,997** and 2010-2011: **790,999 = 17%.** The increase the year before the Portal was introduced was 8%.

20. PIBA submits that the evidence relied upon by MOJ in this Consultation and in the Impact Assessment goes no where near substantiating the conclusion which the MOJ has drawn: that there has been an increase in whiplash claims against a backdrop of declining RTAs or that there has been an increase in fraudulent RTA PI claims.

21. The MoJ does not appear to have considered other reasons to explain an increase in genuine whiplash claims, such as a general increase in public awareness of their ability to claim for whiplash due to television advertisements and claims farmers.

22. The MOJ has put forwards no credible evidence of an increase in fraudulent claims (as is acknowledged by the Consultation).

23. The evidence presented does not substantiate the MOJ's assertion that there has been a rise in fraudulent claims.

24. Despite the assistance, resources and financial power of the ABI and the insurance industry, inter alia given on 14 February 2012 at the Downing Street summit mentioned in the Impact Assessment, the MOJ has been unable or is unwilling to present credible evidence of an increase in fraud in the consultation document or the impact assessment.

25. PIBA submits it is inappropriate and unnecessary for new measures to be implemented to address an issue that is not proven to exist on the balance of probabilities.

RESPONSE TO PART 2 OF THE CONSULTATION: BETTER MEDICAL EVIDENCE

An Independent Medical Panel

26. PIBA agrees that a system should be devised and implemented so that medical practitioners are required to undergo training focused on Whiplash Injuries and certification before they can provide reports in RTA whiplash cases.

27. Any system should be devised with input from lawyers specialising in personal injury, medical referral agencies and the Royal Medical Colleges as well as representatives from the insurance industry. The system should set out the training that should be undertaken by medical practitioners before they can be certified to provide medical reports in RTA whiplash cases. There are a great deal of high quality research papers on whiplash and a list of them is appended hereto in Appendix 1. A classic example of one of the review papers is that by McCLune & Waddell[1] at appendix 3.

28. There are also high quality forms for assessing whiplash provided by inter alia the Quebec Task Force on Whiplash in the mid 1990s:[2] see Appendix 2.

29. The training must be in addition to the experts' general medical training and qualifications and should cover the following:

- All major past and current research papers on whiplash.
- The need for careful analysis of the likely impact speeds and mechanism of the accident.
- Post-accident evidence of actual symptoms.
- Guidance on when it is appropriate or necessary to obtain medical notes for a proper diagnosis or to verify the Claimant's symptoms.
- Guidance on the need to consider whether a claim is genuine rather than [as at

---

[1] Emerg Med J 2002;19:499–506;

[2] **Quebec Task Force,** ***Spitzer et al, "Scientific Monograph of the Quebec Task Force on Whiplash Associated Disorders: Redefining "whiplash" and its management" (1995) Spine 20 (8 suppl) 1S-73.***

present] the assumption that the patient is to be believed.

- Guidance on how to distinguish genuine from fraudulent or exaggerated claims or symptoms so that medical practitioners are able to express concerns about whether a claim is genuine. However, any positive finding of fraudulent behaviour should remain a matter for the courts to determine and medical practitioners should not be expected to adopt the role of arbiters of fact. Accordingly, medical practitioners should only express concerns, doubts and highlight discrepancies. They should not be expected to determine whether or not the Claimant is telling the truth.
- Guidance on assessing evidence of damage (if any) to the vehicles involved, which should be sent to the medical practitioners when preparing their reports (if available). If there is no discernable damage to the vehicles then the training should provide guidance on how the medical expert should approach this when reaching a diagnosis.
- Guidance on when it is appropriate for a GP to provide the initial report and when it is necessary for a more specialist medical practitioner, such as an orthopaedic surgeon or neurosurgeon, to do so.

30. PIBA also considers that the Portal rules should be amended so that:

a) Only certified medical practitioners are permitted to provide medical reports in whiplash cases.

b) Medical practitioners should not be permitted to provide a medical report in relation to a claimant to whom they have provided treatment, unless they are exceptional reasons for doing so. This will alleviate the issue of treating medical practitioners being reluctant to decline a diagnosis of whiplash. It is also good practice that treating practitioners do not provide medical reports for legal proceedings, as conflicts of interest can arise.

31. Medical report fees should be fixed with a review of the fees every 2 years. There should be different level of fees for GPs from those for Surgeons. Additional fees should be paid for a review of the medical records which might not be required in all cases, e.g. a child claimant where there is no suspicion of fraud.

32. PIBA thinks it would be appropriate that certified medical practitioners are required to undertake refresher training at regular intervals to ensure they remain up-to-date with any relevant developments and policies. The frequency and extent of such refresher training will need to be considered by those charged with setting up the scheme.

Accreditation Scheme vs National Call-Off Contract

33. PIBA supports an accreditation scheme as the most appropriate model. The accreditation scheme should allow doctors, groups of doctors and medical reporting organisations to apply for accreditation so long as each medical practitioner providing reports has attended and passed the necessary training.

34. The training required for accreditation should be provided to each medical practitioner by the independent organisation set up to run the accreditation scheme and not, for example, by the medical reporting organisations seeking to accredit their members. This would help to ensure consistency and quality in the standard of the training

35. PIBA does not see any good reason to support a national call-off contract model over an accreditation scheme. Claimants and insurers should still be entitled to select the medical practitioners of their choice, subject to those practitioners being accredited. A national call-off contract would be unnecessarily restrictive and may prevent access by all parties to their

medical practitioners of choice. It may also create difficulties in relation to ensuring sufficient coverage of medical practitioners accredited with preparing medical reports.

Peer Review

36. PIBA does not believe it would be necessary or proportionate to include an element of peer review into every assessment. Fraudulent or exaggerated claims only make up a small minority of whiplash claims. In the majority of cases, it is likely there will be no or little concern about the claim being fraudulent or exaggerated and requiring a peer review in every case would unnecessarily and disproportionately increase the cost of the scheme.

37. PIBA would support peer review in a random sample of assessments each year to ensure quality control of, and consistency within, the scheme. The lawyers and medical practitioners involved in devising the scheme should also consider whether it would be useful for there to be an automatic peer review in cases where fraud or exaggeration of symptoms is suspected.

The Cost of the Scheme

38. The cost of implementing and running the scheme should be borne by the insurers who will benefit from the scheme reducing the overall costs of obtaining medical evidence in whiplash cases and helping it to detect and challenge fraudulent and exaggerated claims.

39. It would be appropriate for medical practitioners who wish to be accredited to contribute to the training and accreditation costs.

RESPONSE TO PART 3 OF THE CONSULTATION: BETTER INCENTIVES TO CHALLENGE FRAUDULENT OR EXAGGERATED CLAIMS – EXPANDING THE SMALL CLAMS TRACK

40. PIBA responds as follows as to the proposal that the Small Claims Track threshold should be increased:

- this would reduce access to justice for many legitimate victims of whiplash injuries;

- this is unlikely to have the effect which the government anticipates of reducing the cost of defending claims.

ACCESS TO JUSTICE

41. PIBA highlights the three risks which the government has already identified in its own proposal (paragraphs 65-67) if the SCT limit is raised.

42. **A reduction in access to justice resulting from injured parties either not claiming initially or not challenging rejections of valid claims**. PIBA submit that this is the likely consequence of pushing personal injury claimants onto the SCT.

43. **Discrimination:** The middle classes may be able to bring small claims, but the aged, the weak, the uneducated, the mentally disabled, immigrants with poor English and the poor will not be able to do so.

44. **Equality of arms.** Claimants in the SCT are likely to be self-represented but insurers will almost certainly instruct lawyers to defend their interests. Our experience is that self-represented litigants often struggle to advance their case effectively against professional

advocates. This is all the more troubling if the claimant's honesty is to be challenged, an issue we return to below.

45. **Under-settlement.** It is likely that individuals with valid claims will be more likely to accept settlements of less than the amount which would provide fair compensation for the injury which they have suffered.

46. These risks are not effectively mitigated either by the measures implemented to improve support for self-represented litigants or by the availability of BTE insurance.

47. **An illustration of the problems facing self-represented litigants running a whiplash claim on the small claims track:**

- The Claimant would first have to submit a Claim Notification Form through the portal. This would require him to identify the Defendant's insurer. The first line of the standard form CNF states "Before filling in this form you are encouraged to seek independent legal advice". That would be a waste of time because lawyers would refuse to work for no pay.

- If liability is denied by the Defendant's insurers, or if the claim otherwise drops out of the RTA protocol (because, for example, the Defendant's insurers are suspicious as to the veracity of the claim), the Claimant is then left to issue proceedings in the County Court.

- The Claimant would then have to obtain medical evidence in support of his claim. Most self-represented litigants would not know where to start with this process and many could not afford the cost.

- Whether or not liability is in issue, the Claimant would have to prepare for the disclosure of relevant documents and to prepare a witness statement.

- On receipt of the medical report, the Claimant would then have to decide whether to disclose it. Sometimes Claimants with apparently minor injuries in fact go on to develop much more significant problems (chronic pain syndromes etc.). No self-represented litigant would be able to spot that possibility, whereas personal injury lawyers are generally experienced in doing so.

- Further, a Claimant would not know what to do if they were unhappy with the medical report for good reasons.

- The Claimant may then face a pleaded Defence alleging or insinuating dishonesty. It is unlikely that they would know what to do with this if the allegations were in fact unfounded. The inability of honest, self-represented litigants to defend themselves against an assault on their honesty is addressed in more detail below.

- If the claim gets as far as an assessment of quantum, the Claimant would then have to value his claim. He would have no guidance on this at all. He would most likely have no access to the Judicial College Guidelines, and would be unlikely to be able to use them if he did. He would have no experience of valuing claims for pain, suffering and loss of amenity and would have no means of accessing Kemp & Kemp or Current Law. If the insurers made him an offer, he would have no way of knowing whether it was adequate. In these

circumstances, insurers will surely make low offers to tempt the Claimant, and the risk of under-compensation is obvious.

- If the matter proceeds to a hearing, the Claimant will have to represent himself. He will be entirely reliant on the District Judge to protect his interests during the hearing. The Defendant's representative will cross examine the Claimant and will submit for a very low valuation of his damages. The Claimant will not know how to cross-examine the Defendant's witnesses and will not know how to respond on quantum.

THE SMALL CLAIMS TRACK IS NOT A JURISDICTION FOR CHALLENGING FRAUD

48. PIBA rejects the suggestion that allocating whiplash claims to the SCT will allow insurers to defend claims where there is a suspicion of fraud or exaggeration. This is because:

- as soon as the defendant to such a claim puts the honesty of the claimant in issue, the case will almost certainly be allocated or reallocated to the Fast Track;

- the way in which the SCT operates in Part 27 of the Civil Procedure Rules makes it unsuitable for determining whether a claimant is being honest or not.

49. Raising the SCT limit to £5,000, either for whiplash claims or for RTA personal injury claims generally, will make the small claims track the 'normal' track for such claims, under an amended CPR 26.6(1)(a). However, the court on allocation is required to consider a set of specified matters when considering whether to allocate a case to its 'normal' track. These are listed in CPR 26.8, and include "the financial value, if any, of the claim", "the likely complexity of the facts, law or evidence" and "the amount of oral evidence which may be required". Significantly, the Practice Direction to Part 26 states as follows (at para. 8.1(1)(d)):

"A case involving a disputed allegation of dishonesty will not usually be suitable for the small claims track."

PIBA cannot find any discussion of this provision in the consultation. It is noted that there is no proposal to rewrite Part 26 or its Practice Direction. If there was such a proposal PIBA would submit that it was deeply faulted. Forcing injured claimants into an arena where their honesty is to be tried without any legal representation is, in our opinion, a breach of their Human Right to a fair trial.

50. As explained above, in any case where the claimant's honesty is put in issue, the case will be allocated to the Fast Track (or in some cases the multi-track). We highlight the following matters:

- any allegation that the claimant is not telling the truth in any respect has to be expressly pleaded: see *Kearsley v Klarfeld* [2005] EWCA Civ 1510;

- the Queen's Bench Guide states as follows: "... full particulars of any allegation of dishonesty or malice [should be pleaded in a Defence] and, where any inference of fraud or dishonesty is alleged, the basis on which the inference is alleged should also be included;"

- the Court of Appeal in *Kearsley* considered that cases where a whiplash injury was disputed on the basis that a road traffic collision was insufficiently forceful to have caused it could properly be allocated to the *Multi-Track*.

51. Thus it is our view that without significantly altering the principles of allocation already established in the Civil Procedure Rules and the relevant case law, any insurer seeking to test the credibility of a whiplash claim will find that it is *immediately allocated or reallocated to the fast track or the multi-track*.

The Small Claims Track is unsuitable for challenging claims thought to be dishonest

52. It is submitted that the existing principles for allocation are fair, and CPR 26 PD 8.1(1)(d) (set out in paragraph 5 above) serves an essential purpose. We submit that expecting dishonesty to be challenged in the SCT misunderstands the way in which the SCT jurisdiction operates.

53. If the rules were amended to keep whiplash claims under £5,000 where the claimant's honesty is in issue in the small claims track, we submit that this would be ***unfair on the claimant*** and ***of little value to the defendant***.

54. Unfairness to the Claimant

Expecting a claimant to defend himself against an allegation of dishonesty in the small claims track is unfair for the following reasons:

- **The claimant is unlikely to have legal representation** because the track is not cost-bearing. Parties to litigation whose honesty is being publicly impugned should have access to professional representation wherever possible;

- **The defendant is likely to have legal representation**. Insurers will pay for solicitors and counsel to attend such hearings to cross-examine the claimant as to his honesty. This would result in a very unfair inequality of arms;

- **The rules of evidence do not apply in the SCT**, pursuant to CPR 27.8(3). Thus, insurers would be able to adduce evidence without challenge which they would not otherwise be entitled to adduce in the fast track or multi-track.

- **The claimant would have little time in which to consider the evidence against him**. In keeping with the quick and informal way in which the small claims track is designed to operate, standard directions only require the disclosure of documents and witness statements 14 days before a hearing (see Appendix B and Appendix C to the Practice Direction to Part 27). This is insufficient time for a claimant (especially an unrepresented claimant) to understand and deal with evidence adduced to demonstrate dishonesty.

- **The claimant would have no time or opportunity to adduce evidence in response**. Until 14 days before the hearing, the claimant would have no way of knowing the full evidential basis for the allegations pleaded in the Defence. The standard directions do not allow for a party to serve further evidence before the hearing.

55. In order to address this unfairness, Part 27 would have to be substantially rewritten. We note that the consultation does not propose any amendment to Part 27 at all. Further,

amending the CPR to address these problems would inevitably make the jurisdiction more formal, and much more akin to the fast track. This would in turn make it more unfair that a litigant should be expected to navigate his way through the process without legal representation.

56. Little Value to the Defendant

There is no discussion in the consultation as to how the insurers will go about challenging claims thought to be exaggerated or dishonest. In our experience, there are 4 main ways to test whether a claimant is being truthful when he says that he has suffered a whiplash injury:

- the claimant's **medical records** can be scrutinised. A defendant can check whether a claimant sought medical treatment or advice for his alleged injury, and can assess whether the medical record of any such attendance is consistent with the claimant's account of symptoms etc..

- the claimant's **claims history** can be checked, to see if he is a serial claimant, or if he has previously had claims rejected for being dishonest. Insurers have substantial databases containing such information.

- sometimes the **defendant** can give evidence which might call into question the honesty of the claimant's case. The defendant might say that the impact was virtually imperceptible, or that the claimant at no point mentioned having been injured in post-accident conversations.

- the **consistency of the claimant's accounts** can be assessed. The claimant will often have to describe the accident, his injury, its onset and severity etc. several times: in the claim notification form, to his medico-legal expert, in his Particulars of Claim and in his witness statement. Discrepancies between these accounts can undermine the credibility of the claimant's case.

57. Using any of this evidence in the small claims track to challenge claims thought to be dishonest would be very difficult, for the following reasons:

- **Medical records are very unlikely to be disclosed within the SCT**. Part 31 (disclosure of documents) does not apply to SCT claims (by CPR 27.2(1)(b)) and the costs of obtaining them would be irrecoverable anyway.

- **There would be no Statements or Truth**. Statements of Truth under CPR Part 22 were intended by the Civil Procedure Rules to oblige litigants to verify the honesty and accuracy of their case and their evidence. Proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a statement of truth (CPR 32.14). The small claims track does not use statements of truth[3], surely one of the most useful methods for encouraging honesty in civil litigation.

- **Evidence will not be given under oath**. This is the effect of CPR 27.8(4). Giving evidence after swearing an oath has a sobering effect on the willingness of witnesses to lie. It is hard to see how moving suspicious whiplash claims into a jurisdiction which generally dispenses with oaths will achieve the objective of reducing fraud overall.

[3] CPR Parts 32 and 33 are excluded by CP 27.2(1)(c) and (d).

- **There will be little time in which to investigate the claim**. The claimant's witness statement and all documents in support of his claim will be served around 14 days before the hearing, affording the defendant very little time in which to cross-reference the various accounts, run searches on asserted facts through databases and other investigatory tools etc..

- **There would be no questions to the medical expert**[4] to ask whether the evidence for a genuine whiplash claim was sound.

- **There would be no Requests for Information**[5] by which to ask the Claimant to clarify his case or to test his willingness to be candid about his medical or claims history.

- **There would be no applications for specific disclosure**[6] to extract documents in the claimant's possession which may shed light on the honesty of his claim.

58. PIBA cannot see how pushing all whiplash claims into the small claims track will achieve anything other than *impairing* the insurers' ability to challenge claims. The speed and informality of the small claims track will make it *easier* for fraudsters to get their claims through to judgment without serious challenge.

PREVIOUS CONSULTATIONS AND OTHER REFORMS

59. Proposals to raise the SCT limit in personal injury claims have been considered twice before. In each case it was concluded that it would be preferable to make the process for PI claims over £1,000 more cost-effective. Numerous reforms have recently been implemented or are about to be implemented to achieve this objective. These include the introduction of fixed recoverable costs for RTA claims, the RTA Protocol and reforms relating to the funding of civil litigation. Further proposals have been made to fix costs in the fast track.

60. PIBA suggests that the government waits to see what effect these reforms will have on the number of whiplash claims and in particular on the number of dishonest claims. The risk to access to justice arising from the proposal to raise the SCT threshold identified by the consultation itself is significant in our opinion. Procedural reform should not be effected for the sake of it.

RESPONSE TO PART 4 OF THE CONSULTATION: FURTHER ACTION

61. Paragraph 88 and Question 8 of the Consultation asks what more the government should consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims. We suggest the following, and contend that they are far more likely to achieve this outcome than adjusting the threshold for the allocation of personal injury claims.

62. The Government should increase the likely consequences of being found out

Dishonest claimants in personal injury cases are often not people with criminal backgrounds. As with dishonest claims on household insurance, there is a sense that "everyone's doing it", "no one will know", "insurers can afford it" and "the worst that can happen is that I'll not get any compensation".

---

[4] CPR 35.6 is excluded from SCT cases by CPR 27.2(1)(e).

[5] CPR Part 18 is excluded by CPR 27.2(1)(f).

[6] CPR 31 is excluded in its entirety by CPR 27.2(1)(b).

63. In our opinion more needs to be done to get the message across that pursuing a dishonest personal injury claim is likely to have significant consequences, and will be treated very seriously. This could be done in any one or more of the following ways:

64. The consequences of being found out could be widely publicised. The perception at paragraph 18 above should be properly addressed. The consequences of attempting to defraud the DWP are widely advertised. The same should be attempted for PI claims.

65. **The police should be encouraged to follow up cases in which a claim has been dismissed on the basis that it was dishonest and the judge has referred the case to the DPP.**

66. **The procedure for committal for contempt should be made quicker and cheaper**. Presently this is a cumbersome and costly procedure. Insurers should be able to pursue such proceedings more readily and at less expense.

67. **The Supreme Court decision in *Summers v Fairclough Homes Ltd* [2012] UKSC 26 should be publicised** The Appellant insurers in *Summers* sought to argue that where a Claimant grossly exaggerates an otherwise genuine personal injury claim, his right to damages should be extinguished altogether. The Supreme Court did not allow the appeal, but made is clear that the courts did have discretion to do so. Whilst that litigation did not concern a whiplash injury, it would be open to government publicise the fact that where a court finds that a claimant has dishonestly and substantially exaggerated the majority of the claim, the courts have discretion to order that the Claimant should lose his right to damages altogether and should pay the Defendant's costs.

68. Medical Records should be disclosed in all cases

The draft protocol for the extension of the process for low value personal injury claims in road traffic accidents states at paragraph 7.2B: "In most claims with a value of no more than £10,000, it is expected that the medical expert will not need to see any medical records". In fact, as argued above, scrutiny of a claimant's medical records represents one of the very few ways in which the claimant's assertion of a whiplash injury can be checked. We understand the desire to save the cost of obtaining such records, and concerns as to the burden on medical practitioners, but we do not see that it is unreasonable to expect any person wishing to pursue a personal injury claim to demonstrate that they sought medical advice promptly, and that they have been consistent in their account of the injury.

1st March 2013

The Personal Injuries Bar Association

Chair: Charles Cory-Wright QC
Vice chair: Andrew Ritchie QC

Appendices:

Appendix 1
Medical Papers on Whiplash - bibliography
Appendix 2
Quebec Task Force Form, *Spitzer et al, "Scientific Monograph of the Quebec Task Force on Whiplash Associated Disorders: Redefining "whiplash" and its management" (1995) Spine 20 (8 suppl) 1S-73,*
Appendix 3
McClune and Waddell; Emerg Med J2002;19:499–506
A classic example of the plethora of review papers on whiplash.
Appendix 5
D of T 2006 paper on RTA statistics being wrong.
Appendix 6
Rand's 2002 Swiss Insurers paper.