

- (c) A tariff and increased small claims track limits will do nothing to reduce the problem of fraudulent/exaggerated claims; indeed, they are likely to increase the problem.
 - (d) The implication, inherent in the proposals, that the increase in whiplash claims is down to an increase in fraudulent claims, is unsupported by evidence.
 - (e) PIBA does not anticipate a tariff or increased small claims track limits will lead to a reduction in the overall cost of litigating minor claims given the reforms will inevitably lead to a rise in the number of litigants in person and concomitant increased costs on insurers in case handling and increased burden on the court service.
 - (f) PIBA has no confidence in the suggestion that consumers will benefit by way of reduced insurance premiums when there is no enforcement mechanism to ensure insurers pass on savings.
2. The proposals pay insufficient regard to the rights of genuine claimants when conflating them with fraudulent and exaggerated claims.
 3. PIBA objects to the assertion that the number of minor claims should be reduced as an end in itself when these are claims by individuals injured as a result of the negligence of another.
 4. The proposals are discriminatory and will affect the most vulnerable in society.
 5. Wide-ranging measures have been implemented in the last four years:-
 - (a) 2013:- by reducing fixed recoverable costs in, inter alia, RTA cases (1.7.13) and making CFA up-lifts and ATE premiums irrecoverable (1.4.13).
 - (b) 2015:- to combat exaggerated and fraudulent claims by MedCo Portal (from 6.4.15) & and the Criminal Justice and Courts Act 2015, s.57 (from 13.4.15) supplementing QOCs 'fundamental dishonesty' exception (from 1.4.13).
 6. The 2013 & 2015 reforms should be permitted to 'bed down' so that their full effect can be evaluated in due course.

QUESTIONS ASKED BY THE JUSTICE COMMITTEE

The definition of whiplash and the prevalence of RTA-related whiplash claims

Definition of whiplash

7. The Prison & Court's Bill, s.61 & 62 provides parameters for a definition "whiplash injury" that will be of a "description specified in regulations"².
8. PIBA's Response to Whiplash Consultation at paras 8 to 22 addresses the difficulties in identifying a coherent definition of "whiplash injury" and the use of over 900 words in s.61 & 62 of the Bill (prior to *actual* definition in a SI) are indicative of the difficulty.
9. The Bill at s.62(1)(b) and s.62(6) refer to the definition being "but for the claimant's failure to mitigate the whiplash injury" and "as if the person had taken reasonable steps to mitigate its effect".
10. An assumption of "mitigation" for defining "whiplash injury" will result in contested litigation, in particular when considering threshold cases (those either side of the 2 year limit, about which see below).
11. Further, most claimants who suffer injuries of less than 2 years duration are stoic and do not seek treatment that, in any event, can be very difficult to obtain on the NHS. Claimants should not have their compensation reduced because of their not having burdened the NHS with requests for treatment.
12. An unintended consequence of the proposals will be to encourage claimants to seek treatment from the NHS to rebut an averral of a failure to mitigate.

² Prison & Court's Bill, s.61(1)&(2)

13. PIBA note that the Prisons and Courts Bill, s.62 recognises the need for the definition to include “minor psychological injuries”³. However, these are undefined in the Bill. The Government Response to the Consultation at para 45 provided that:

45. A definition will be developed to reduce the scope for affected claims to be displaced into other categories of claim. The Government accepts that the definition should not cover more serious psychological illnesses, for example, depression and post- traumatic stress disorder, which are diagnosable using international standards. The Government therefore proposes to limit the scope of this measure to minor psychological injuries, such as ‘travel anxiety’ and ‘shock.’

14. PIBA submits that the Bill should define “minor psychological injuries” as a condition that falls short of a diagnosable psychiatric condition:-

“Minor psychological injury” is a psychological injury which is not capable of diagnosis as a recognised psychiatric injury by international diagnostic standards

15. The difficulties with defining “whiplash injury”, where the definition matters as it has the impact on reducing compensation by between **44%** and **89%** in qualifying cases, is a reason why the proposals are *misconceived*.

Prevalence of RTA-related whiplash claims

16. The incidence of RTA-related whiplash claims was addressed in PIBA’s Response to Whiplash Consultation, paras 38 to 52.
17. Whether claims have increased or decreased is *not* a good reason for the imposition of a tariff that fundamentally changes the law of England & Wales established in the nineteenth century that a claimant is entitled to full compensation⁴.

³ as submitted by PIBA in their Response to Whiplash Consultation, paras 20 to 22

⁴ Lord Blackburn in *Livingstone v Rawyards Coal Company* (1880) 5 App.Cas. 25 at 39 “I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”

18. If there are issues with fraudulent or exaggerated claims then these issues should be addressed. As amplified below, the imposition of a Tariff will *encourage* fraud and exaggeration, not reduce it, and deprive deserving claimants of full compensation.

Whether or not fraudulent whiplash claims represent a significant problem and, if so, whether the proposed reforms would tackle this effectively

Do fraudulent whiplash claims represent a significant problem?

19. Fraud is *a problem* but it is not a *significant* problem. PIBA addressed statistics and their implications at PIBA's Response to Whiplash Consultation, paras 40 to 52.
20. PIBA objects to the conflation of minor claims with fraudulent and exaggerated claims. There is a significant difference between genuine claims that result in low-level injury, and fraud, which is a criminal offence.

Whether the proposed reforms would tackle fraudulent whiplash claims effectively

21. PIBA has seen no evidence to support the proposition that the introduction of a tariff will address fraudulent whiplash claims. A person set on committing a fraud is not going to be put off by the fact that, if successful, he or she will recover pursuant to a tariff rather than assessment.
22. PIBA warned in previous consultations that, inter alia, the Portal would encourage fraudulent claims because it would be more cost-effective for insurers to pay out on claims than challenge them⁵. PIBA warns again that introducing a tariff will encourage fraud and exaggeration further.
23. For example, if, as is alleged, whiplash claims are entirely subjective, with no objective signs of injury to be detected, then there is an obvious risk that some claimants will describe their symptoms to a medical expert as lasting for a longer duration of time in order to obtain damages at a higher band or to escape the 2 year threshold altogether. Further, with a low fixed sum introduced for minor injuries, there is even less incentive for insurers to challenge potentially fraudulent claims.

⁵ "PIBA Response to Consultation Paper CP17/2012 "Reducing the number and costs of whiplash claims" 1.3.13, Appendix A to PIBA's Response to Whiplash Consultation

24. PIBA suggests that a more effective way to prevent fraudulent or exaggerated claims from being advanced is to more closely regulate the Claims Management Companies and the industry within which they operate, and the practice of insurance companies making pre-medical offers for low value claims that encourages this behaviour, both of which the Bill seeks to address and with which PIBA agrees.
25. In all events, reductions of general damages of between **44%** and **89%** for meritorious claims is contrary to the long established principle of full compensation for personal injury claimants on account of the few who pursue fraudulent claims is a *disproportionate* remedy and *wrong* in principle.

The provisions in Part 5 of the Bill introducing a tariff to regulate damages for RTA-related whiplash claims, with an uplift in exceptional circumstances

A tariff to regulate damages for RTA-related whiplash claims

26. PIBA has addressed above aim of reducing fraudulent or exaggerated claims is not connected to what the proposed legislation will actually achieve.
27. PIBA addressed each of the other reasons that purport to support a tariff in PIBA's Response to Whiplash Consultation at paras 55 to 72 and 94 to 114. In summary:-
 - (a) Compensation is too high- There is no evidence to support this bald and worrying assertion, nor logically could there be. There is no evidence provided that the pain suffered in consequence of whiplash is more or less than other injuries such as a broken leg.

The level of awards made for personal injuries is currently set by the judiciary by reference to established brackets of damages identified in the Judicial College Guidelines and tested day-in day-out in the courts of this country.

A tariff is, in effect, suggesting that the JC Guidelines have 'got it wrong'. It is of considerable concern to PIBA that the Government (and not even Parliament as the tariff is to be set statutory instrument) should consider itself better placed to make this assessment than the judiciary.

- (b) Controls costs by providing certainty to insurers- Once the nature of an injury has crystallised because, for example, the claimant has recovered, the value of that injury is usually discernible through the tools already available such as the Judicial College Guidelines. Insurers have no difficulty doing so.

There is no greater uncertainty now than there will be with a tariff with stepped changes in quantum depending on duration of injury. The difference is that with the proposed tariff claimants will get between **43%** and **89%** less than what they are currently entitled to.

In terms of litigation costs, this was cut to a minimum with the substantial *reductions* effected by the introduction of Portal fixed recoverable costs from July 2013⁶. Further, the increase in small claims limit to £5,000 for RTAs and to £2,000 in all other cases will result in large increase in litigants in person causing insurer and the court costs to increase.

- (c) Protects from under-settlement- A “one size fits all” tariff approach is unjust and will not protect against under-settlement. A fixed tariff does not allow for the varying severity and consequences of each injury to be taken into account; when, as here, the tariff is set artificially low, it will inevitably lead to the majority of claimants being under-compensated.

28. None of the reasons given justify the proposal to remove the discretion of the court to award damages commensurate with the injury sustained, and on the basis of the full compensation as opposed to reductions of general damages of between **44%** and **89%**. The proposals are *arbitrary, disproportionate* and *wrong*.

⁶ in RTA cases up to £10,000 fixed recoverable costs are Stage 1 £200; Stage 2 £300; Stage 3 Type A £250, Type B £250, Type C £150. Most cases settle at Stage 2 or before meaning £500 fixed recoverable costs for a claim up to £10,000

29. The proposed reductions are as follows⁷:-

Injury Duration	2015 average payment for PSLA – uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New tariff amounts	New tariff percentage reduction by comparison to JC Guidelines	
				JC lower bracket	JC upper bracket
0–3 months	£1,750	a few hundred pounds to £2,050	£225.00	0%	89%
4–6 months	£2,150	£2,050 to £3,630	£450.00	78%	
7–9 months	£2,600	£2,050 to £3,630	£765.00		
10–12 months	£3,100	£2,050 to £3,630	£1,190.00		67%
13–15 months	£3,500	£3,630 to £6,600	£1,820.00	50%	
16–18 months	£3,950	£3,630 to £6,600	£2,660.00		
19–24 months	£4,500	£3,630 to £6,600	£3,725.00		44%

30. If the ‘exceptional’ up-lift is applied to the proposed tariff the reductions of general damages are between **32%** and **87%**. The up-lift does not ameliorate, in any real sense, the proposed *arbitrary* and *disproportionate* reductions.

31. Illustrative of the arbitrary nature of the proposals is where an injury lasts for two years and a day when general damages may *increase* by up to **44%** (or **32%** with the ‘exceptional’ up-lift). From a practical standpoint, claimants (likely to be litigants in person) will not know what offers to make or accept, similarly insurers.

32. Further, cases straddling 2 years e.g. between 1 and 3 years injury duration (representing respective submissions of the parties) will be litigated to determine

⁷ Part 1 of the Government Response to: Reforming the Soft Tissue Injury (‘whiplash’) Claims Process, para 78 with percentage reductions identified by comparison to the JC Guidelines (13th Ed) upper & lower brackets

which side of the 2 year threshold the case lies with all corresponding costs and waste of court resources.

33. These cases will mostly be undertaken by litigants in person who rightly will consider the tariff amounts as *arbitrary* and *unfair* wondering why a day of increased pain, suffering and loss of amenity can result in an increase by **44%** in the award.
34. Further, medical experts and judges will have to grapple with these issues. Due to these and the mitigation issues, what would otherwise be a straightforward quantification of damages hearing of short duration will become lengthy, complex and legally overburdened by the detailed statutory interpretation of s.62 & 63, the statutory instrument and *fine* findings of facts.
35. If there is to be a tariff, s.62(2) of the Bill should be amended thus “The amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury is to be an amount specified in regulations made by the Lord Chancellor **by reference to the JC Guidelines and reviewed when up-dated**”.

An uplift in exceptional circumstances

36. Whilst PIBA are in favour of the judiciary retaining as much discretion as possible, PIBA does not support ‘exceptional circumstances’.
37. First, an uplift of the proposed 20% will not resolve the *arbitrary* reduction in general damages when the damages will still be between **32%** and **87%** less than currently awarded.
38. Secondly, such an uplift not *remotely* reaching common law damages will *not* address the 2 yrs and a day threshold point raised above.
39. Thirdly, ‘exceptional circumstances’ will result in contested cases (claimant alleging ‘exceptional’; defendant denying it), inconsistent outcomes, appeals, increase in legal costs, burden on the court service, difficulty in settling cases etc.
40. Fourthly, PIBA are concerned as to how litigants in person (the likely claimant in tariff cases) will be able to approach ‘exceptional circumstances’.

Banning the settlement of claims without medical evidence

41. PIBA agrees with the proposals in the Prison and Courts Bill, s.64 (Rules against settlement before medical report) in principle.
42. The Prison and Courts Bill, s.64(4) states “appropriate evidence” is to be defined in regulations. PIBA submits that for the ban to be effective and for consistency, the definition should be that identified already in the Civil Procedure Rules at 16PD.4.3A⁸.

The impact of raising the small claims limit to £5,000 for RTA-related whiplash claims, and of raising the small claims limit to £2,000 for personal injury claims more generally, taking account of the planned move towards online court procedures

Small claims limit increase to £5,000 for RTA claims

43. The proposal is to increase the threshold to £5,000 general damages for all personal injuries that are RTA related (and not as the question suggests, only for whiplash injuries).
44. The effect of increasing the general damages limit to £5,000 is set out in Table G at Appendix D to PIBA’s Response to Whiplash Consultation that includes serious injuries such as fractures, internal injuries requiring surgery and injuries with permanent consequences including scarring. The volume of cases affected will be *large*.
45. For personal injuries of this severity to be dealt with by litigants in person (as will mostly be the case) will have *significant* repercussions for **access to justice**: see PIBA’s Response to Whiplash Consultation, paras 130(a) to (k).
46. The proposals are **discriminatory** for the reasons set out in PIBA’s Response to Whiplash Consultation, paras 131 to 133. The proposals will have a **profound** effect on the **administration** of justice and other court users: see PIBA’s Response to Whiplash Consultation, paras 136 to 137.

⁸ “... a fixed cost medical report ... (a) consultant orthopaedic surgeon (b) consultant in Accident & Emergency Medicine (c) General Practitioner ... (d) Physiotherapist ...” (CPR 16PD.4.3A)

47. There has been hitherto **no** support from the judiciary or government sponsored research for McKenzie Friends (unqualified, uninsured ‘helpers’) as a solution to unrepresented parties: see PIBA’s Response to Whiplash Consultation, paras 159 to 162.
48. If claimants seek and obtain legal advice and assistance, the cost will in effect *reduce* their damages, which is **contrary** to the principle of full compensation.
49. Claims Management Companies are likely to see the increase to £5,000 as a commercial opportunity resulting in an *increase* in fraudulent & exaggerated claims.
50. The aims of the legislation will not be achieved by increasing the limit for Small Claims Track limit to £5,000 for RTA cases: see PIBA’s Response to Whiplash Consultation at para 138 to 146.

Small claims limit to £2,000 for personal injury claims more generally

51. An increase of the current £1,000 threshold to an inflation adjusted £2,000 for non-RTA cases cannot be objected to on grounds of principle. Nonetheless, the effect will be to increase the numbers of litigants in person with the consequences identified in PIBA’s Response to Whiplash Consultation at para 130(a) to (k).

The role of claims management companies in respect of these matters

52. PIBA submits that an effective way to prevent fraudulent or exaggerated claims from being advanced is more closely to regulate the Claims Management Companies and the industry within which they operate⁹.
53. Persistent methods of marketing by CMCs entice the vulnerable and the opportunistic to advance claims which are not true or to exaggerate valid claims. The foregoing needs to be addressed as this is where, in PIBA’s view, the problem lies in low value claims.

⁹ PIBA Response to Whiplash Consultation, para 59

54. At the heart of the concerns expressed by Government appears to be the increase in the size of claims following cold calling. The proportionate response is to legislate so as to limit or remove cold calling, not to block the right of an injured party to recover *full* compensation for a civil wrong, a right of such antiquity as to require the most potent policy factors to suppress.

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